DIGITAL ASSETS, PETS, AND GUNS:

ESTATE PLANNING DOES NOT INCLUDE JUST GRANDMA'S CAMEO BROOCH ANYMORE

PRESENTED BY

GERRY W. BEYER

Governor Preston E. Smith Regents Professor of Law
Texas Tech University School of Law
1802 Hartford St.
Lubbock, TX 79409-0004

(806) 834-4270
gwb@ProfessorBeyer.com
www.ProfessorBeyer.com
www.BeyerBlog.com

ESTATE PLANNING COUNCIL OF CENTRAL TEXAS

January 7, 2014

Austin, Texas

Revised 12/07/2013

GERRY W. BEYER

Governor Preston E. Smith Regents Professor of Law
Texas Tech University School of Law
Lubbock, TX 79409-0004

(806) 834-4270
gwb@ProfessorBeyer.com
www.ProfessorBeyer.com

EDUCATION

B.A., Summa Cum Laude, Eastern Michigan University (1976)
J.D., Summa Cum Laude, Ohio State University (1979)
LL.M., University of Illinois (1983)
J.S.D., University of Illinois (1990)

SELECTED PROFESSIONAL ACTIVITIES

Bar memberships: United States Supreme Court, Texas, Ohio (inactive status), Illinois (inactive status)
Member: American Law Institute; American College of Trust and Estate Counsel (Academic Fellow); American Bar Foundation; Texas Bar Foundation; American Bar Association; Texas State Bar Association

CAREER HISTORY

Private Practice, Columbus, Ohio (1980)
Instructor of Law, University of Illinois (1980-81)
Professor, St. Mary's University School of Law (1981-2005)
Governor Preston E. Smith Regent's Professor of Law, Texas Tech University School of Law (2005 – present)
Visiting Professor, Boston College Law School (1992-93)
Visiting Professor, University of New Mexico School of Law (1995)
Visiting Professor, Southern Methodist University School of Law (1997)
Visiting Professor, Santa Clara University School of Law (1999-2000)
Visiting Professor, La Trobe University School of Law (Melbourne, Australia) (2008 & 2010)
Visiting Professor, The Ohio State University Moritz College of Law (2012)

SELECTED HONORS AND ACTIVITIES

Order of the Coif
Excellence in Writing Awards, American Bar Association, Probate & Property (2012, 2001, & 1993)
Outstanding Researcher from the School of Law, Texas Tech University (2013)
Chancellor's Council Distinguished Teaching Award (Texas Tech University) (2010)
Outstanding Professor Award – Phi Alpha Delta (Texas Tech University Chapter) (2013) (2010) (2009) (2007) (2006)
President's Excellence in Teaching Award (Texas Tech University) (2007)
Professor of the Year – Phi Delta Phi (St. Mary's University chapter) (1988) (2005)
Student Bar Association Professor of the Year Award – St. Mary's University (2001-2002) (2002-2003)
Russell W. Galloway Professor of the Year Award – Santa Clara University (2000)
Outstanding Faculty Member – Delta Theta Phi (St. Mary's University chapter) (1989)
Distinguished Faculty Award – St. Mary's University Alumni Association (1988)
Most Outstanding Third Year Class Professor – St. Mary's University (1982)
State Bar College – Member since 1986
Keeping Current Probate Editor, *Probate and Property* magazine (1992-present)

SELECTED PUBLICATIONS

Author and co-author of numerous law review articles, books, and book supplements including WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS (5th ed. 2012); FAT CATS AND LUCKY DOGS – HOW TO LEAVE (SOME OF) YOUR ESTATE TO YOUR PET (2010); TEACHING MATERIALS ON ESTATE PLANNING (4th ed. 2013); 9 & 10 TEXAS LAW OF WILLS (Texas Practice 2002); TEXAS WILLS AND ESTATES: CASES AND MATERIALS (5th ed. 2006); 12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIANSHIPS (3rd ed. 2007); *When You Pass on, Don't Leave the Passwords Behind: Planning for Digital Assets*, PROB. & PROP., Jan./Feb. 2012, at 40; *Wills Contests – Prediction and Prevention*, 4 EST. PLAN. & COMM. PROP. L.J. 1 (2011); *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U.L. REV. 865 (2007); *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000); *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990); *The Will Execution Ceremony — History, Significance, and Strategies*, 29 S. TEX. L. REV. 413 (1988); *Videotaping the Will Execution Ceremony — Preventing Frustration of Testator's Final Wishes*, 15 ST. MARY'S L.J. 1 (1983).

TABLE OF CONTENTS

PART I

DIGITAL ASSETS

I. INTRODUCTION

For hundreds of years, we have viewed personal property as falling into two major categories – tangible (items you can see or hold) and intangible (items that lack physicality). Recently, a new subdivision of personal property has emerged that many label as "digital assets." There is no real consensus about the property category in which digital assets belong. Some experts say they are intellectual property, some say they are intangible property, and others say they can easily be transformed from one form of personal property to another with the click of a "print" button. *See* Scott Zucker, *Digital Assets: Estate Planning for Online Accounts Becoming Essential (Part II)*, The Zucker Law Firm PLLC (Dec. 16, 2010). In actuality, some accounts that we consider "assets" are simply licenses to use a website's service that generally expire upon death. *See* Steven Maimes, *Understand and Manage Digital Property*, The Trust Advisor Blog (Nov. 20, 2009).

Digital assets may represent a sizeable portion of a client's estate. A survey conducted by McAfee, Inc. revealed that the average perceived value of digital assets for a person living in the United States is $54,722. *McAfee Reveals Average Internet User Has More Than $37,000 in Underprotected 'Digital Assets'*, McAfee.com, (Sept. 27, 2011) (the $37,000 figure is the global average).

While estate planners have perfected techniques used to transfer types of property that have been around for a long time, most estate planners have not figured out how to address the disposition of digital assets. It is important to understand digital assets and to incorporate the disposition of them into clients' estate plans.

This article aims to educate estate planning professionals on the importance of planning for the disposition of digital assets, provides those planning techniques, and discusses how to administer an estate containing digital assets. The appendix contains a sample form that your clients may use to organize their digital assets.

II. TYPES OF DIGITAL ASSETS

The term "digital asset" does not have a well-established definition as the pace of technology is faster than the law can adapt. One of the best definitions is found in a proposed Oregon statute:

> "Digital assets" means text, images, multimedia information, or personal property stored in a digital format, whether stored on a server, computer, or other electronic device which currently exists or may exist as technology develops, and regardless of the ownership of the physical device upon which the digital asset is stored. Digital assets include, without limitation, any words, characters, codes, or contractual rights necessary to access the digital assets.

Digital Assets Legislative Proposal, OREGON STATE BAR (May 9, 2012).

Digital assets can be classified in numerous different ways, and the types of property and accounts are constantly changing. (A decade ago, who could have imagined the ubiquity of Facebook? Who can imagine what will replace it in the next few decades?) People may accumulate different categories of digital assets: personal, social media, financial, and business. The individual may also have a license or property ownership interest in the asset. *See* Laura Hoexter and Alexandra Gerson, *Who Inherits My Facebook? Estate Planning for Digital Assets* (June 25, 2012). Although there is some overlap, of course, clients may need to make different plans for each.

A. Personal

The first category includes personal assets stored on a computer or smart phone, or uploaded onto a web site such as Flickr or Shutterfly. These can

include treasured photographs or videos, e-mails, or even playlists. Photo albums can be stored on an individual's hard drive or created through an on-line system. (They also can be created through social media, as discussed below.) People can store medical records and tax documents for themselves or family members. The list of what a client's computers can hold is, almost literally, infinite. Each of these assets requires different means of access—simply logging onto someone's computer generally requires a password, perhaps a different password for operating system access, and then each of the different files on the computer may require its own password.

B. Social Media

Social media assets involve interactions with other people on websites Facebook, MySpace, LinkedIn, and Twitter, as well as e-mail accounts. These sites are used not only for messaging and social interaction, but they also can serve as storage for photos, videos, and other electronic files.

C. Financial Accounts

Though some bank and investment accounts have no connection to brick-and-mortar buildings, most retain some connection to a physical space. They are, however, increasingly designed to be accessed via the Internet with few paper records or monthly statements. For example, an individual can maintain an Amazon.com account, be registered with PayPal, Bitcoin, or other financial sites, have an e-Bay account, and subscribe to magazines and other media providers. Many people make extensive arrangements to pay bills online such as income taxes, mortgages, car loans, credit cards, water, gas, telephone, cell phone, cable, and trash disposal.

D. Business Accounts

An individual engaged in any type of commercial practice is likely to store some information on computers. Businesses collect data such as customer orders and preferences, home and shipping addresses, credit card data, bank account numbers, and even personal information such as birthdates and the names of family members and friends. Physicians store patient information. eBay sellers have an established presence and reputation. Lawyers might store client files or use a Dropbox.com-type service that allows a legal team spread across the United States to access litigation documents through shared folders.

E. Domain Names or Blogs

A domain name or blog can be valuable, yet access and renewal may only be possible through a password or e-mail.

F. Loyalty Program Benefits

In today's highly competitive business environment, there are numerous options for customers to make the most of their travel and spending habits, especially if they are loyal to particular providers. Airlines have created programs in which frequent flyers accumulate "miles" or "points" they may use towards free or discounted trips. Some credit card companies offer users an opportunity to earn "cash back" on their purchases or accumulate "points" which the cardholder may then use for discounted merchandise, travel, or services. Retail stores often allow shoppers to accumulate benefits including discounts and credit vouchers. Some members of these programs accumulate a staggering amount of points or miles and then die without having "spent" them. For example, there are reports that "members of frequent-flyer programs are holding at least 3.5 trillion in unused miles." *Managing Your Frequent-Flyer Miles* (last visited Oct. 21, 2012). *See also* Becky Yerak, *Online Accounts After Death: Remember Digital Property When Listing Assets*, CHICAGO TRIB., Aug. 26, 2012.

The rules of the loyalty program to which the client belongs plays the key role in determining whether the accrued points may be transferred. Many customer loyalty programs do not allow transfer of accrued points upon death, but as long as the beneficiary knows the online login information of the member, it may be possible for the remaining benefits to be transferred or redeemed. However, some loyalty programs may view this redemption method as fraudulent or

require that certain paperwork be filed before authorizing the redemption of remaining benefits.

G. Other Digital Assets

Your client may own or control virtually endless other types of digital assets. For example, your client may own valuable "money," avatars, or virtual property in online games such as World of Warcraft or Second Life.

III. IMPORTANCE OF PLANNING FOR DIGITAL ASSETS

A. To Make Things Easier on Executors and Family Members

When individuals are prudent about their online life, they have many different usernames and passwords for their accounts. This is the only way to secure identities but this devotion to protecting sensitive personal information can wreak havoc on families upon incapacity or death. *See* Andrea Coombes, *You Need an Online Estate Plan*, WALL ST. J. July 19, 2009. Consider A&E's *Hoarders*, a reality-based television show that reveals the lives of people who cannot part with their belongings and have houses full of floor-to-ceiling stacks of "junk" as a result. While most of us find this disgusting, are we not also committing the same offense online when we create multiple e-mail accounts, social networking accounts, websites, Twitter accounts, eBay accounts, online bill-paying arrangements, and more? Sorting through a deceased's online life for the important things can be just as daunting as cleaning out the house of a hoarder.

To make matters worse, the rights of executors, agents, guardians, and beneficiaries with regard to digital assets are unclear as discussed later in this article. Thus, family members may have to go to court for legal authority to gain access to these accounts. Even after gaining legal authority, the company running the online account still may not acquiesce to a family member's authority without a battle.

This process is complicated further if someone is incapacitated rather than deceased because that person will continue to have expenses that a deceased person would not have. Without passwords, a power of attorney alone may not be enough for the agent to pay these expenses. If no power of attorney is in place, a guardian may have to be appointed to access these accounts, and some companies will still require a specific court order on top of that before they release account information.

B. To Prevent Identity Theft

In addition to needing access to online accounts for personal reasons and closing probate, family members need this information quickly so that a deceased's identity is not stolen. Until authorities update their databases regarding a new death, criminals can open credit cards, apply for jobs under a dead person's name, and get state identification cards. There are methods of protecting a deceased's identity, but they all involve having access to the deceased's online accounts. *See* Aleksandra Todorova, *Dead Ringers: Grave Robbers Turn to ID Theft*, WALL ST. J., Aug 4, 2009.

C. To Prevent Financial Losses to the Estate

1. Bill Payment

Electronic bills for utilities, loans, insurance, and other expenses need to be discovered quickly and paid to prevent cancellations. This concern is augmented further if the deceased or incapacitated ran an online business and is the only person with access to incoming orders, the servers, corporate bank accounts, and employee payroll accounts. *See* Tamara Schweitzer, *Passing on Your Digital Data*, INC., Mar. 1, 2010. Bids for items advertised on eBay may go unanswered and lost forever.

2. Domain Names

The decedent may have registered one or more domain names that have commercial value. If registration of these domain names is not kept current, they can easily be lost to someone waiting to snag the name upon a lapsed registration.

Here is list of some of the most expensive domain names that have been sold in recent years:

1. VacationRentals.com for $35 million
2. Insure.com: 2009 for $16 million
3. Sex.com: 2010 for $14 million
4. Fund.com: 2008 for £9.99 million
5. Porn.com: 2007 for $9.5 million
6. Fb.com: 2010 for $8.5 million
7. Business.com: 1999 for $7.5 million
8. Diamond.com: 2006 for $7.5 million
9. Beer.com: 2004 for $7 million
10. Israel.com: 2008 for $5.88 million
11. Casino.com: 2003 for $5.5 million
12. Slots.com: 2010 for $5.5 million
13. Toys.com: 2009 for $5.1 million
14. Asseenontv.com: 2000 for $5.1 million
15. iCloud.com: 2011 for $4.5 million
16. GiftCard.com: 2012 for $4 million
17. AltaVista.com: 1998 for $3.3 million
18. Candy.com: 2009 for $3.0 million
19. Loans.com: 2000 for $3.0 million
20. Gambling.com: 2011 for $2.5 million

List of most expensive domain names, Wikipedia (updated Aug. 16, 2013).

3. Encrypted Files

Some digital assets of value may be lost if they cannot be decrypted. Consider the case of Leonard Bernstein who died in 1990 leaving the manuscript for his memoir entitled *Blue Ink* on his computer in a password-protected file. To this day, no one has been able to break the password and access what may be a very interesting and valuable document. *See* Helen W. Gunnarsson, *Plan for Administering Your Digital Estate*, 99 ILL. B.J. 71 (2011).

4. Virtual Property

The decedent may have accumulated valuable virtual property for use in on-line games. For example, a planet for the *Entropia Universe* sold for $6 million in 2011 and a space station for the same game sold for $635,000 in 2010. Andrea Divirgilio, *Most Expensive Virtual Real Estate Sales*, Bornrich.com (Apr. 23, 2011) (also discussing other high priced sales of virtual property); Oliver Chiang, *Meet The Man Who Just Made a Half Million From the Sale of Virtual Property*, Forbes.com (Nov. 13, 2010). There are also reports of more "reasonable" prices for virtual items such as a virtual sword for use in *Age of Wulin*, a video game, which was sold for $16,000. Katy Steinmetz, *Your Digital Legacy: States Grapple with Protecting Our Data After We Die*, Time Tech (Nov. 29, 2012).

D. To Avoid Losing the Deceased's Personal Story

Many digital assets are not inherently valuable, but are valuable to family members who extract meaning from what the deceased leaves behind. Historically, people kept special pictures, letters, and journals in shoeboxes or albums for future heirs. Today, this material is stored on computers or online and is often never printed. Personal blogs and Twitter feeds have replaced physical diaries, and e-mails have replaced letters. Without alerting family members that these assets exist, and without telling them how to get access to them, the story of the life of the deceased may be lost forever. This is not only a tragedy for family members, but also possibly for future historians who are losing pieces of history in the digital abyss. Rob Walker, *Cyberspace When You're Dead*, N.Y. TIMES, Jan. 5, 2011.

For more active online lives, this concern may also involve preventing spam from infiltrating a loved one's website or blog site. Comments from friends and family are normally welcomed, but it is jarring to discover the comment thread gradually infiltrated with links for "cheap Ugg boots." *Id.* "It's like finding a flier for a dry cleaner stuck among flowers on a grave, except that it is much harder to remove." *Id.* In the alternative, family members may decide to delete the deceased's website against the deceased's wishes simply because those wishes were not expressed to the family.

E. To Prevent Unwanted Secrets from Being Discovered

Sometimes people do not want their loved ones discovering private emails, documents, or other electronic material. They may contain hurtful secrets, non politically correct jokes and stories,

or personal rantings. The decedent may have a collection of adult recreational material (porn) which he or she would not want others to know had been accumulated. A professional such as an attorney or physician may have files containing confidential client information. Without designating appropriate people to take care of electronically stored materials, the wrong person may come across this type of information and use it in an inappropriate or embarrassing manner.

F. To Prepare for an Increasingly Information-Drenched Culture

Although the principal concern today appears to be the disposition of social media and e-mail contents, the importance of planning for digital assets will increase each day. Online information will continue to spread out across a growing array of flash drives, iPhones, and iPads, and it will be more difficult to locate and accumulate. As people invest more information about their activities, health, and collective experiences into digital media, the legacies of digital lives grow increasingly important. If a foundation for planning for these assets isn't set today, we may re-learn the lesson the Rosetta Stone once taught us: "there is no present tense that can long survive the fall and rise of languages and modes of recordkeeping." Ken Strutin, *What Happens to Your Digital Life When You Die?*, N.Y. L.J., Jan. 27, 2011 (For fifteen centuries, the meaning of the hieroglyphs on the Rosetta Stone detailing the accomplishments of Ptolemy V were lost when society neglected to safeguard the path to deciphering the writings. A Napoleonic soldier eventually discovered the triptych, enabling society to recover its writings.).

IV. USER AGREEMENTS

A. Terms of Service

When an individual signs up for a new online account or service, the process typically requires an agreement to the provider's terms of service. Service providers may have policies on what will happen on the death of an account holder but individuals rarely read the terms of service carefully, if at all. Nonetheless, the user is at least theoretically made aware of these policies before being able to access any service. Anyone who has signed up for an online service has probably clicked on a box next to an "I agree" statement near the bottom of a web page or pop-up window signifying consent to the provider's terms of use. The terms of these "clickwrap" agreements are typically upheld by the courts.

For example, Google's terms of service do not include an explicit discussion of what happens when the account holder dies. The terms state that the individual agrees not to "assign (or grant a sub-license of) your rights to use the Software, grant a security interest in or over your rights to use the Software, or otherwise transfer any part of your rights to use the Software," although copyright remains in the user. *Google Terms of Service*, GOOGLE APPS, #7 (last visited Sept. 4, 2013). In a somewhat comical provision that seems to envision Google's concern of a user coming back as a vampire or zombie, the terms provide that "upon receipt of a certificate or other legal document confirming your death, Google will close your account and you will no longer be able to retrieve content contained in that account."

Google's e-mail service, Gmail, on the other hand, does have its own policy, explained in its help section, for "Accessing a Deceased Person's Mail." Here are some of the key provisions of the policy:

> If you need access to the Gmail account content of an individual who has passed away, in rare cases we may be able to provide the contents of the Gmail account to an authorized representative of the deceased person.
>
> At Google, we're keenly aware of the trust users place in us, and we take our responsibility to protect the privacy of people who use Google services very seriously. Any decision to provide the contents of a deceased person's email will be made only after a careful review.
>
> Before you begin, please understand that Google may be unable to provide the Gmail account content, and sending a request or filing the required documentation does not guarantee that we will be able to assist you. The application to obtain email content is a lengthy process with multiple waiting

> periods. If you are the authorized representative of a deceased person and wish to proceed with an application to obtain the contents of a deceased person's Gmail account, please carefully review the following information regarding our two stage process.

Accessing a Deceased Person's Mail, GMAIL HELP, (last visited Sept. 4, 2013).

At the end of its terms of service, Yahoo! explicitly states that an account cannot be transferred: "You agree that your Yahoo! account is non-transferable and any rights to your Yahoo! ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted.." *Yahoo! Terms of Service*, Yahoo! (last visited Sept. 4, 2013).

Facebook, the world's most popular online social network, recognized a need to allow a deceased person's wall to provide a source of comfort in 2009. *See* Jess Moore, *Facebook Memorials a Part of Campus Life*, USA TODAY (Mar. 22, 2011); Matthew Moore, *Facebook Introduces 'Memorial' Pages to Prevent Alerts About Dead Members*, THE TELEGRAPH (Oct. 27, 2009; *Facebook, Inc.*, The New York Times (Oct. 5, 2012). It permits someone to "Report a Deceased Person's Profile." *How Do I Report a Deceased User or an Account That Needs to be Memorialized or Deleted?*, Facebook Help Center?, *Memorialization Request* (last visited Sept. 4, 2013). When Facebook receives proof of death through an obituary or a news article, the page can be "memorialized," so that only confirmed friends will continue to have access. Because the "wall" remains, friends can still post on the memorialized page. (Facebook "walls" are an interactive feature of a user's "profile" page which reflect the user's recent Facebook activity. Depending on user privacy settings, the wall enables a view of recent status updates, changes to the user's profile information, photos posted by or of the user, sharing links and other Internet content, and interactive comments regarding all such content between the user and his or her Facebook "friends." *See* John Miller, *Is MySpace Really My Space?: Examining the Discoverability of the Content of Social Media Accounts*, 30 No. 2 Trial Advoc. Q. 28, 29 (2011).).

B. Ownership

A problem may also arise if the client does not actually own the digital asset but merely has a license to use that asset while alive. It is unlikely a person can transfer to heirs or beneficiaries music, movies, and books they have purchased in electronic form although they may transfer "old school" physical records (vinyl), CDs, DVDs, books, etc. without difficulty. It has been reported that actor Bruce Willis wants to leave his large iTunes music collection to his children but that Apple's user agreement prohibits him from doing so. *See* Brandon Griggs, *Can Bruce Willis Leave His iTunes Music to His Kids?*, CNN.com (Sept. 4, 2012). *See also* Roger Yu, *Digital Inheritance Laws Remain Murky*, USA TODAY, Sept. 19, 2012; *See* Aileen Entwistle, *Safeguarding Your Online Legacy After You've Gone*, Scotsman. Com, March 30, 2013 (iTunes and Kindle books are only lifetime licenses).

V. FEDERAL LAW

Federal law regulates the unauthorized access to digital assets and addresses the privacy of online communication. *See* Deven R. Desai, *Property, Persona, and Preservation*, 81 TEMP. L. REV. 67 (2008); Molly Wilkens, *Privacy and Security During Life, Access After Death: Are They Mutually Exclusive?*, 62 HASTINGS L.J. 1037 (2011); Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It,* 72 GEO. WASH. L. REV. 1208 (2004); Allan D. Hankins, Note, *Compelling Disclosure of Facebook Content Under the Stored Communications Act*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 295 (2012).

While the statutes themselves do not directly address issues involving fiduciary's access to digital assets and accounts, they can create constraints for individuals attempting to plan for their digital assets and their fiduciaries.

A. Stored Communications Act

The Stored Communications Act, 18 USC § 2701(a), makes it a crime for a person to "intentionally access[] without authorization a facility through which an electronic communication service is provided." It also criminalizes the intentional exceeding of access to the facility. The Act, however, does not apply to conduct which is authorized by the user.

Section 2702 prohibits an electronic communication service or a remote computing service from knowingly divulging the contents of a communication that is stored by or carried or maintained on that service, unless disclosure is made "with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service."

B. Computer Fraud and Abuse Act

The Computer Fraud and Abuse Act, 18 U.S.C. § 1030 also prohibits the unauthorized access to computers.

C. Interface With User Agreements

Problems may arise if the terms of service prohibit a user from granting others access to the account. If a user reveals his or her user name and password and another person uses that information to access an account, it could be in violation of these acts as being without "lawful consent."

One approach being taken by some states, which either have or are considering granting personal representatives the ability to access the accounts, is to provide by statute that such access is not a breach of any terms of the user agreement. For example, the proposed Nevada statute states:

> The act by a personal representative to take control of, conduct or continue any account or asset of a decedent * * * does not invalidate or abrogate any conditions, terms of service or contractual obligations the holder of such an account or asset has with the provider or administrator of the account, asset or Internet website.

Nev. Senate Bill 131 (as amended Apr. 17, 2013).

As another example, the proposed Virginia statute provides:

> This section supersedes any contrary provision in the terms of service agreement, and a fiduciary shall be considered an authorized user who has the lawful consent of the person or estate to whom he owes a fiduciary duty for purposes of accessing or possessing such person's or estate's digital accounts and digital assets.

Virginia S.B. 914, 2013 Session.

Many issues may arise, however, with this type of provision.

- Do such statutory provisions interfere with freedom of contract and/or already established contract rights?
- Will contrary provisions in the terms of service agreement be deemed unenforceable as against public policy?
- How will choice of law provisions in the user agreements which indicate that the agreement is governed by the law of some other state or country be handled?
- Are statutes which attempt to circumvent the federal statutes unconstitutional?

VI. PLANNING SUGGESTIONS

Legal uncertainty reinforces the importance of planning to increase the likelihood that an individual's wishes concerning the disposition of digital assets will be actually carried out. Even individuals with digital property are not taking steps to plan for that property. *See* Becky Yerak, *Online Accounts After Death: Remember Digital Property When Listing Assets*, CHICAGO TRIB., Aug. 26, 2012. (reporting that a survey by BMO Retirement Institute revealed that 57% of respondents who believed it was very or somewhat important to plan for digital assets had not made such plans).

Currently, many attorneys do not include such planning as part of their standard set of services, however, they should begin to do so immediately. *See* Kelly Greene, *Passing Down Digital Assets*, WALL ST. J., Aug. 31, 2012. Digital assets are valuable, both emotionally and financially, and they are pervasive.

A. Specify Disposition According to Provider's Instructions

Though most Internet service providers have a policy on what happens to the accounts of deceased users, these policies are not prominently posted and many users may not be aware of them. If they are part of the standard terms of service, they may not appear on the initial screens as users quickly click through them.

In April 2013, Google took an innovative first step by creating the *Inactive Account Manager* which users may use to control what happens to emails, photos, and other documents stored on Google sites such as +1s, Blogger, Contacts and Circles, Drive, Gmail, Google+ Profiles, Pages and Streams, Picasa Web Albums, Google Voice, and YouTube. The user sets a period of time after which the user's account is deemed inactive. Once the period of time runs, Google will notify the individuals the user specified and, if the user so indicated, share data with these users. Alternatively, the user can request that Google delete all contents of the account. *See Plan Your Digital Afterlife With Inactive Account Manager*, Google Data Liberation Blog (Apr. 11, 2013); Kashmir Hill, *Will You Use Google's Death Manager To Let Loved Ones Read Your Email When You Die?*, Forbes.com (Apr. 11, 2013).

B. Back-Up to Tangible Media

The user should consider making copies of materials stored on Internet sites or "inside" of devices on to tangible media of some type such as a CD, DVD, portable hard drive, or flash drive. The user can store these materials in a safe place, such as a safe deposit box, and then leave them directly to named beneficiaries in the user's will. Of course, this plan requires constant updating and may remove a level of security if the files on these media are unencrypted. However, for some files such as many years of vacation and family photos, this technique may be effective.

C. Prepare Comprehensive Inventory of Digital Estate

1. Creation

An initial estate planning questionnaire should include questions about the client's digital assets. While people may think of bank accounts, stock accounts, real estate, and other brick-and-mortar items as property suitable for estate planning, they may not have considered their digital assets. Accordingly, an attorney can help. In this situation, individuals need to develop an inventory of these assets, including a list of how and where they are held, along with usernames, passwords, and answers to "secret" questions. A sample form is included in the Appendix to this article. Lawyers can then provide advice on what happens in the absence of planning, the default system of patchwork laws and patchy Internet service provider policies, as well as the choices for opting out of the default systems.

2. Storage

Careful storage of the inventory document is essential. Giving a family member or friend this information while alive and well can backfire on your clients. For example, if a client gives his daughter his online banking information to pay his bills while he is sick, siblings may accuse her of misusing the funds. Further, a dishonest family member would be able to steal your client's money undetected.

If you decide that a separate document with digital asset information is the best route for your client, this document should be kept with your client's will and durable power of attorney in a safe place. The document can be delivered to the client's executor upon the client's death or agent upon the client's incapacity. You may consider encrypting this document and keeping the passcode in a separate location as a further safeguard.

Another option is to use an online password storage service such as 1Password, KeePass, or my-iWallet. Your client would then need to pass along only one password to a personal representative or agent. *See* Nancy Anderson,

You Just Locked Out Your Executor and Made Your Estate Planning a Monumental Hassle, FORBES, Oct. 18, 2012. However, this makes this one password extremely powerful as now just one "key" unlocks the door to your client's entire digital world.

Warning: Giving someone else the client's user name and password may be against the terms of service in the contract. Accordingly, if someone uses your client's access information, it may be deemed a state or federal crime because it exceeds the access to that information that is stated in the user agreement.

D. Provide Immediate Access to Digital Assets

Your client may be willing to provide family members and friends immediate access to some digital assets while still alive. Your client may store family photographs and videos on websites such as Shutterfly and DropShots, which permit multiple individuals to have access. Your client could create a YouTube channel. *See* Nancy Anderson, *You Just Locked Out Your Executor and Made Your Estate Planning a Monumental Hassle*, FORBES, Oct. 18, 2012.

E. Authorize Agent to Access Digital Assets

The client may include express directions in a durable power of attorney authorizing the agent to access his or her digital accounts. However, as mentioned above, it is uncertain whether the agent can use that authority in a legal manner to access the information depending on the terms of service agreement.

Below is a provision adapted from a clause suggested by Keith P. Huffman, *Law Tips: Estate Planning for Digital Assets*, Indiana Continuing Legal Education Forum (Dec. 4, 2012):

> Digital Assets. My agent has (i) the power to access, use, and control my digital device, including, but not limited to, desktops, laptops, peripherals, storage devices, mobile telephones, smart phones, and any similar device which currently exists or exists in the future as technology develops for the purpose of accessing, modifying, deleting, controlling or transferring my digital assets, and (ii) the power to access, modify, delete, control, and transfer my digital assets, including, but not limited to, any emails, email accounts, digital music, digital photographs, digital videos, software licenses, social network accounts, file sharing accounts, financial accounts, domain registrations, web hosting accounts, tax preparation service accounts, on-line stores, affiliate programs, other on line programs, including frequent flyer and other bonus programs, and similar digital items which currently exist or exist in the future as technology develops.

F. Place Digital Assets in a Trust

One of the most innovative solutions for dealing with digital assets is to create a revocable trust to hold the assets. *See* Joseph M. Mentrek, *Estate Planning in a Digital World*, 19 Ohio Prob. L.J. 195 (May/June 2009). A trust may be a more desirable place for account information than a will because it would not become part of the public record and is easier to amend than a will.

The owner could transfer digital property into a trust and provide the trustee with detailed instructions regarding management and disposition. Assuming the asset is transferable, the digital asset could be folded into an existing trust. *See* Jessica Bozarth, *Copyrights & Creditors: What Will Be Left of the King of Pop's Legacy?*, 29 CARDOZO ARTS & ENT. L.J. 85, 104-07 (2011). An individual also could set up a separate trust just to hold digital property or to hold specified digital assets. However, creating a separate revocable trust for digital assets may be overkill for many individuals and only be practical for those with digital assets of substantial value.

The client could register accounts in the name of the trust so the successor trustee would legally (and, one hopes, seamlessly) succeed to these accounts. In addition, many digital assets take the form of licenses that expire upon death. They may survive the death of the settlor if the trust owns these accounts and assets instead.

When a person accumulates more digital assets, designating these assets as trust assets may be as simple as adding the word "trustee" after the

owner's last name. *See* John Conner, *Digital Life After Death: The Issue of Planning for a Person's Digital Assets After Death*, 4 EST. PLAN. & COMM. PROP. L.J. 301 (2011).

G. Place Digital Asset Information in a Will

When determining how to dispose of digital assets, one's first instinct may be to put this information in a will. However, a will may not be the best place for this information for several reasons. Because a will becomes public record once admitted to probate, placing security codes and passwords within it is dangerous. Further, amending a will each time a testator changes a password would be cumbersome and expensive. If a client actually wishes to pass on a digital asset rather than the information of how to deal with the asset, a will may not be the proper transfer mechanism.

A will, however, is useful for limited purposes. For example, your client could specify beneficiaries of specific digital assets especially if those assets are of significant monetary value. A testator may also reference a separate document such as the inventory discussed above that contains detailed account information which would provide the executor with invaluable information.

If the ownership of the digital asset upon death is governed by the user agreement, the asset may actually be of the non-probate variety. Thus, like a multiple-party bank account or life insurance policy, the digital asset may pass outside of the probate process.

Because only a few states have statutes authorizing a personal representative to gain access to digital assets, it may be prudent to include a provision granting such authority in wills. The following provision is suggested by James Lamm. *See* Michael Froomkin, *Estate Planning for Your Digital Afterlife*, Discourse.net (Feb. 18, 2013).

> The personal representative may exercise all powers that an absolute owner would have and any other powers appropriate to achieve the proper investment, management, and distribution of: (1) any kind of computing device of mine; (2) any kind of data storage device or medium of mine; (3) any electronically stored information of mine; (4) any user account of mine; and (5) any domain name of mine. The personal representative may obtain copies of any electronically stored information of mine from any person or entity that possesses, custodies, or controls that information. I hereby authorize any person or entity that possesses, custodies, or controls any electronically stored information of mine or that provides to me an electronic communication service or remote computing service, whether public or private, to divulge to the personal representative: (1) any electronically stored information of mine; (2) the contents of any communication that is in electronic storage by that service or that is carried or maintained on that service; (3) any record or other information pertaining to me with respect to that service. This authorization is to be construed to be my lawful consent under the Electronic Communications Privacy Act of 1986, as amended; the Computer Fraud and Abuse Act of 1986, as amended; and any other applicable federal or state data privacy law or criminal law. The personal representative may employ any consultants or agents to advise or assist the personal representative in decrypting any encrypted electronically stored information of mine or in bypassing, resetting, or recovering any password or other kind of authentication or authorization, and I hereby authorize the personal representative to take any of these actions to access: (1) any kind of computing device of mine; (2) any kind of data storage device or medium of mine; (3) any electronically stored information of mine; and (4) any user account of mine. The terms used in this paragraph are to be construed as broadly as possible, and the term "user account" includes without limitation an established relationship between a user and a computing device or between a user and a provider of Internet or other network access, electronic communication services, or remote

computing services, whether public or private.

H. Use Online Afterlife Company

Recently, entrepreneurs recognizing the need for digital estate planning have created companies that offer services to assist in planning for digital assets. These companies offer a variety of services to assist clients in storing information about digital assets as well as notes and emails that clients wish to send post-mortem. As an estate planning attorney, you may find this additional service to be valuable and recommend one to your clients.

A non-exclusive list of the different companies and the services they offer is set forth below in alphabetical order. The author is not recommending any of these companies and no endorsement should be implied because of a company's inclusion or exclusion from this list. You must use due diligence in investigating and selecting a digital afterlife company. For example, in the two years I have been maintaining this list, about one-third of the companies have gone out of business or merged with another similar firm.

Name	Services Offered
AfterSteps	Provides users with a step-by-step guide in planning their estate, financial, funeral, and legacy plans, which will be transferred to the users' designated beneficiares upon passing.
AssetLock	Enables users to upload documents, final letters, final wishes, instructions, important locations, and secret information to an online safe deposit box. Once the user dies and a minimum number of recipients confirm the user's death, AssetLock will release pre-designated information to the pre-designated recipients.
Cirrus Legacy	Enables users to keep track of their email accounts, online banking, PayPal, ebay, Amazon, and web hosting, and how these will be passed on.
Dead Man's Switch	Enables users to write emails and designate recipients. Once user fails to respond to three emails, Dead Man's Switch releases the emails to the recipients.
DeadSocial	Sends messages after death via Facebook and Twitter.
Deathswitch	Enables users to write emails and designate recipients.
Estate Map	Moves an estate planning attorney's intake and enables clients to securely store and pass on importante estate information.
Estate++	Enables users to upload important legal documents, photographs, notes, and instructions to a virtual safe deposit box.
E-Z-Safe	Enables users to securely store, update, retrieve, and pass their growing digital assets.
If I Die	Enables users to write notes that will be sent to pre-designated recipients at death.
Legacy Locker	Enables users to save all online account information in a digital safe deposit box and assign beneficiaries for each account.
LivesOn	Allows a person to "continue" tweeting after death and to name a person with authority to continue the account.
My Wonderful Life	Enables users to leave letters, instructions, information, and photographs for pre-designated recipients.
Parting Wishes	Enables users to draft online estate planning documents, design online memorials, create web pages about their lives, prepare final messages, document funeral wishes, and designate Keyholders to distribute this information.
Secured Safe [formerly DataInherit, Entrustet,and others]	Provides users with online storage for passwords and digital documents.
SlightlyMorbid	Enables users to leave behind emails, instructions, and personal online contacts.
Vital Lock	Posthumously delivers text, videos, images, audio recordings, and links to pre-designated recipients.

VII. OBSTACLES TO PLANNING FOR DIGITAL ASSETS

Including digital assets in estate plans is a new phenomenon. Many of the kinks have not yet been straightened out. Some of the problem areas include safety issues involved with passwords, the hassle of updating this information, the uncertainty surrounding online afterlife management companies, and the fact that some online afterlife management companies overstate their abilities.

A. Safety Concerns

Clients may be hesitant to place all of their usernames, passwords, and other information in one place. We have all been warned, "Never write down your passwords." This document could fall into the hands of the wrong person, leaving your client exposed. One option to safeguard against this is to have your clients create two documents; one with usernames and one with passwords. The documents can be stored in different locations or given to different individuals. With an online afterlife management company or an online password vault, clients may worry that the security system could be breached, leaving them completely exposed. *See* Deborah L. Jacobs, *Six Ways to Store Securely the Keys to Your Online Financial Life*, FORBES, Feb. 15, 2011. The same concern is present if your client chooses to place all this information in one document.

B. Hassle

Planning for digital assets is an unwanted burden. Digital asset information is constantly changing and may be stored on a variety of devices (e.g., desktop computers, laptop computers, smart phones, cameras, iPads, CDs, DVDs, and flashdrives). A client may routinely open new email accounts, new social networking or gaming accounts, or change passwords. Documents with this information must be revised and accounts at online afterlife management companies must be frequently updated. For clients who wish to keep this information in a document, advise them to update the document quarterly and save it to a USB flash drive or in the cloud, making sure that a family member, friend, or attorney knows where to locate it. *See* Tamara Schweitzer, *Passing on Your Digital Data*, INC., Mar. 1, 2010.

C. Uncertain Reliability of Online Afterlife Management Companies

Afterlife management companies come and go; their life is dependent upon the whims and attention spans of their creators and creditors. Lack of sustained existence of all of these companies make it hard, if not impossible, to determine whether this market will remain viable. Clients may not want to spend money to save digital asset information when they are unsure about the reliability of the companies. *See id.*

D. Overstatement of the Abilities of Online Afterlife Management Companies

Some of these companies claim they can distribute digital assets to beneficiaries upon your client's death. Explain to your clients that these companies cannot do this legally, and that they need a will to transfer assets, no matter what kind. Using these companies to store information to make the probate process easier is fine but they cannot be used to avoid probate altogether. David Shulman, an estate planner in Florida, stated that he "would relish the opportunity to represent the surviving spouse of a decedent whose eBay business was 'given away' by Legacy Locker to an online friend in Timbuktu." David Shulman, *Estate Planning for Your Digital Life, or, Why Legacy Locker Is a Big Fat Lawsuit Waiting to Happen*, SOUTH FLORIDA ESTATE PLANNING LAW (Mar. 21, 2009).

E. Federal Law Restrictions

There are at least two unresolved issues raised by Federal law. The first is whether the fiduciary is "authorized" to access the digital property pursuant to the statutes prohibiting unauthorized access to computers and computer data. *See* Jim Lamm, *Facebook Blocks Demand for Contents of Deceased User's Account*, Oct. 11, 2012, (discussing *In re Request for Order Requiring Facebook, Inc. to Produce Documents and Things*, the Daftary case, in which the court held that the Stored Communications Act's privacy

rights protect Facebook contents and that Facebook cannot be compelled to turn over the contents).

A second issue is whether the fiduciary can request that the provider disclose records. In that situation, the fiduciary does not go online but rather asks the provider for the records. The critical question here is determining that the fiduciary becomes the subscriber for purposes of permitting access under one of the exceptions to the Stored Communications Act. While state law can clarify that the fiduciary is an authorized user, this is an issue of federal law.

The problem of fiduciary access possibly being in violation of the law is also an issue in other nations such as the United Kingdom where using a deceased's username and password could result in the person who gains access violating the Computer Misuse Act of 1990. *See* Aileen Entwistle, *Safeguarding Your Online Legacy After You've Gone*, Scotsman. Com, March 30, 2013.

VIII. FIDUCIARY ACCESS TO DIGITAL ESTATE

The rights of executors, administrators, agents, and guardians with regard to digital assets are muddy. Their rights in the digital world can be analogized to their rights in the brick-and-mortar world, for which there are well-established probate laws governing access, as well as established procedures designed to safeguard the power of attorney process. *See*, *e.g.*, UNIFORM POWER OF ATTORNEY ACT (2008); Kathryn T. McCarty & Mark R. Singler, *Practical Estate Planning for the Elder Client*, 24-Mar CBA Rec. 30, 31-32 (2010). However, the practical extension of these laws to digital assets is just beginning to be tested.

The Uniform Law Commission has established a Drafting Committee on Fiduciary Access to Digital Information. "The Committee will draft a free-standing act and/or amendments to ULC acts, such as the Uniform Probate Code, the Uniform Trust Code, the Uniform Guardianship and Protective Proceedings Act, and the Uniform Power of Attorney Act, that will vest fiduciaries with at least the authority to manage and distribute digital assets, copy or delete digital assets, and access digital assets." *New ULC Drafting Committees and Study Committees*, Uniform Law Commission (Aug. 15, 2012).

In advance of that proposal, states have begun to consider and enact their own laws. Since 2000, a small number of states have passed legislation relating to the power of executors and administrators to have access to and control of the decedent's digital assets. Other states are considering legislation. These statutes vary in form and substance, and their power and impact remains unclear due to the limited judicial interpretation that has occurred to date. None of the laws, however, cover the rights of other fiduciaries (e.g., successor trustees or agents acting pursuant to a power of attorney).

A. Existing State Law

Existing legislation takes a variety of forms, and can be divided into different "generations." Each generation is a group of statutes covering similar (or identical) types of digital assets, often under an analogous access structure. The first generation, comprising California, Connecticut, and Rhode Island, only cover e-mail accounts. Perhaps recognizing the shortcomings of such a limited definition, Indiana's second-generation statute, enacted in 2007, is more open-ended, covering records "stored electronically." The third generation statutes, enacted since 2010 in Oklahoma and Idaho, explicitly expand the definition of digital assets to include social media and microblogging (e.g., Twitter). These generations are not necessarily distinct in time as legislation of each generational type has recently been proposed in various states. *See generally* Jason Mazzone, *Facebook's Afterlife*, 90 N. CAR. L. REV. 1643 (2012).

1. First Generation

The first generation statutes, enacted as early as 2002, only cover e-mail accounts. They do not contain provisions enabling or permitting access to any other type of digital asset.

a. California

The first and most primitive first generation statute was enacted by California in 2002. This

statute is not specifically directed to personal representatives and simply provides, "Unless otherwise permitted by law or contract, any provider of electronic mail service shall provide each customer with notice at least 30 days before permanently terminating the customer's electronic mail address." CAL. .BUS. & PROF. CODE § 17538.35 (West 2010). Providers are likely to provide this notice via e-mail. *See* Jonathan J. Darrow & Gerald R. Ferrera, *Who Owns a Decedent's E-Mails: Inheritable Probate Assets or Property of the Network?*, 10 N.Y.U. J. Legis. & Pub. Pol'y, 281, 296 (2006-2007). Consequently, in the case of a deceased account holder, the notice will be "wholly useless" unless the personal representative has rapid access to the decedent's e-mail account and monitors it regularly. Tyler G. Tarney, *A Call for Legislation to Permit the Transfer of Digital Assets at Death*, 40 Cap. U. L. Rev. 773, 788 (2012).

b. Connecticut

Connecticut was one of the first states to address executors' rights to digital assets. In 2005, the legislature passed S.B. 262, requiring "electronic mail providers" to allow executors and administrators "access to or copies of the contents of the electronic mail account" of the deceased, upon showing of the death certificate and a certified copy of the certificate of appointment as executor or administrator, or by court order. S.B. 262, 2005 Leg., Reg. Sess. (Conn. 2005) (codified at CONN. GEN. STAT. ANN § 45a-334a (West 2012)). The bill specifically defined "electronic mail service providers" as "sending or receiving electronic mail" on behalf of end-users. *Id.*

c. Rhode Island

In 2007, Rhode Island passed the Access to Decedents' Electronic Mail Accounts Act, requiring "electronic mail service providers" to provide executors and administrators "access to or copies of the contents of the electronic mail account" of the deceased, upon showing of the death certificate and certificate of appointment as executor or administrator, or by court order. H.B. 5647, 2007 Leg., Jan. Sess. (R.I. 2007) (codified at R.I. GEN. LAWS § 33-27-3 (2012)). Rhode Island uses a definition of "electronic mail service provider" similar to Connecticut's: "an intermediary in sending or receiving electronic mail" who "provides to end-users . . . the ability to send or receive electronic mail." *Id.*

2. Second Generation (Indiana)

Perhaps in acknowledgement of changing technological times, one state has a second generation statute which uses a broad definition of covered digital assets. While an open-ended definition may allow the law to remain relevant as new technologies are invented and new types of digital assets gain prominence, its generality may also create confusion and uncertainty as to what assets will actually be covered and how best to engage in planning for them.

In 2007, the Indiana legislature added a provision to its state code requiring custodians of records "stored electronically" regarding or for an Indiana-domiciled decedent, to release such records upon request to the personal decedent's personal representative. IND. CODE § 29-1-13-1.1 (2007). The personal representative must furnish a copy of the will and death certificate, or a court order. *Id*. After the custodian is notified of the decedent's death, the custodian may not dispose of or destroy the electronic records for two years. Custodians need not release records "in violation of any applicable federal law" or "to which the deceased person would not have been permitted in the ordinary course of business." *Id.*

3. Third Generation

Third generation legislation acknowledges the changes to the digital asset landscape, since California enacted its first generation e-mail legislation in 2002. These third generation laws expressly recognize new and popular digital assets – social networking and microblogging. While these laws may better serve the current population than the limited first generation statutes, they share the same risk of becoming obsolete in only a few years.

a. Oklahoma

In 2010, Oklahoma enacted legislation with a fairly broad scope, giving executors and administrators "the power . . . to take control of,

conduct, continue, or terminate any accounts of a deceased person on any social networking website, any microblogging or short message service website or any e-mail service websites." H.B. 2800, 52nd Leg., 1st Sess. (Okla. 2010) (codified at OKLA. STAT. tit. 58, § 269 (2012)).

b. Idaho

On March 26, 2012, Idaho amended its Uniform Probate Code to enable personal representatives and conservators to "[t]ake control of, conduct, continue or terminate any accounts of the decedent on any social networking website, any microblogging or short message service website or any e-mail service website." S.B. 1044, 61st Leg., Reg. Sess. (Idaho 2011). Sponsors declared that the purpose of the bill was to "make it clear" that personal representatives and conservators can control the decedent's or protected person's "social media . . . such as e-mail, blogs instant messaging, Facebook types of accounts, and so forth." Statement of Purpose, 1044–RS20153, Leg. 61, Reg. Sess. (Idaho 2011).

c. Nevada

Effective October 1, 2013, Nevada authorizes a personal representative to direct the termination of e-mail, social networking, and similar accounts. Nev. 2013 Sess. Laws ch. 325.

In an attempt to avoid problems with federal law, the statute states:

> The act by a personal representative to direct the termination of any account or asset of a decedent * * * does not invalidate or abrogate any conditions, terms of service or contractual obligations the holder of such an account or asset has with the provider or administrator of the account, asset or Internet website.

4. Specialized State Legislation (Virginia)

In 2013, Virginia enacted § 64.2-110 which grants the personal representative of a deceased minor access to the minor's digital accounts such as those containing e-mail, social networking information, and blogs. The personal representative assumes the deceased minor's terms of service agreement for the purposes of consenting to and obtaining the disclosure of the contents of the account.

The reason this legislation is limited to minors is because its chief proponent, Ricky Rash, wants to obtain information from his son's Facebook account which he hopes will explain why his son committed suicide. *See* Evan Carroll, *Virginia Passes Digital Assets Law*, The Digital Beyond, Feb. 19, 2013.

B. Proposed State Legislation

This section discusses proposed state legislation, both pending at the time this article was revised and legislation that was unsuccessful. *See also* Jim Lamm, *List of State Laws and Proposals Regarding Fiduciary Access to Digital Property During Incapacity or After Death*, Digital Passing (last updated Apr. 1, 2013) (including the states of Colorado, Missouri, and Ohio).

1. Massachusetts

The Massachusetts Senate approved a bill giving personal representatives and authorized family members "reasonable access" to a decedents "electronic mail account[s]." S. 2313, 187th General Court, Reg. Sess. (Mass. 2012); *Mass. Senate Eyes Law Governing Access to the Deceased*, 90.9 WBUR (June 27, 2012). The bill specifically demands that access be given even if it conflicts with a provider's terms of service, unless the decedent expressly declined to have their e-mail account released after death. S. 2313, 187th General Court, Reg. Sess. (Mass. 2012). The bill appears to have died in the Massachusetts House. Cite?

2. Maryland

The Maryland Senate considered a very simple statute which permits a personal representative to deal with email, social networking sites, microblogging, and SMS services. Senate Bill 29. The bill received an unfavorable report on February 18, 2013. Cite?

3. Michigan

The Michigan House considered a very simple statute that would permit a personal representative to deal with email, social

networking sites, microblogging, and SMS services. House Bill 5929 (Sept. 20, 2012). The bill appears to have gained little or no support. Cite?

4. Nebraska

Legislative Bill 783, introduced in 2012, "provides the personal representative of a deceased individual the power to take control of or terminate any accounts or message services that are considered digital [sic] assets," and notes that "[t]he power can be limited by will or court order." L.B. 783, 102nd Leg., 2nd Sess. (Neb. 2012), *Introducer's Statement of Intent* – L.B. 783, Leg. 102, 2nd Sess. (Neb. 2012). If enacted, the bill would amend Nebraska's statute to give personal representatives "the power . . . to take control of, conduct, continue, or terminate any account of a deceased person on any social networking web site, microblogging or short message service web site, or e-mails service website," in addition to the personal representative's pre-existing authority to take title to the estate's real property. *Id.*

The Nebraska Bar Association, sponsor of the bill, worked with Facebook lobbyists on the precise wording of the proposed bill "so it meshes with Facebook's service contracts." Paul Hammel, *Nebraska Legislature: what happens to your Facebook page when you die?*, OMAHA WORLD-HERALD (Jan. 30, 2012). Nebraska's proposed bill was referred to the Judiciary Committee in January, 2012, before being indefinitely postponed.

A substantially similar bill was introduced on January 10, 2013. L.B. 37, 103rd Leg., 1st Sess. (Neb. 2013). After hearings late in January 2013, no further action appears to have been taken on the bill.

5. New Hampshire

The New Hampshire House is considering a very simple statute that would permit a personal representative to deal with email, social networking sites, microblogging, and SMS services. HB 0116 (Jan. 3, 2013). In late January 2013, the House voted to give the sponsor of the bill, Peter Sullivan, time to prepare an amendment to establish a study of the digital asset issue. Norma Love, *Who Controls Your Facebook Page After Death? N.H. Lawmakers Examine It*, Seacoastonline (Jan. 31, 2013). Some House members believed that the bill was premature and perhaps unenforceable. *Id.* (quoting Timothy Horrigan).

6. New Jersey

The 2012 New Jersey Assembly considered a very simple statute that would permit a personal representative to deal with email, social networking sites, microblogging, and SMS services. N.J. A2954 (as amended). The bill appears to have gained little or no support.

7. New York

In February 2012, Brooklyn Assemblyman Felix Ortiz introduced legislation that authorizes a decedent's fiduciary to take control of certain web accounts. New York Bill A09317 (2012) (amending N.Y. EST. POWERS & TR. L. § 11-1.1(b)(23)). This third generation statute provides that "unless expressly prohibited by the will or court order, [the executor has authority] to take control of, conduct, continue or terminate any account of the decedent on any social networking web site, microblogging or short message service web site or email service web site." The bill was referred to the Judiciary Committee on February 16, 2012 and no votes have been taken as of October 20, 2012. *See generally* Melissa Holmes, *Social Media Users Can Create "Online Executor" In Will*, WGRZ.com, Feb. 5, 2012. This statute did not pass.

In January 2013, a similar statute was introduced into the New York Assembly. A823-2031. After being referred to the Judiciary on January 9, 2013, no action has yet been taken.

8. North Carolina

North Carolina is considering a comprehensive bill to address a wide variety of digital asset issues. Senate Bill 279 (Mar. 13, 2013 revision). Here are some of the key features of the bill:

- Grants personal representatives access to non-financial digital assets.

- Includes the control of digital assets and accounts in the list of powers which a settlor may incorporate by reference into a trust instrument.
- Adds "digital assets and accounts" to the list of powers a principal may grant an agent in the statutory short form for a general power of attorney.
- Grants the guardian of the estate of an incompetent individual access to the ward's digital assets.

9. North Dakota

The New Dakota Legislature considered a very simple statute that would permit a personal representative to deal with email, social networking sites, microblogging, and SMS services. H.B. 1455, 63rd N.D. Leg. Ass. After passing House, the bill failed to pass the Senate on April 9, 2013.

10. Oregon

The Oregon Senate is currently considering a bill to deal with digital assets issues. Senate Bill 54, 77th Oregon Legislative Assembly, 2013 Reg. Sess. As introduced, this bill:

> clarifies that a fiduciary has the legal right, as an authorized user, to access online accounts and information. In short, SB 54:
>
> 1. Defines digital accounts and assets.
> 2. Confirms a fiduciary has the right to access, take control of, possess, handle, conduct, continue, distribute, dispose of or terminate digital assets and digital accounts.
> 3. Instructs the custodian of a digital asset as to the process by which a fiduciary can access or possess information.
> 4. Provides indemnification so that a custodian can provide information without liability.

Testimony of Victoria Blachly, Senate Judiciary Committee (Feb. 11, 2013).

11. Pennsylvania

The Pennsylvania General assembly considered a very simple statute that would permit a personal representative to deal with email, social networking sites, microblogging, and SMS services. H.B. 2580, Session of 2012. It was referred to Judiciary on August 23, 2012 and appears to have died there. Cite?

12. Virginia

The Virginia Senate considered a bill to address various issues dealing with fiduciary access to digital assets and the interface with user agreements. S.B. 914, 2013 Session. Less than one month after its introduction, however, the bill was stricken at the request of Patron in Courts of Justice.

C. States Studying Digital Asset Legislation

The Maine Legislature issued a resolution in March 2013 to study the issue of the inheritance of digital assets. The legislature directed the Probate and Trust Law Advisory Commission o "conduct a review of the legal impediments to the disposition of digital assets upon an individual's death or incapacity and develop legislative recommendations based on the review." The report is due no later than December 1, 2013. 126th Me. Leg. Doc. 850, H.P. 601 (Mar. 5, 2013).

D. Shortcomings of Existing State Digital Asset Legislation

Many of the statutes are creatures of the precise time period in which they were passed, limited by the technology available at the time. Connecticut's 2005 statute and Rhode Island's 2007 law cover only "electronic mail." Idaho's 2012 statute, Nebraska's proposed legislation and Oklahoma's 2010 statute include social networking, microblogging, e-mail, and "short message service[s]." None were comprehensive even at the time of drafting, and will likely become less relevant to contemporary digital asset issues as time goes on and sources of digital assets cycle in and out of popularity.

Of the states that have passed or attempted digital asset legislation, only Indiana's arguably includes

any type of digital assets beyond social networking, e-mail, and other social and communication-type services. Indiana defined records covered under its statute as those electronically stored by the custodian, available to the decedent in the normal course of the custodian's business. Indiana's statute arguably covers other types of digital assets, such as financial records, assets related to business conducted over the Internet, online storage and domain hosting, gaming and entertainment accounts, etc. Though judicial interpretations of the relatively recent statute remain limited, the caveat that custodians need only release records that were available to the decedent in the "ordinary course of business" may be a valuable defense angle for reluctant online service providers.

One criticism that has been levied against state digital asset legislation is that these laws may fail to address the contractual relationship between service providers and their end users. Some of the legislation includes caveats that record release or access will only occur where consistent with other state and federal laws, or "where otherwise authorized" (as Oklahoma put it). Through standard terms of service (either expressly consented to by the decedent, or increasingly through passive notification methods like a clickwrap agreement), it is possible that the decedent has already entered into a legally enforceable contract waiving his or her rights under digital asset laws. This may occur due to simple boilerplate language like "nontransferable," or under more explicit and detailed provisions. It remains unclear whether digital service providers can use these provisions to avoid release or access.

Even if digital asset legislation covers the particular provider and asset at issue in a particular matter, there is still no guarantee that the type of access sought will be ultimately provided. Much like the existing deceased user policies of digital service providers themselves, the existing legislation provides varying degrees of access. A fiduciary might be interested only in copying the contents of a file or deleting the account, or might want full management authority, including transferring it to another person. The type of access permitted or required by statute may not be of the type sought by an estate.

For example, an executor or administrator who seeks to continue the digital operation of a decedent's asset (e.g., a blog, message board, or digital store on eBay or Amazon) may be disappointed even in states that have taken the initiative to legislate in this area. Connecticut and Rhode Island grant "access or copies," but their statutory language does not specify who makes that decision – whether it is the estate's choice, or the digital service provider gets the final say. Indiana merely requires "release" of digitally stored records; its statute does not even mention full access or transfer as a possibility. By contrast, the Oklahoma and Idaho laws are much broader in granting access to the accounts themselves.

E. Fiduciary Access to Digital Assets Act

The National Conference of Commissioners on Uniform State Laws is in the process of drafting a model state law entitled the Fiduciary Access to Digital Assets Act. "The purpose of this act is to vest fiduciaries with the authority to access, manage, distribute, copy or delete digital assets and accounts. It addresses four different types of fiduciaries: personal representatives of decedents' estates, conservators for protected persons, agents acting pursuant to a power of attorney, and trustees." Prefatory Note to Feb. 7, 2013 draft.

F. Cases

There are few appellate court cases, although numerous media stories recount the difficulties of accessing a deceased's online accounts. In one well-publicized case, after Lance Cpl. Justin Ellsworth was killed in 2004 while serving with the United States Marine Corps in Afghanistan, his parents began a legal battle with Yahoo! to gain access to messages stored in his e-mail account. *Yahoo Will Give Family Slain Marine's E-mail Account*, USA TODAY (April 21, 2005). Yahoo! initially refused the family's request, but ultimately did not fight a probate court order to hand over more than 10,000 pages of e-mails. *Id.* However, the family remained disappointed

when the data CD provided by Yahoo! contained only received e-mails and none their late son had written. *Id.* A Wisconsin couple sought court orders against Google and Facebook to help them understand their 21 year-old son's suicide. Jessica Hopper, *Digital Afterlife: What Happens to Your Online Accounts When You Die?*, Rock Center, June 1, 2012. Similar difficulties have prompted state legislators to introduce legislation on the issue including the Massachusetts proposal previously discussed. *Mass. Senate Eyes Law Governing Access to the Deceased*, 90.9 WBUR (June 27, 2012).

IX. FUTURE REFORM AREAS

The increasing use of digital assets, the need for planning, and the existing uncertainty over the application of current laws ensures changes in the legal landscape. Some of the areas for future reform include addressing digital assets from the perspectives of an agent, a decedent's personal representative, and a guardian.

A. Agents

All states allow powers of attorney and approximately one quarter have enacted some version of the Uniform Power of Attorney Act. To ensure that agents have the appropriate authority, states could adopt explicit legislation recognizing that digital assets can be controlled through powers of attorney. In the absence of such legislation, businesses may not recognize the authority of the agent over digital accounts and assets, even though the standard form could easily be construed to cover these situations. For example, Eve Kripke held a power of attorney for her husband, who suffered from Lewy body dementia, a disease affecting cognition, movement, and emotions. She managed his online bank account with Bank of America for several years until she was informed that she had the wrong password. Though she was able to answer a series of questions on the website, including her husband's Social Security number, she could not answer questions about the numbers on his Bank of America credit card — which she had cut up and disposed of because her husband could no longer use it. Jon Yates, *Problem Solver: Readers Crack BofA Code, Help Woman Gain Access to Account*, CHICAGO TRIBUNE (Aug. 23, 2011). Bank of America offered several compromises including listing Eva as a joint account holder. The power of attorney, however, was insufficient for granting access to online banking. "'You must be an account holder or user,' a bank spokesperson explained. 'The reason we do this is to protect the customer and mitigate risk.'" Jon Yates, *Power of Attorney Powerless in Online Baking: Bank Says Caretaker Spouse Will Have to Rely on Monthly Statements*, CHICAGO TRIBUNE (May 26, 2011).

To ensure that powers of attorney will be respected, states have two options. They might establish separate, distinct powers of attorney specifically for digital assets, developing a special form tailored to the digital world that could be executed in addition to powers of attorney that cover health care and other financial decision-making. In the alternative, they can simply adapt, or amend (if necessary) existing legislation and sample forms. For example, the UPoAA recognizes that some grants of authority to an agent require explicit conferrals of authority. Control over digital assets could simply be added to the list. UNIFORM POWER OF ATTORNEY ACT § 201 (2008). The principal could be required to list the specific accounts, such as Facebook or Twitter or PayPal, on the form, or could check off a box allowing for access to any and all such accounts.

B. Personal Representatives

As discussed earlier, states are beginning to address the power of executors to deal with digital assets. Especially with the formation of the Uniform Law Commission's Drafting Committee on Fiduciary Access to Digital Information, it is likely that this trend will continue and at a rapid pace. It is anticipated that the legislation will: (1) enumerate with some precision the exact nature of the executor's power to manage and distribute digital assets, (2) provide guidance as to whether an executor may access, decrypt, copy, or delete electronically stored data, and (3) recognize the testator's ability to limit use and access to digital assets in some method either by testamentary provisions or by agreement with the entity storing the data.

C. Guardians of Incapacitated Adults

Given that a guardian is appointed by the court and generally has the ability to force third parties to accept the guardian's authority, a guardian theoretically will have the same access and control over digital assets as the owner. However, a problem may arise because contracts with providers and other entities may attempt to limit the power of a guardian. Legislation regarding a decedent's personal representative should cover guardians as well. See Memo from Suzanne Brown Walsh to Uniform Law Commission Scope and Program Committee (June 21, 2012).

D. Providers Gather User's Actual Preferences

Though most Internet service providers have some kind of policy on what happens to the accounts of deceased users, these policies are not prominently posted and many consumers may not be aware of them. If they are parts of the standard terms of service, they may not appear on the initial screens, as Internet users quickly click past them. *See* Kevin W. Grierson, Annotation, *Enforceability of "Clickwrap" or "Shrinkwrap" Agreements Common in Computer Software, Hardware, & Internet Transactions*, 106 A.L.R.5th 309 (2003).

Internet service providers should follow Google's lead and develop procedures for a person to indicate what happens upon the user's death. To ensure that more people make provisions, providers should provide an easy method at the time a person signs up for a new service so the person can designate the disposition of the account upon the owner's incapacity or death.

E. Federal Law

Ultimately, Congress will need to enact national legislation, to ensure uniformity among the states and to guarantee that Internet service providers will respect each state's forms. Such laws could use existing Internet regulation legislation as a model. Federal law could require Internet providers to respect state laws on fiduciary powers, or even to ensure that all Internet users click through an "informed consent" provision when they sign up for new services. This will at least provide default rules.

At the moment however, there is little movement in Congress to address digital asset issues according to the office of Sen. Mark Pryor who heads the Senate Commerce subcommittee on communications and technology. Lauren Gambino, *In Death, Facebook Photos Could Fade Away Forever*, Associated Press (Mar. 1, 2013). In fact, Rep. Darrell Issa has proposed a two-year moratorium on legislation impacting the Internet. Katy Steinmetz, *Your Digital Legacy: States Grapple with Protecting Our Data After We Die*, Time Tech (Nov. 29, 2012).

X. CONCLUSION

Yes, complications surround planning for digital assets, but all clients need to understand the ramifications of failing to do so. Estate planning attorneys need to comprehend fully that this is not a trivial consideration and that it is a developing area of law. Cases will arise regarding terms of service agreements, rights of beneficiaries, and the success of online afterlife management companies. Until the courts and legislatures clarify the law, estate planners need to be especially mindful in planning for these frequently overlooked assets.

APPENDIX – DIGITAL ESTATE INFORMATION SAMPLE FORM[1]

DIGITAL ESTATE INFORMATION

I. LOCATIONS OF HARD COPY FILES AND MEDIA BACKUP

Personal records =

Financial =

Home/apartment records =

Media backups =

> The location of traditional paper records as well as where back ups of digital information are stored is very helpful.

II. DEFAULT INFORMATION

User names =

Passwords =

Secret questions:

Mother's maiden name =
Grade school =
Street where grew up =

> Many clients have default information which they use for many accounts. If no specific access information is provided, this at least provides a starting point.
>
> Some clients may also have a method of assigning passwords. If so, the client should provide this information.

[1] For another sample form, see James D. Lamm, *Digital Audit: Passwords & Digital Property* (2012).

III. ELECTRONIC DEVICE ACCESS

Device	Website	Username	PIN	Password
Computer – home				
Computer – office				
Operating System				
Voice mail – home				
Voice mail – work				
Voice mail – cell phone				
Security system				
Tablet				
e-Reader				
GPS				
Router				
DVR/TiVo				
Television				

IV. E-MAIL ACCOUNTS

Description	E-mail address	Username	PIN	Password	Disposition Desires
Work					
Home					
School					

V. DOMAIN NAMES

Website/Domain Name	Webhost	Username	PIN	Password
Personal				
Business				

VI. ON-LINE STORAGE

Name	Website	Username	PIN	Password
Dropbox				
Google Drive				

VII. FINANCIAL SOFTWARE

Item	Website	User Name	PIN	Password
Quicken				
TurboTax				

VIII. BANKING

Institution	Website	User Name	Password	ATM PIN	Security Image
Checking					
Savings					
PayPal					

IX. STOCKS, BONDS, SECURITIES

Institution	Website	User Name	Password	Other Information

X. INCOME TAXES

Item	Website	User Name	PIN	Password
Federal Income tax payment	https://www.eftps.com/eftps/			
State Income tax payment				
Prior computerized tax returns				

XI. RETIREMENT

Institution	Website	User Name	Password	Other Information

XII. INSURANCE

Institution	Website	User Name	Password	Other Information
Health				
Life				
Property				

XIII. CREDIT CARDS

Institution	Website	User Name	Password	PIN
American Express				
Visa				

XIV. DEBTS

Institution	Website	User Name	Password	Other Information
Mortgage				
Cars				
Student Loan				

XV. UTILITIES

Institution	Website	User Name	Password	Other Information
Electric				
Gas				
Internet				
Phone(landline)				
Phone (cell)				
TV				
Trash				
Water				

XVI. BUSINESSES

Institution	Website	User Name	Password	Other Information
Amazon.com				
e-Bay.com				

XVII. SOCIAL NETWORKS

Institution	Website	User Name	Password	Disposition Desires
Facebook				
LinkedIn				
Twitter				
MySpace				

XVIII. DIGITAL MEDIA ACCOUNTS

Institution	Website	User Name	Password	Other Information
Netflix				
iTunes				
YouTube				
Hulu				
Nook				
Kindle				

XIX. LOYALTY PROGRAMS

Name	Website	User Name	Password
Delta			
Southwest Airlines			
Best Buy			
Office Depot			

XX. OTHER ACCOUNTS

Name	Website	User Name	Password
Skype			
LoJack			
WoW			
HalfLife			
Flickr			
Medical records			

PART II

PETS

I. INTRODUCTION

Dogs, cats, parrots, and other pet animals play extremely significant roles in the lives of many individuals. People own pets for a variety of reasons – they love animals, they enjoy engaging in physical activity with the animal such as playing ball or going for walks, and they enjoy the giving and receiving of attention and unconditional love. Research indicates that pet ownership positively impacts the owner's life by lowering blood pressure, reducing stress and depression, lowering the risk of heart disease, shortening the recovery time after a hospitalization, and improving concentration and mental attitude. *See A Dog's Life (or Cat's) Could Benefit Your Own*, SAN ANTONIO EXPRESS-NEWS, May 18, 1998, at 1B (explaining how some insurance companies lower life insurance rates for older owners of pets).

Over two-thirds of pet owners treat their animals as members of their families. *See* Cindy Hall & Suzy Parker, *USA Snapshots – What We Do For Our Pets*, USA TODAY, Oct. 18, 1999, at 1D. Twenty percent of Americans have even altered their romantic relationships over pet disputes. *See* Andre Mouchard, *Book Prepares Pet Owners For Loss of Their Loved Ones*, SAN JOSE MERCURY NEWS, Mar. 16, 1999, at 2E. Pet owners are extremely devoted to their animal companions with 80% bragging about their pets to others, 79% allowing their pets to sleep in bed with them, 37% carrying pictures of their pets in their wallets (or in their cellular telephones), and 31% taking off of work to be with their sick pets. *See* Hall & Parker, supra. During the December 1999 holiday season, the average pet owner spent $95 on gifts for pets. *See* Anne R. Carey & Marcy E. Mullins, *USA Snapshots – Surfing For Man's Best Friend*, USA TODAY, Dec. 16, 1999, at B1.

The number of individuals who own animals is staggering. As many as 43.5 million households in the United States own dogs and 37.7 million own cats. In addition to these traditional pets, Americans also own a wide variety of other animals. For example, there are 14.7 million households with fish, 6.4 million with birds, over 5 million with small animals such as hamsters and rabbits, and 4.4 million with reptiles. *See* Melissa A. Monroe, *Creature Comforts*, SAN ANTONIO EXPRESS-NEWS, May 4, 2005, at E1 (reporting statistics gathered from the American Pet Products Manufacturers Association's 2005/2006 National Pet Owners Survey).

The investment pet owners make in their pets is rapidly increasing. According to the American Pet Products Manufacturers Association, Inc., spending on pets has more than doubled since 1994 and now exceeds $40 billion per year. *See* Anne R. Carey & Keith Carter, *USA Today Snapshot – Spending on Furry Friends,* USA TODAY, Aug. 25, 2006.

The love owners have for their pets transcends death as documented by studies revealing that between 12% and 27% of pet owners include their pets in their wills. The popular media frequently reports cases that involve pet owners who have a strong desire to care for their beloved companions. *See* Anne R. Carey & Marcy E. Mullins, *USA Snapshots – Man's Best Friend?*, USA TODAY, Dec. 2, 1999, at 1B (12%); Elys A. McLean, *USA Snapshots – Fat Cats—and Dogs*, USA TODAY, June 28, 1993, at 1D (27%); *Vital Statistics*, HEALTH, Oct. 1998, at 16 (18%).

Billionaire Leona Helmsley left $12 million in her will to a trust to benefit her white Maltese named Trouble. Singer Dusty Springfield's will made extensive provisions for her cat, Nicholas. The will instructed that Nicholas' bed be lined with Dusty's nightgown, Dusty's recordings be played each night at Nicholas' bedtime, and that

Nicholas be fed imported baby food. *See Dusty's Cool Fat Cat*, PEOPLE, Apr. 19, 1999, at 11.

Doris Duke, the sole heir to Baron Buck Duke who built Duke University and started the American Tobacco Company, left $100,000 in trust for the benefit of her dog. *See* Walter Scott, *Personality Parade*, PARADE MAG., Sept. 11, 1994, at 2; *In re Estate of Duke*, No. 4440/93, slip op. (N.Y. Sur. Ct. N.Y. County July 31, 1997) (upholding trust and quoting relevant provisions of Duke's will).

Natalie Schafer, the actress who portrayed Lovey on the television program *Gilligan's Island*, provided that her fortune be used for the benefit of her dog. *See* Beverly Williston, *Gilligan's Lovey Leaves It All to Her Dog*, SAN ANTONIO STAR, Apr. 28, 1991, at 5.

The wills of well-known individuals who are still alive may also contain pet provisions. For example, actress Betty White is reported as having written a will which leaves her estate estimated at $5 million for the benefit of her pets. *See Betty White Leaves $5M to Her Pets*, SAN ANTONIO STAR, Nov. 4, 1990, at 25. Likewise, Oprah Winfrey's will purportedly mandates that her dog live out his life in luxury. *See* Janet Charlton, *Star People*, SAN ANTONIO STAR, Mar. 3, 1996, at 2.

The primary goal of the pet owner's attorney is to carry out the pet owner's intent to the fullest extent allowed under applicable law. Accordingly, the attorney should select a method that has the highest likelihood of working successfully to provide for the pet after its owner's death. (The pet owner should also determine if any special arrangements need to be made to care for the pet if the owner becomes disabled.) After discussing the history of providing for a pet after the owner's death, this article discusses the variety of techniques currently available and comments on the advisability of each.

II. HISTORY

A. Common Law

Will the legal system permit animal owners to accomplish their goal of providing after-death care for their pets? The common law courts of England looked favorably on gifts to support specific animals. *See In re Dean*, 41 Ch. D. 552 (1889). This approach, however, did not cross the Atlantic. "Historically, the approach of most American courts towards bequests for the care of specific animals has not been calculated to gladden the hearts of animal lovers." Barbara W. Schwartz, *Estate Planning for Animals*, 113 TR. & EST. 376, 376 (1974). Attempted gifts in favor of specific animals usually failed for a variety of reasons, such as for being in violation of the rule against perpetuities because the measuring life was not human or for being an unenforceable honorary trust because it lacked a human or legal entity as a beneficiary who would have standing to enforce the trust.

The persuasiveness of these two traditional legal grounds for prohibiting gifts in favor of pet animals is waning rapidly under modern law. In at least one-half of the states, courts and legislatures have been increasingly likely to permit such arrangements by applying a variety of techniques and policies.

B. Uniform Probate Code

In 1990, the National Conference of Commissioners on Uniform State Laws added a section to the Uniform Probate Code to validate "a trust for the care of a designated domestic or pet animal and the animal's offspring." UNIF. PROB. CODE § 2-907, cmt. (1990). This provision, as amended in 1993, provides as follows:

> **§ 2-907. Honorary Trusts; Trusts for Pets.**
>
> (a) [Honorary Trust.] * * *
>
> (b) [Trust for Pets.] Subject to this subsection and subsection (c), a trust for the care of a designated domestic or pet animal is valid. The trust terminates when no living animal is covered by the trust. A governing instrument must be liberally construed to bring the transfer within this subsection, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general

intent of the transferor. Extrinsic evidence is admissible in determining the transferor's intent.

(c) [Additional Provisions Applicable to Honorary Trusts and Trusts for Pets.] In addition to the provisions of subsection (a) or (b), a trust covered by either of those subsections is subject to the following provisions:

(1) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the trust's purposes or for the benefit of a covered animal.

(2) Upon termination, the trustee shall transfer the unexpended trust property in the following order:

(i) as directed in the trust instrument;

(ii) if the trust was created in a non-residuary clause in the transferor's will or in a codicil to the transferor's will, under the residuary clause in the transferor's will; and

(iii) if no taker is produced by the application of subparagraph (i) or (ii), to the transferor's heirs under Section 2-711.

(3) For the purposes of Section 2-707, the residuary clause is treated as creating a future interest under the terms of a trust.

(4) The intended use of the principal or income can be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual.

(5) Except as ordered by the court or required by the trust instrument, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, or fee is required by reason of the existence of the fiduciary relationship of the trustee.

(6) A court may reduce the amount of the property transferred, if it determines that that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property under subsection (c)(2).

(7) If no trustee is designated or no designated trustee is willing or able to serve, a court shall name a trustee. A court may order the transfer of the property to another trustee, if required to assure that the intended use is carried out and if no successor trustee is designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. A court may also make such other orders and determinations as shall be advisable to carry out the intent of the transferor and the purpose of this section.

At least ten states have enacted this provision including Alaska [unofficial text], Arizona, Colorado [unofficial text], Hawaii, Illinois [unofficial text], Michigan, Michigan, Montana, North Carolina, South Dakota, and Utah. In addition, several other states have used the UPC provision as a model for their own enabling legislation.

C. Uniform Trust Code

Likewise, the Uniform Trust Code completed in 2000 provides that a "trust may be created to provide for the care of an animal alive during the settlor's lifetime." UNIF. TRUST. CODE § 408 (2000). This provision reads as follows:

§ 408. Trust for Care of Animal.

(a) A trust may be created to provide for the care of an animal alive during the 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.
>
> (b) A trust authorized by this section 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. 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.
>
> (c) Property of a trust authorized by this section 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. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.

At least twenty jurisdictions, including Alabama Arkansas [unofficial text], District of Columbia [unofficial text], Florida, Georgia, Kansas [unofficial text], Maine, Maryland, Missouri, Nebraska, New Hampshire, New Mexico [unofficial text], North Dakota [unofficial text], Ohio, Oregon [unofficial text], Pennsylvania [unofficial text], South Carolina [unofficial text], Tennessee [unofficial text], Vermont, Virginia, West Virginia, and Wyoming [unofficial text], have already adopted this provision or have modeled their statutes after this provision.

D. Other Approaches

Many other states have developed their own statutes, often using the uniform provisions as models. These states include California [unofficial text], Connecticut [unofficial text], Delaware, Idaho, Indiana [unofficial text], Iowa [unofficial text], Massachusetts, Nevada, New Jersey [unofficial text], New York [unofficial text], Oklahoma, Rhode Island, Texas [unofficial text], and Washington [unofficial text].

One state, Wisconsin, authorizes trusts for the benefit of pets, but does not make them enforceable. In other words, in this state, the trust is merely honorary.

The remaining states have not yet legislatively authorized pet trusts.

III. SHORT-TERM PLANNING STEPS

The owner should take four important steps to assure that the animal will receive proper care immediately upon the owner being unable to look after the animal.

A. Animal Card

The owner should carry an "animal card" in the owner's wallet or purse. This card should contain information about the pet, such as its name, type of animal, location where housed, and special care instructions along with the information necessary to contact someone who can obtain access to the pet. If the owner is injured or killed, emergency personnel will recognize that an animal is relying on the owner's return for care and may notify the named person or take other steps to locate and provide for the animal. The animal card will help assure that the animal survives to the time when the owner's plans for the pet's long-term care take effect.

The following sample animal card is reproduced with the permission of the Humane Society of the United States.

Front

WALLET ALERT CARD

THE HUMANE SOCIETY OF THE UNITED STATES

In the event of an emergency, please call the emergency caregivers for my pets listed on the back of this card

PET OWNER'S NAME

I HAVE _____ PETS IN MY HOME

PET'S NAME TYPE OF ANIMAL

Back

EMERGENCY PET CAREGIVERS

NAME

DAYTIME PHONE EVENING PHONE

NAME

DAYTIME PHONE EVENING PHONE

NAME

DAYTIME PHONE EVENING PHONE

IF THEY ARE NOT AVAILABLE, PLEASE CALL MY *(circle one)*

PET SITTER VETERINARIAN BOARDING KENNEL

NAME PHONE NUMBER

B. Animal Document

The owner should prepare an "animal document" which contains the same information as on the animal card and perhaps additional details as well. The owner should keep the animal document where it is likely to be found by anyone caring for the pet such as near where the pet's food is stored. In addition, a copy should be kept in the same location where the pet owner keeps his or her estate planning documents. The benefit of this technique is basically the same as for carrying the animal card, that is, an enhanced likelihood that the owner's desires regarding the pet will be made known to the appropriate person in a timely manner.

The following sample animal document is reproduced with the permission of the Humane Society of the United States.

Front

For Emergency Caregivers for my Pet(s)

Please make additional copies of this sheet if needed.

Thank you for agreeing to take care of my pet(s) during an emergency if I am unable to do so. Below is all of the information you'll need.

_____
sign your name

CONTACT INFORMATION

YOUR NAME

ADDRESS

CITY | STATE | ZIP

DAYTIME PHONE | EVENING PHONE | CELL PHONE

YOUR EMERGENCY CONTACT

NAME | RELATIONSHIP

DAYTIME PHONE | EVENING PHONE | CELL PHONE

OTHER EMERGENCY CAREGIVERS FOR MY PET(S)

NAME (1)

DAYTIME PHONE | EVENING PHONE | CELL PHONE

NAME (2)

DAYTIME PHONE | EVENING PHONE | CELL PHONE

NAME (3)

DAYTIME PHONE | EVENING PHONE | CELL PHONE

VETERINARIAN

VETERINARIAN'S NAME | ADDRESS

OFFICE PHONE | AFTER-HOURS EMERGENCY PHONE

DIRECTIONS TO OFFICE

EMERGENCY CARE CENTER

AFTER-HOURS EMERGENCY CARE CENTER

DIRECTIONS TO AFTER-HOURS EMERGENCY CARE CENTER

PET SITTER

PET SITTING SERVICE | ADDRESS

OFFICE PHONE | AFTER-HOURS EMERGENCY PHONE

Back

BOARDING KENNEL

BOARDING KENNEL ADDRESS

OFFICE PHONE AFTER-HOURS EMERGENCY PHONE

PET INFORMATION (YOU MAY WISH TO ATTACH A PHOTO)

PET'S NAME TYPE OF ANIMAL

COLOR BREED WEIGHT AGE MICROCHIPPED Y/N

CARE INSTRUCTIONS

LOCATION OF LEASHES, CARRIERS, AND OTHER SUPPLIES

LOCATION OF FOOD AND WATER WHERE PURCHASED?

TYPE OF FOOD HOW MUCH/HOW OFTEN?

IS PET ALLOWED TO GO OUTSIDE? IF YES, WHEN AND WHERE?

FAVORITE TOYS OR GAMES FAVORITE HIDING PLACES

FOR CATS

CLEAN LITTER BOX HOW OFTEN? WHAT BRAND OF LITTER?

FOR DOGS

WALK HOW OFTEN? FAVORITE ROUTES?

MEDICAL HISTORY

IMPORTANT MEDICAL INFORMATION (E.G., MEDICAL CONDITIONS, PRESCRIPTIONS)

INSTRUCTIONS FOR MEDICATION OR OTHER SPECIAL NEEDS

COMMENTS ON PERSONALITY OR BEHAVIOR

PROVISIONS FOR LONG-TERM CARE

(E.G., WHERE WILL OR TRUST IS FILED, KEEPING CERTAIN PETS TOGETHER, DISPOSITION OF PET'S BODY IN CASE OF DEATH)

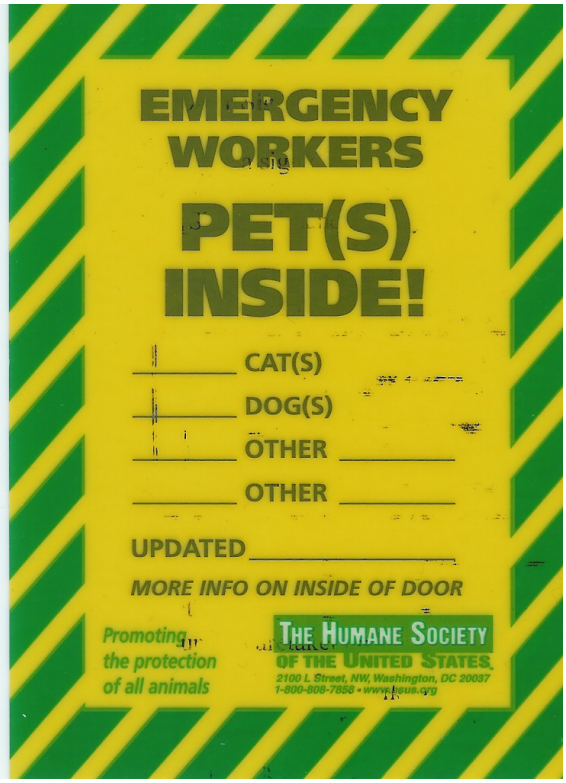
Promoting the protection of all animals

THE HUMANE SOCIETY OF THE UNITED STATES

2100 L Street, NW, Washington, DC 20037
1-800-808-7858 • www.hsus.org

C. Door Sign

The owner should provide signage regarding the pets on entrances to the owner's dwelling. These notices will alert individuals entering the house or apartment that pets are inside. The signage is also important during the owner's life to warn others who may enter the dwelling (e.g., police, fire fighters, inspectors, meter readers, friends) about the pets. *See* M. Keith Branyon, *What Do You Do With Four-Legged Beneficiaries*, STATE BAR OF TEXAS, LEGAL ASSISTANTS DIVISION, LAU SEMINAR (2001). The Humane Society of the United States recommends and supplies self-stick door/window signs for emergency workers and emergency contacts stickers for the inside of the dwelling which provide information about the pet owner, veterinarian, neighbors familiar with the pets, emergency pet caregivers, pet sitters, etc. A sample sticker is reproduced below with permission of the Humane Society of the United States.



D. Power of Attorney

The owner should consider including special instructions pertaining to the pet in the owner's durable power of attorney. These instructions should authorize the agent to care for the pet and to spend the owner's money on the pet's care (day-to-day, veterinarian, etc.). The owner may also wish to grant the agent the power to place the pet with a long-term caregiver. For a sample form drafted to comply with New Hampshire law, see *Durable Power of Attorney for Pet Care*, ElderPet, University of New Hampshire. *See also* *Providing for Your Pet's Future Without You*, 69 TEX. B.J. 1025 (2006).

IV. TRADITIONAL TRUST

The most predictable and reliable method to provide for a pet animal is for the owner to create an enforceable inter vivos or testamentary trust in favor of a human beneficiary (the pet's caregiver) and then require the trustee to make distributions to the beneficiary to cover the pet's expenses provided the beneficiary is taking proper care of the pet. This technique avoids the two traditional problems with gifts to benefit pet animals. The actual beneficiary is a human and thus, there is a beneficiary with standing to enforce the trust and there is a human measuring life for rule against perpetuities purposes. Even if the owner lives in a state like Texas, which enforces animal trusts, the conditional gift in trust may provide for more flexibility and a greater likelihood of the owner's intent being carried out. For example, some states limit the duration of an animal trust to 21 years. If a long-lived animal (such as a parrot) is involved, the trust may end before the animal dies.

A wide variety of factors and considerations come into play in drafting a trust to carry out the pet owner's desires. This section discusses the issues that the pet owner should address.

A. Determine Whether to Create Inter Vivos or Testamentary Trust

The pet owner must initially determine whether to create an inter vivos trust or a testamentary trust. An inter vivos trust takes effect immediately and thus will be in operation when the owner dies, thereby avoiding the delay between the owner's death and the probating of the will and subsequent functioning of the trust. Funds may not be available to provide the pet with proper care if there is a delay after death because the trust is not already in place. The pet

owner can also make changes to the inter vivos trust more easily than to a testamentary trust which requires the execution of a new will or codicil.

On the other hand, the inter vivos trust may have additional start-up costs and administration expenses. A separate trust document is needed and the owner must part with property to fund the trust. The inter vivos trust, could, however, be nominally funded. Additional funding could be tied to a nonprobate asset, such as a bank account naming the trustee (in trust) as the pay on death payee or a life insurance policy naming the trustee (in trust) as the beneficiary, to provide the trust with immediate funds after the owner's death. If appropriate, the pet owner could provide additional property by using a pour over provision in the owner's will. Inter vivos trusts will almost always be changeable and revocable until the pet owner's death.

B. Designate Trust Beneficiary/Animal Caregiver

The pet owner must thoughtfully select a caregiver for the animal. This person becomes the actual beneficiary of the trust who has standing to enforce the trust if the trustee fails to carry out its terms. Thus, the caregiver should be sufficiently savvy to understand the basic functioning of a trust and his or her enforcement rights.

It is of utmost importance for the pet owner to locate a beneficiary/caregiver who is willing and able to care for the animal in a manner that the owner finds acceptable. The prospective caregiver should be questioned before being named to make certain the caregiver will assume the potentially burdensome obligation of caring for the pet, especially when the pet is in need of medical care or requires special attention as it ages. The pet and the prospective caregiver should meet and spend quality time together to make sure they, and the caregiver's family, get along harmoniously with each other.

The pet owner should name several alternate caregivers should the owner's first choice be unable to serve for the duration of the pet's life. To prevent the pet from ending up homeless, the owner may authorize the trustee to select a good home for the pet should none of the named individuals be willing or able to accept the animal. The trustee should not, however, have the authority to appoint him- or herself as the caregiver as such an appointment would eliminate the checks and balances aspect of separating the caregiver from the money provider.

If the pet owner is unable to name a caregiver and does not want to leave the selection up to the trustee, the pet owner could appoint several individuals, such as veterinarians, family members, and friends, to an animal care panel which is charged with the responsibility of locating a suitable caregiver. The panel could use various means to locate a proper caregiver, such as advertising in a local newspaper and consulting with local animal welfare organizations. The panel would interview the prospective caregivers and select the person it felt would provide the best care for the pet under the terms of the trust.

C. Nominate Trustee

As with the designation of the caregiver, the pet owner needs to select the trustee with care and check with the trustee before making a nomination. The trustee, whether individual or corporate, must be willing to administer the property for the benefit of the animal and to expend the time and effort necessary to deal with trust administration matters. If the pet owner has sufficient funds, a set stipend for the trustee may be appropriate. Note that professional and corporate trustees typically charge for their services. The pet owner should name alternate trustees should the named trustee be unable to serve until the trust terminates. In addition, an alternate trustee may have standing to remove the original trustee from office should the original trustee cease to administer the trust for the benefit of the pet.

D. Bequeath Animal to Trustee, in Trust

The pet owner should bequeath the animal to the trustee, in trust, with directions to deliver custody of the pet to the beneficiary/caregiver. If the owner has left animal instructions in an animal card or document, the animal may actually already be in the possession of the caregiver.

E. Determine Amount of Other Property to Transfer to Trust

The pet owner should carefully compute the amount of property necessary to care for the animal and to provide additional payments, if any, for the caregiver and the trustee. Many factors will go into this decision, such as the type of animal, the animal's life expectancy (see *Dr. Bob's All Creatures Site* which sets out the life expectancies for dogs, cats, parrots, reptiles, amphibians, rodents, and some exotics), the standard of living the owner wishes to provide for the animal, and the need for potentially expensive medical treatment. Adequate funds should also be included to provide the animal with proper care, be it with an animal-sitter or at a professional boarding business, when the caregiver is an vacation, out-of-town on business, receiving care in a hospital, or is otherwise temporarily unable to personally provide for the animal.

The size of the pet owner's estate must also be considered. If the owner's estate is relatively large, the owner could transfer sufficient property so the trustee could make payments primarily from the income and use the principal only for emergencies. On the other hand, if the owner's estate is small, the owner may wish to transfer a lesser amount and anticipate that the trustee will supplement income with principal invasions as necessary.

The pet owner must avoid transferring an unreasonably large amount of money or other property to the trust because such a gift is likely to encourage heirs and remainder beneficiaries of the owner's will to contest the arrangement. The pet owner should determine the amount that is reasonable for the care of the animals and fund the trust accordingly. Even if the owner has no desire to benefit family members, friends, or charities until the demise of the animal, the owner should not leave his or her entire estate for the animal's benefit. If the amount of property left to the trust is unreasonably large, the court may reduce the amount to what it considers to be a reasonable amount. *See, e.g., Templeton Estate*, 4 Fiduciary 2d 172, 175 (Pa. Orphans' Ct. 1984) (applying "inherent power to reduce the amount involved . . . to an amount which is sufficient to accomplish [the owner's] purpose"); *Lyon Estate*, 67 Pa. D. & C. 2d 474, 482-83 (Orphan's Ct. 1974) (reducing the amount left for the animal's care based on the supposition that the owner mistook how much money would be needed to care for the animals). Cf. UNIF. PROB. CODE § 2-907(c)(6) (1993) (authorizing the court to reduce amount if it "substantially exceeds the amount required" to care for the animal); UNIF. TRUST CODE § 408(c) (providing that "[p]roperty of a trust authorized by this section 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").

It is often a good idea to state expressly in the trust that if a court determines that excess funds were placed into the trust, that they pass to a certain person or charity who in the pet owner's opinion would be very unlikely to ever make a claim that the funds were excessive. Thus, an incentive to contest the amount is removed.

F. Describe Desired Standard of Living

The owner should specify the type of care the beneficiary is to give the animal and the expenses for which the caregiver can expect reimbursement from the trust. Typical expenses include food, housing, grooming, medical care, and burial or cremation fees. The pet owner may also want to include more detailed instructions. Alternatively, the owner may leave the specifics of the type of care to the discretion of the trustee. If the pet owner elects to do so, the pet owner should seriously consider providing the caregiver with general guidelines to both (1) avoid claims that the caregiver is expending an unreasonable amount on the animal and (2) prevent the caregiver from expending excessive funds. For example, in the case of *In re Rogers*, 412 P.2d 710, 710-11 (Ariz. 1966), the court determined that the caregiver was acting in an unreasonable manner when he purchased an automobile to transport the dog while stating that it was a matter of opinion whether the purchase of a washing machine to launder the dog's bed clothing was reasonable.

G. Specify Distribution Method

The owner should specify how the trustee is to make disbursements from the trust. The simplest method is for the owner to direct the trustee to

pay the caregiver a fixed sum each month regardless of the actual care expenses. If the care expenses are less than the distribution, the caregiver enjoys a windfall for his or her efforts. If the care expenses are greater than the distribution, the caregiver absorbs the cost. The caregiver may however, be unable or unwilling to make expenditures in excess of the fixed distribution that are necessary for the animal. Thus, the owner should permit the trustee to reimburse the caregiver for out-of-pocket expenses exceeding the normal distribution.

Alternatively, the owner could provide only for reimbursement of expenses. The caregiver would submit receipts for expenses associated with the animal on a periodic basis. The trustee would review the expenses in light of the level of care the pet owner specified and reimburse the caregiver if the expenses are appropriate. Although this method may be in line with the owner's intent, the pet owner must realize that there will be additional administrative costs and an increased burden on the caregiver to retain and submit receipts.

H. Establish Additional Distributions for Caregiver

The owner should determine whether the trustee should make distributions to the caregiver above and beyond the amount established for the animal's care. An owner may believe that the addition of the animal to the caregiver's family is sufficient, especially if the trustee will reimburse the caregiver for all reasonable care expenses. On the other hand, the animal may impose a burden on the caregiver and thus additional distributions may be appropriate to encourage the caregiver to continue as the trust's beneficiary. In addition, the caregiver may feel more duty bound to provide good care if the caregiver is receiving additional distributions contingent on providing the animal with appropriate care.

I. Limit Duration of Trust

The duration of the trust should not be linked to the life of the pet. The measuring life of a trust must be a human being unless state law has enacted specific statutes for animal trusts or has modified or abolished the rule against perpetuities. For example, the pet owner could establish the trust's duration as 21 years beyond the life of the named caregivers and trustees with the possibility of the trust ending sooner if the pet dies within the 21 year period.

J. Designate Remainder Beneficiary

The pet owner should clearly designate a remainder beneficiary to take any remaining trust property upon the death of the pet. Otherwise, court involvement will be necessary with the most likely result being a resulting trust for the benefit of the owner's successors in interest. *See Willett v. Willett*, 247 S.W. 739, 741 (Ky. 1923) (noting that the pet owner neglected to provide for the distribution of the remaining trust property upon the pet's death and thus the property would pass through intestate succession). The pet owner must be cautioned not to leave the remaining trust property to the caregiver because the caregiver would then lack a financial motive to care for the animal and thus might accelerate its death to gain immediate access to the trust corpus. The pet owner may also want to authorize the trustee to terminate the trust before the pet's death "if the remaining principal is small and suitable arrangements have been made for the care of the animals." Frances Carlisle & Paul Franken, *Drafting Trusts for Animals*, N.Y. L.J., Nov. 13, 1997, at 1.

The pet owner may wish to consider naming a charity that benefits animals as the remainder beneficiary. "Hopefully the charity would want to assure the well-being of the animals and an added advantage is that the Attorney General would be involved to investigate if any misappropriation of funds by the trustee occurred." *Id*. The pet owner must precisely state the legal name and location of the intended charitable beneficiary so the trustee will not have difficulty ascertaining the appropriate recipient of the remainder gift.

K. Identify Animal to Prevent Fraud

The pet owner should clearly identify the animal that is to receive care under the trust. If this step is not taken, an unscrupulous caregiver could replace a deceased, lost, or stolen animal with a replacement so that the caregiver may continue to receive benefits. For example, there is a report that "[a] trust was established for a black cat to be cared for by its deceased owner's maid. Inconsistencies in the reported age of the pet

tipped off authorities to fact that the maid was on her third black cat, the original long since having died." Torri Still, *This Attorney is for the Birds*, RECORDER (San Francisco), at 4 (Mar. 22, 1999); Sue Manning, *Estate Planning: Who will care for your pet?*, SEATTLE TIMES, June 24, 2011.

The pet owner may use a variety of methods to identify the animal. A relatively simple and inexpensive method is for the trust to contain a detailed description of the animal including any unique characteristics such blotches of colored fur and scars. Veterinarian records and pictures of the animal would also be helpful. A professional could tattoo the pet with an alphanumeric identifier. A tattoo, however, could later cause problems for the pet because a pet thief could mutilate the pet to remove the tattoo, such as cutting off an ear or leg, if the pet's primary function is breeding. A more sophisticated procedure is for the pet owner to have a microchip implanted in the animal. The trustee can then have the animal scanned to verify that the animal the caregiver is minding is the same animal. Of course, an enterprising caregiver could surgically remove the microchip and have it implanted in another physically similar animal. The best, albeit expensive, method to assure identification is for the trustee to retain a sample of the animal's DNA before turning the animal over to the caregiver and then to run periodic comparisons between the retained sample and new samples from the animal.

A pet owner, however, may be less concerned with providing for the animals owned at the time of will execution, but rather wants to arrange for the care of the animals actually owned at time of death. "It would be onerous for [the owner] to execute a new trust instrument or will whenever a new animal joins the family." Carlisle & Franken, at 1. In this situation, the owner may wish to describe the animals as a class instead of by individual name or specific description.

L. Require Trustee to Inspect Animal on Regular Basis

The owner should require the trustee to make regular inspections of the animal to determine its physical and psychological condition. The inspections should be at random times so the caregiver does not provide the animal with extra food, medical care, or attention merely because the caregiver knows the trustee is coming. The inspections should take place in the caregiver's home so the trustee may observe first-hand the environment in which the animal is being kept.

A "quality of life" provision may be appropriate to prevent the caretaker from keeping the pet alive when the pet no longer is able to enjoy life. For example, "the owner of a German shepherd left relatives the use of an entire estate as long as the dog lived. 'They kept it alive almost two years on life support. The dog was totally incapable of moving.'" Sue Manning, *Estate Planning: Who will care for your pet?*, SEATTLE TIMES, June 24, 2011.

M. Provide Instructions for Final Disposition of Animal

The pet owner should include instructions for the final disposition of the animal when the animal dies. The will of one pet owner is reported as containing the following provision: "[U]pon the death of my pets they are to be embalmed and their caskets to be placed in a Wilbert Vault at Pine Ridge Cemetery." *The Last Laugh—Wills With a Sense of Humor*, FAM. ADVOC., Summer 1981, at 60, 62. The owner may want the animal to be buried in a pet cemetery or cremated with the ashes either distributed or placed in an urn. The cost for a pet burial ranges from $250 to $1,000 while pet cremations are significantly less expensive. A memorial for the pet may also be created for viewing on a variety of Internet sites. *See* In Loving Memory of our Very Best Friends; In Memory of Pets.

N. Sample Provisions

Below are sample will provisions to provide for a pet animal. These provisions are generic, that is, they are not designed to comply with the specifics of any particular state statute authorizing pet trusts. Instead, these sample provisions create a "traditional" trust, which after appropriate adjustments for local law, should be effective regardless of whether the jurisdiction has enacted a special pet trust statute.

I would greatly appreciate your comments and suggestions so that I may enhance the quality of these provisions. If you are willing to donate your pet trust provisions, I would be pleased to post them on my website and acknowledge your

authorship at http://www.professorbeyer.com/Articles/Sample_Provisions.htm.

[include in section of will devoted to specific gifts and legacies]

I leave [description of pet animal] and [amount of money adequate for animal's care and trust administration expenses] to [name of trustee], in trust, under the terms of the [name of trust] created under Article [] of this will. If [animal] does not survive me by [survival period], this provision of my will is of no effect.

[include as separate will article creating trust for animal's benefit]

ARTICLE []
[name of animal] TRUST

A. Conditions of Creation

This trust is to be created upon the conditions stated in Article [].

B. Governing Law

This trust is to be governed by [name of state] law unless this Article provides to the contrary.

C. Trustees

I appoint [primary trustee] as the trustee of this trust. If [primary trustee] is unwilling or unable to serve, I appoint [alternate trustee] as trustee.

D. Bond

No bond shall be required of any trustee named in this Article.

E. Trustee Compensation

The trustee shall be entitled to reasonable compensation from the trust for serving as trustee.

[or]

No trustee shall be entitled to compensation for serving as trustee.

F. Beneficiaries of Trust

[Caregiver] is the beneficiary of this trust provided [Caregiver] receives [name of animal] into [his] [her] home and provides [animal] with proper care as defined in Section G of this Article. The trustee shall deliver [animal] into [Caregiver's] possession after securing a written promise from [Caregiver] to provide [animal] with proper care. If [Caregiver] (1) dies, (2) is unable to provide [animal] with proper care, or (3) is not providing [animal] with proper care, [alternate beneficiary] will then become the beneficiary of this trust provided [alternate beneficiary] provides [animal] with proper care. [continue in like manner for additional alternates]

If there is no qualified alternate beneficiary, [allow the trustee to select caregiver, other than the trustee] [create animal care panel to select caregiver] [donate animal].

G. Proper Care

Proper care means [description of care including, for example, requirement of regular visits to a veterinarian].

The trustee shall visit [caregiver]'s home at least [monthly] [quarterly] [annually] to make certain [animal] is receiving proper care. If in the trustee's sole discretion [animal] is not receiving proper care as defined above, trustee shall immediately remove [animal] from the beneficiary's possession and deliver the animal to the alternate beneficiary.

H. Distribution of Trust Property While [Animal] is Alive

1. Care of [Animal]

The trustee shall distribute [amount] to the beneficiary each [month] [year] provided the beneficiary is taking proper care of [animal] as defined in Section G of this Article.

[or]

The trustee shall reimburse [caregiver] for all reasonable expenses [caregiver] incurs in the proper care of [animal] as defined in Section G of this Article. Reasonable expenses include, but are not limited to, [food, housing, grooming, medical care, and burial or cremation fees.]

[2. Caregiver Compensation]

The trustee [shall] [may] pay [dollar amount] to trustee on a [monthly] [annual] basis provided [caregiver] is taking proper care of [animal] as defined in Section G of this Article.

[3. Liability Insurance]

The trustee [shall] [may] use trust property to purchase liability insurance to protect the trust, the trustee, and [caregiver] from damage [animal] causes to property or persons.]

[4. Offspring of [Animal]]

The trustee [shall] [may] [shall not] use trust property to reimburse [caregiver] for expenses associated with any offspring of [animal].

[5. Excess Principal]

If a court determines that this trust contains excess property and orders the trustee to distribute that property other than as described above, then that excess shall be distributed under Subsection (I) as if this trust were terminating] [to [name of beneficiary]].

I. Termination of Trust

This trust terminates on the earlier of (a) 21 years after [testator's] death, or (b) upon the death of [animal].

[consider including how death of animal is to be proved, e.g., death certificate from a vet]

[consider having trust also terminate when animal is deemed "lost" – require evidence to prove loss of pet, e.g., copies of police reports, ads in newspapers seeking the pet's return, copies of posters placed in the community, etc.]

J. Distribution of Property Upon Trust Termination

Upon the termination of this trust all remaining trust property shall pass to [remainder beneficiary] if [he] [she] is alive at the time of trust termination. If [remainder beneficiary] is not alive at the time of trust termination, all remaining trust property shall pass to [alternate remainder beneficiary] if [he] [she] is alive at the time of trust termination. [continue in like manner for additional alternates]

K. Spendthrift Provision

This is a spendthrift trust, that is, to the fullest extent permitted by law, no interest in the income or principal of this trust may be voluntarily or involuntarily transferred by any beneficiary before payment or delivery of the interest by the trustee.

L. Principal and Income

The trustee shall have the discretion to credit a receipt or charge an expenditure to income or principal or partly to each in any manner which the trustee determines to be reasonable and equitable.

M. Trustee Powers

The trustee shall have [all powers granted to trustees under [name of state] law.

[or]

The trustee shall have the following powers: [enumerate trustee powers]

N. Exculpatory Clause

The trustee shall not be liable for any loss, cost, damage, or expense sustained through any error of judgment or in any other manner except for, and as a result of, a trustee's own bad faith or gross negligence.

[**Note:** Additional provisions will be necessary if the animal and its offspring are valuable from a monetary standpoint.]

V. "STATUTORY" PET TRUST

[This section is based on Texas law. For the pet trust statute in other states, see page 49.]

With the enactment of Trust Code § 112.037, which took effect on January 1, 2006, Texas joined the growing number of states which authorize statutory pet trusts. This type of trust is a basic plan and does not require the pet owner to make as many decisions regarding the terms of the trust.

The statute "fills in the gaps" and thus a simple provision in a will such as, "I leave $1,000 in trust for the care of my dog, Rover" may be effective. As discussed in detail below, the

statute would provide the following with respect to this bequest:

- The trust ends when Rover dies.
- The court may appoint a person to enforce the trust, that is, to make certain the $1,000 is actually used for Rover.
- Any person interested in Rover's welfare may ask the court to appoint a person to enforce the trust.
- Any person interested in Rover's welfare may ask the court to remove a person who is taking care of Rover if Rover's care in not up to par.
- The $1,000 may be used only for Rover's care unless the court determines that $1,000 is excessive. Any excess must be distributed to the pet owner of, if the pet owner is deceased, to the pet owner's successors in interest
- When Rover dies, the remaining money (if any) will return to the pet owner of, if the pet owner is deceased, to the pet owner's successors in interest.

A. Authorization

The statute permits the pet owner to create a trust to provide for the care of an animal alive during the settlor's lifetime (that is, not animals born after the settlor's death).

B. Termination

The trust ends when the last surviving animal for which the trust was created dies.

C. Enforcement

In a traditional pet trust, the named beneficiary has standing to enforce the trust but a statutory pet trust may lack a human beneficiary. To make certain someone has standing to enforce the trust, the statute permits the settlor to appoint a trust enforcer. If the settlor does not appoint an enforcer, the court may appoint someone. Any person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or remove a person previously appointed.

D. Use of Property

1. General Rule

The property in the trust may be used only for the care of the animal unless the exception discussed below applies.

2. Exception

If the court determines that the value of the trust property exceeds the amount required for the care of the animals, the court may authorize trust property to be used in a different manner. In priority order, here is the list of the ways in which the court may allow the excess property to be used:

- As specified by the settlor in the trust.
- If the settlor is still alive, to the settlor.
- If the settlor is deceased and died testate, under the terms of the settlor's will.
- If the settlor is deceased and died intestate, to the settlor's heirs.

E. Rule Against Perpetuities

Instead of exempting pet trusts from the Rule Against Perpetuities which would have been problematic given that perpetuities are prohibited by the Texas Constitution, the legislature created a special rule for determining measuring lives. The measuring lives include:

- The human beneficiaries of the trust.
- The humans named in the trust instrument, even if not beneficiaries.
- If the settlor is living at the time the trust becomes irrevocable, the settlor of the trust.
- If the settlor is not living at the time the trust becomes irrevocable, the individuals who would have inherited the settlor's property had the settlor died intestate at the time the trust became irrevocable.

VI. CONSIDER OUTRIGHT CONDITIONAL GIFT

An outright gift of the animal coupled with a reasonable sum to care for the animal, which is

conditioned on the beneficiary taking proper care of the animal is a simpler but less predictable method. Both drafting and administrative costs may be reduced if the owner does not create a trust. Only if the pet owner's estate is relatively modest should this technique be considered because there is a reduced likelihood of the owner's intent being fulfilled as there is no person directly charged with ascertaining that the animal is receiving proper care. Although the owner may designate a person to receive the property if the pet is not receiving proper care, such person might not police the caregiver sufficiently, especially if the potential gift-over amount is small or the alternate taker does not live close enough to the caregiver to make first-hand observations of the animal.

If the owner elects this method, the owner needs to decide if the condition of taking care of the pet is a condition precedent or a condition subsequent. If the owner elects a condition precedent, the caregiver receives the property only if the caregiver actually cares for the animal. Thus, if the animal were to predecease the owner, the caregiver would not benefit from the gift. On the other hand, the owner could create a condition subsequent so that the gift vests in the caregiver and is only divested if the caregiver fails to provide proper care. The owner should expressly state what happens to the gift if the pet predeceases its owner. In the absence of express language, the caregiver would still receive a condition subsequent gift but not one based on a condition precedent. *See In re Andrews's Will*, 228 N.Y.S.2d 591, 594 (Sur. Ct. 1962) (holding that the beneficiary received the legacy even though the pet died before the testator because the condition was subsequent).

VII. CONSIDER OUTRIGHT GIFT TO VETERINARIAN OR ANIMAL SHELTER

A simple option available to the pet owner is to leave the pet and sufficient property for its care to a veterinarian or animal shelter. This alternative will not, however, appeal to most pet owners who do not like the idea of the pet living out its life in a clinic or shelter setting. The animal would no longer be part of a family and is not likely to receive the amount and quality of special attention that the pet would receive in a traditional home. Nonetheless, this option may be desirable if the owner is unable to locate an appropriate caregiver for the animal.

VIII. CONSIDER GIFT TO LIFE CARE CENTER

In exchange for an inter vivos or testamentary gift, various organizations promise to provide care for an animal for the remainder of the animal's life. The amount of the payment often depends on the type of animal, age of animal, and age of pet owner. One of the nation's most notable life care centers is the Stevenson Companion Animal Life-Care Center located at Texas A & M University. For additional information on life care centers in Texas, see M. Keith Branyon, *What Do You Do With Four-Legged Beneficiaries*, STATE BAR OF TEXAS, LEGAL ASSISTANTS DIVISION, LAU SEMINAR (2001). For an extensive list of life care centers, see http://www.professorbeyer.com/Articles/Animals.html.

IX. TAX CONCERNS

This section provides an overview of basic tax issues that are associated with pet trusts. For a detailed discussion, see Gerry W. Beyer & Jonathan Wilkerson, *Max's Taxes: A Tax-Based Analysis of Pet Trusts*, 43 UNIV. RICHMOND L. REV. 1219 (2009).

A. Income Tax

Both the federal and state governments may impose an income tax on the income earned by property in a pet trust just as these entities do with regard to other trusts. Depending on how the trust is structured, the following individuals or entities may be responsible for the tax.

1. The Settlor (Pet Owner)

If the pet owner retained the power to revoke the trust, then the pet owner is responsible for the tax on the income earned by the trust property.

2. The Beneficiary (Pet Caregiver)

If the settlor cannot revoke the trust (e.g., the settlor created an irrevocable trust or a testamentary trust), then the beneficiary will be responsible for the income tax on trust

distributions up to the amount of the trust's distributable net income for the year of distribution.

3. The Trust

If the settlor cannot revoke the trust (e.g., the settlor created an irrevocable trust or a testamentary trust), then the trust will be responsible for the income tax on trust income which is retained in the trust (i.e., not distributed to the beneficiary).

4. Tax Reduction Strategy

To avoid income tax concerns, the settlor could require that all trust investments be in municipal bonds which are exempt from the federal income tax and any applicable state or local income tax.

B. Gift Tax

If the pet owner creates an inter vivos pet trust, gift tax issues may arise.

1. Revocable Pet Trust

No gift tax will be imposed if the pet owner retains the power to revoke the trust because an irrevocable transfer has not occurred.

2. Irrevocable Pet Trust

Transfers to a pet trust rarely qualify for the annual exclusion. Accordingly, the pet owner will be responsible for the gift tax imposed on the transfer. However, most transfers will be protected from gift tax liability by the pet owner's $1 million lifetime gift tax exemption.

C. Estate Tax

1. Revocable Pet Trust

If the pet owner created a revocable trust, the property remaining in the trust at the time of the pet owner's death will be subject to the federal estate tax if the pet owner died before January 1, 2010 or after December 31, 2010.

For wealthy pet owners, the estate tax issue that may arise is whether the estate would be entitled to a charitable deduction if the remainder beneficiary is a recognized charity. Rev. Ruling 78-105 indicated that the answer is "no" unless the trust is void so that the entire corpus passed directly to a charity without ever being used for the pet. As recently as 2007, legislation was introduced in Congress, the *Morgan Bill*, which would allow charitable remainder pet trusts to enjoy the charitable estate tax deduction.

2. Irrevocable Pet Trust

If the pet owner properly structured an inter vivos irrevocable trust, none of the property in the pet trust will be subject to estate tax upon the pet owner's death.

X. "CLIENT FRIENDLY" FREQUENTLY ASKED QUESTIONS

1. What is a "pet trust"?

A pet trust is a legal technique you may use to be sure your pet receives proper care after you die or in the event of your disability.

2. How does a pet trust work?

You (the "settlor") give your pet and enough money or other property to a trusted person or bank (the "trustee") with the duty to make arrangements for the proper care of your pet according to your instructions. The trustee will deliver the pet to your designated caregiver (the "beneficiary") and then use the property you transferred to the trust to pay for your pet's expenses.

3. What are the main types of pet trusts?

There are two main types of pet trusts.

The first type, called a "traditional pet trust," is effective in all states. You tell the trustee to help the person who is providing care to your pet after you die (the beneficiary) by paying for the pet's expenses according to your directions as long as the beneficiary takes proper care of your pet.

The second type of pet trust, called a "statutory pet trust," is authorized in almost 40 states. A statutory pet trust is a basic plan and does not require the pet owner to make as many decisions regarding the terms of the trust. The state law "fills in the gaps" and thus a simple provision in a will such as, "I leave $1,000 in trust for the care of my dog, Rover" may be effective.

4. Which type of pet trust is "better"?

Many pet owners will prefer the traditional pet trust because it provides the pet owner with the ability to have tremendous control over the pet's

care. For example, you may specify who manages the property (the trustee), the pet's caregiver (the beneficiary), what type of expenses relating to the pet the trustee will pay, the type of care the animal will receive, what happens if the beneficiary can no longer care for the animal, and the disposition of the pet after the pet dies.

5. What if my state does not have a special law authorizing pet trusts?

You may still create a traditional pet trust even if your state does not have a pet trust statute.

6. When is a pet trust created?

You may create a pet trust either (1) while you are still alive (an "inter vivos" or "living" trust) or (2) when you die by including the trust provisions in your will (a "testamentary" trust).

7. Which is better – an inter vivos or testamentary pet trust?

Both options have their advantages and disadvantages.

An inter vivos trust takes effect immediately and thus will be functioning when you die or become disabled. This avoids delay between your death and the property being available for the pet's care. However, an inter vivos trust often has additional start-up costs and administration fees.

A testamentary trust is the less expensive option because the trust does not take effect until you die and your will is declared valid by a court ("probating the will"). However, there may not be funds available to care for the pet during the gap between when you die and your will is probated. In addition, a testamentary trust does not protect your pet if you become disabled and unable to care for your pet.

8. What does it mean to "fund" your pet trust?

Funding means to transfer money or other property into your trust for the care of your pet. Without funding, the trustee will not be able to provide your pet with care if you become disabled and after you die.

9. How much property do I need to fund my pet trust?

You need to consider many factors in deciding how much money or other property to transfer to your pet trust. These factors include the type of animal, the animal's life expectancy (especially important in case of long-lived animals), the standard of living you wish to provide for the animal, the need for potentially expensive medical treatment, and whether the trustee is to be paid for his or her services. Adequate funds should also be included to provide the animal with proper care, be it an animal-sitter or a professional boarding business, when the caretaker is on vacation, out-of-town on business, receiving care in a hospital, or is otherwise temporarily unable personally to provide for the animal.

The size of your estate must also be considered. If your estate is relatively large, you could transfer sufficient property so the trustee could make payments primarily from the income and use the principal only for emergencies. On the other hand, if your estate is small, you may wish to transfer a lesser amount and anticipate that the trustee will supplement trust income with principal invasions as necessary.

You should avoid transferring an unreasonably large amount of money or other property to your pet trust because such a gift is likely to encourage your heirs and beneficiaries to contest the trust. If the amount of property left to the trust is unreasonably large, the court may reduce the amount to what it considers to be a reasonable amount.

10. When do I fund my pet trust?

If you create an inter vivos pet trust, that is, a trust which takes effect while you are alive, you need to fund the trust at the time it is created. You may also add additional funds to the trust at a later time or use the techniques discussed below.

If you create a testamentary pet trust, that is, the trust is contained in your will and does not take effect until you die, then you need to fund the trust by a provision in your will or by using one of the techniques discussed below.

11. How do I fund my pet trust?

Direct transfers: If you create your trust while you are alive, you need to transfer money or other property to the trustee. You need to be certain to document the transfer and follow the

appropriate steps based on the type of property. For example, if you are transferring money, write a check which shows the payee as, "[name of trustee], trustee of the [name of pet trust], in trust" and then indicate on the memo line that the money is for "contribution to [name of pet trust]." If you are transferring land, your attorney should prepare a deed naming the grantee with language such as "[name of trustee], in trust, under the terms of the [name of pet trust]."

If you create the trust in your will, you should include a provision in the property distribution section of your will that transfers both your pet and the assets to care for your pet to the trust. For example, "I leave [description of pet] and [amount of money and/or description of property] to the trustee, in trust, under the terms of the [name of pet trust] created under Article [number] of this will."

Pour over will provision: If you create your pet trust while you are alive, you may add property (a "pour over") from your estate to the trust.

Life insurance: You may fund both inter vivos and testamentary pet trusts by naming the trustee of the trust, in trust, as the beneficiary of a life insurance policy. This policy may be one you take out just to fund your pet trust or you may have a certain portion of an existing policy payable to your pet trust. This technique is particularly useful if you do not have or anticipate having sufficient property to transfer for your pet's care. Life insurance "creates" property when you die which you may then use to fund your pet trust. Be sure to consult with your lawyer or life insurance agent about the correct way of naming the trustee of your pet trust as a beneficiary.

Pay on death accounts, annuities, retirement plans, and other contracts: You may have money in the bank, an annuity, a retirement plan, or other contractual arrangement that permits you to name a person to receive the property after you die. You may use these assets to fund both inter vivos and testamentary trusts by naming the trustee of your pet trust as the recipient of a designated portion or amount of these assets. Be sure to consult with your lawyer, banker, or broker about the correct way of naming the trustee of your pet trust as the recipient of these funds. There may be income tax consequences to your estate when retirement plans are used in this way.

12. How do I decide on the individual to name as my pet's caretaker?

The selection of the caretaker for your pet is extremely important. Here are some of the key considerations:

- Willingness to assume the responsibilities associated with caring for your pet.
- Ability to provide a stable home for your pet.
- Harmonious relationship between the caretaker's family members and your pet.

13. Should I name alternate caretakers?

Yes. You should name at least one, preferably two or three, alternate caretakers in case your first choice is unable or unwilling to serve as your pet's caretaker. To avoid having your pet end up without a home, consider naming a sanctuary or no-kill shelter as your last choice.

14. What types of instructions should I include in my pet trust regarding the care of my pet?

Here are some examples of the types of concerns about which you may wish to provide instructions:

- Food and diet.
- Daily routines.
- Toys.
- Cages.
- Grooming.
- Socialization.
- Breeding.
- Medical care, including preferred veterinarian.
- Compensation, if any, for the caretaker.
- Method the caretaker must use to document expenditures for reimbursement.

- Whether the trust will pay for liability insurance in case the animal bites or otherwise injures someone.
- How the trustee is to monitor caretaker's services.
- How to identify the animal.
- Disposition of the pet's remains, e.g., burial, cremation, memorial, etc.

Consider making a video with instructions and demonstrations.

15. Who should be the trustee of my pet trust?

The trustee needs to be an individual or corporation that you trust to manage your property prudently and make sure the beneficiary is doing a good job taking care of your pet. A family member or friend may be willing to take on these responsibilities at little or no cost. However, it may be a better choice to select a professional trustee or corporation that has experience in managing trusts even though a trustee fee will need to be paid.

16. Should I name alternate trustees?

Yes. You should name at least one, preferable two or three, alternate trustees in case your first choice is unable or unwilling to serve as a trustee.

17. Is it a good idea to check with the trustees before naming them in my pet trust?

Yes. Serving as a trustee can be a potentially burdensome position with many responsibilities associated with it. You want to be sure the persons you name as your trustees will be willing to do the job when the time comes.

18. What happens to the property remaining in the trust when my pet dies?

You should name a "remainder beneficiary," that is, someone who will receive any remaining trust property after your pet dies. Note that it is not a good idea to name the caretaker or trustee because then the person has less of an incentive to keep your pet alive. Many pet owners elect to have any remaining property pass to a charitable organization that assists the same type of animal that was covered by the trust.

19. What happens if the trust runs out of property before my pet dies?

If no property remains in the trust, the trustee will not be able to pay for your pet's care. Perhaps the caretaker will continue to do it with his or her own funds. If the caretaker is unwilling or unable to do so, you should indicate in your pet trust the person or organization to whom you would like to donate your pet.

20. How do I get a pet trust?

You should consult with an attorney who specializes in estate planning and, if possible, who also has experience with pet trusts. You may find it helpful to give your attorney a copy of this article.

XI. CONCLUSION

Estate planning provides a method to provide for those whom we want to comfort after we die and to those who have comforted us. Family members and friends can be a source of tremendous support, but they may also let you down in a variety of ways ranging from minor betrayals to orchestrating your own death. Pet animals, however, have a much better track record in providing unconditional love and steadfast loyalty. It is not surprising that a pet owner often wants to assure that his or her trusted companion is well-cared for after the owner's death. By using a properly constructed traditional trust or a statutory pet trust, you may carry out your client's intent to protect his or her non-human family members.

APPENDIX – CITATIONS TO PET TRUST STATUTES

Alabama:
ALA. CODE § 19-3B-408 (2007).

Alaska:
ALASKA STAT. § 13.12.907 (2006).

Arizona:
ARIZ. REV. STAT. ANN. § 14-2907 (2005) [unofficial text].

Arkansas:
ARK. CODE ANN. § 28-73-408 (West 2006) [unofficial text].

California:
CAL. PROB. CODE § 15212 (West Supp. 2007) [unofficial text].

Colorado:
COLO. REV. STAT. § 15-11-901 (2006) [unofficial text].

Connecticut:
CONN. GEN. STAT. § 45A-489A.

Delaware:
DEL. CODE ANN. tit. 12, § 3555.

District of Columbia:
D.C. CODE § 19-1304.08 (2006) [unofficial text].

Florida:
FLA. STAT. § 736.0408 (2012).

Georgia:
GA. CODE ANN. § 53-12-28 (2012) [unofficial text].

Hawaii:
HAW. REV. STAT. § 560.7-501 (2006) [unofficial text].

Idaho:
IDAHO CODE ANN. § 15-7-601 (2006) [unofficial text].

Illinois:
760 ILL. COMP. STAT. 5/15.2 (West Supp. 2006).

Indiana:
IND. CODE ANN. § 30-4-2-18 (West Supp. 2006).

Iowa:
IOWA CODE ANN. § 633A.2105 (West Supp. 2006).

Kansas:
KAN. STAT. ANN. § 58A-408 (2005).

Kentucky:
No statute enacted.

Louisiana:
No statute enacted.

Maine:
ME. REV. STAT. ANN. tit. 18-B, § 408 (West Supp. 2006).

Maryland:
MD. CODE ANN., EST. & TRUSTS § 14-112.

Massachusetts:
MASS. GEN. LAWS ch. 203, § 3C.

Michigan:
MICH. COMP. LAWS § 700.2722.

Minnesota:
No statute enacted.

Mississippi:
No statute enacted.

Missouri:
MO. REV. ANN. STAT. § 456.4-408 (West Supp. 2007).

Montana:
MONT. CODE ANN. § 72-2-1017 (2005) [unofficial text].

Nebraska:
NEB. REV. STAT. § 30-3834 (2006)

Nevada:
NEV. REV. STAT. ANN. § 163.0075 (2006)

New Hampshire:
N.H. REV. STAT. ANN. § 564-B:4-408 (2006).

New Jersey:
N.J. STAT. ANN. § 3B:11-38 (West Supp. 2006).

New Mexico:
N.M. STAT. ANN. § 46A-4-408 (2003) [unofficial text].

New York:
N.Y. EST. POWERS & TRUSTS LAW § 7-8.1 (amended 2010).

North Carolina:
N.C. GEN. STAT. § 36C-4-408 (2006).

North Dakota:
N.D. CENT. CODE § 59-12-08 [unofficial text].

Ohio:
OHIO REV. CODE ANN. § 5804.08 (West Supp. 2007).

Oklahoma
OKLA. STAT. tit. 60, § 199.

Oregon:
OR. REV. STAT. ANN. §130.185 (West 2005) [unofficial text].

Pennsylvania:
20 PENN. PA. STAT. ANN. § 7738 (West Supp. 2006) [unofficial text].

Rhode Island:
R.I. GEN. LAWS § 4-23-1 (2006).

South Carolina:
S.C. CODE ANN. § 62-7-408 (2006) [unofficial text].

South Dakota:
S.D. CODIFIED LAWS § 55-1-21 (2006).

Tennessee:
TENN. CODE ANN. § 35-15-408 (2006) [unofficial text].

Texas:
TEX. PROP. CODE ANN. § 112.037 (West 2007) [unofficial text].

Utah:
UTAH CODE ANN. § 75-2-1001 (West Supp. 2006).

Vermont:
VT. STAT. CODE tit. 14A, § 408.

Virginia:
VA. CODE ANN. § 55-544.08 (2006).

Washington:
WASH. REV. CODE ANN. §§ 11.118.005 -.110 (West 2006).

West Virginia
W. VA. CODE § 44D-4-408.

Wisconsin:
WIS. STAT. ANN. § 701.11 (West 2001).

Wyoming:
WYO. STAT. ANN. § 4-10-409 (2006) [unofficial text].

PART III

GUNS

Many Texans are proud owners of a variety of firearms and many young Texans hope to inherit or purchase firearms in the future. In fact, a 2006 poll reported that 43% of Americans keep a gun in their home. *Americans By Slight Margin Say Gun In the Home Makes it Safer*, Gallup Poll, Oct. 20, 2006. Another study, conducted by the Bureau of Justice Statistics, found that 240,000 machine guns are registered with the Bureau of Alcohol Tobacco, Firearms, and Explosives. Through legislation, federal and state governments have tightened the reigns on the purchase, transfer, and ownership of weapons. Regulations with regard to machine guns and other similar weapons have received the most scrutiny and reform.

This article aims to educate estate planning professionals on how to protect their client's ownership, transfer, and possession rights of National Firearms Act (NFA) weapons, while alive, when incompetent, and at death. In addition, this article addresses how to protect a client's family members and friends from illegally possessing or transferring NFA classified weapons during and after the owner's lifetime.

Estate planning professionals must familiarize themselves with national and state gun laws and use approved estate planning techniques to represent clients effectively who own or are interested in owning firearms. Failure to comply with national and state laws can lead to fines of up to $250,000 and 10 years in prison. 26 U.S.C. § 5861(d),(j) (2005); 26 U.S.C. § 5872 (2005); 49 U.S.C. §§ 781-788 (2003).

I. FEDERAL AND STATE GUN LAWS

A. Federal Law

Congress enacted the NFA in 1934 under Congress' Sixteenth Amendment power of taxation and it largely governs the purchase, sale, transfer, use, and ownership of certain weapons. The $200 transfer tax dictated by the Act in 1934 remains in force today.
See http://www.atf.gov/firearms/nfa.

The Alcohol Tobacco and Firearms division of the United States Department of Treasury provides resources on how to identify whether a weapon falls under NFA regulations. http://www.atf.gov/publications/download/p/atf-p-5320-8/atf-p-5320-8.pdf. NFA firearms include weapons such as machine guns, suppressors, short-barreled shotguns (sawed-off shotguns), and destructive devices (mortars, howitzers, grenade launchers). 27 C.F.R. 479 (2003). NFA firearms are also commonly referred to as "Title II weapons" because these firearms are defined in this title of the National Firearms Act and Gun Control Act.

The most commonly owned NFA weapon is the machine gun. *United States v. Carter*, 530 U.S. 255, 257-58 (2000), and 26 U.S.C. § 5845(b) define machine gun as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger."

Congress has amended and expanded the NFA as the political culture of our nation has evolved. For example, Congress enacted the following additional provisions to regulate firearms: the Gun Control Act of 1968 (GCA) and, most recently, the Firearm Owners' Protection Act (FOPA). The FOPA, although intended to protect Second Amendment rights, changed the GCA so severely that it made the transfer and ownership of machine guns illegal, subject to two exceptions:

- Transfer and possession of machine guns by government agencies (18 U.S.C. § 921 (1986)); and
- Transfer and possession of machine guns that were lawfully possessed in

compliance with the NFA at the time of the prohibition in 1986 (House Amend. 777 to H.R. 4332).

The second exception protects any legal transfer of machine guns lawfully possessed in 1986, whether through sale or inheritance.

Unlawful possession of NFA firearms, be it actual or constructive, comes with strictly enforced criminal penalties and a no tolerance policy. As previously mentioned, the NFA authorizes a fine of up to $250,000, up to ten years in prison, and the forfeiture of the weapon and any "vessel, vehicle, or aircraft" used to conceal or convey the firearm. Therefore, the seemingly tedious procedures and processes that accompany ownership of an NFA weapon are important and relevant for any estate that contains one or more of these weapons.

The trend in NFA gun legislation and regulation is to restrict transfer and ownership in ways that are designed to weed out civilian ownership entirely. This allegedly laudable purpose tends to ignore the monetary and sentimental value that these firearms may represent.

B. State Law

Although the federal government has a comprehensive framework established to regulate the rights associated with certain firearms, state and local governments are not prohibited from imposing additional restrictions. The Texas Legislature has not placed additional restrictions or regulations on Texas residents. Currently, estate planners in Texas must only comply with federal law, but it is important to pay attention to new legislation in case Texas does establish stricter regulations. Compliance with the NFA, GCA, and FOPA is not a defense to violating local laws of gun purchase, sale, transfer, and possession.

II. TRANSFER, OWNERSHIP, AND INHERITANCE OF NON-NFA WEAPONS

A. Purchase and Possession

The Texas Penal Code regulates the transfer and ownership of non-NFA weapons. TEX. PENAL CODE § 46.01 et seq. and TEX. GOV'T. CODE § 411.171 et seq. These weapons typically include rifles, shotguns, and handguns. It is unlawful to sell, rent, loan, or give a handgun, shotgun, or rifle to any person if the transferor knows that the recipient intends to use the weapon unlawfully. It is also unlawful to knowingly sell, rent, give or offer to sell, rent or give any firearm to a person under 18 years of age, without the written consent of his or her parent or guardian. Likewise, it is unlawful to knowingly or recklessly sell any firearm or ammunition to an intoxicated person.

Texas law places additional restrictions on the purchase and possession of firearms on persons convicted of a felony or a Class A misdemeanor involving the person's family or household and persons subject to certain orders issued under the Family Code or Code of Criminal Procedure. Otherwise, Texas does not require its citizens to acquire any type of license to possess a rifle, shotgun, or handgun.

Texas distinguishes between possessing a handgun and carrying a handgun. The Department of Public Safety regulates the issuance of licenses to carry a handgun. An applicant must submit the following to the Department: a completed application form, two recent color passport photographs, fingerprints, proof of age (at least 21), proof of residency in Texas, a handgun proficiency certificate from a qualified handgun instructor, an affidavit stating that applicant has read and understands the law concerning a license to carry and the laws on use of deadly force and that the applicant fulfills all eligibility requirements, and an authorization to access records. The license will be granted if the applicant meets the eligibility requirements including no record of felonies, certain misdemeanors, addictions, mental illness, and delinquency in child support payments or tax payments.

B. Inheritance

Although the risks and criminal penalties associated with the transfer of rifles, shotguns, and handguns are not as high as with NFA weapons, estate planners should understand the laws set forth in the Texas Penal Code and Texas Government Code to provide sound estate planning advice for clients with firearms. As

mentioned above, Texas law prohibits the transfer of firearms under certain circumstances. These circumstances also apply if the transfer of the firearm occurs through estate administration. Therefore, estate planners should be familiar with transfer limitations to plan for the distribution of firearms upon a client's death or incapacity. This requires performing a reasonable investigation into the background and status of the designated recipient of the firearm.

To avoid issues if the designated recipient is ineligible at the time of the decedent's death, estate planners should encourage clients to include a provision naming alternative recipients. If alternative recipients are not named, then the personal representative must take possession until a proper beneficiary is determined and eligibility confirmed. Although the recipient is only required to meet the standards set forth in the Texas Penal Code regarding a lawful transfer, it may be important to advise clients of the additional restrictions associated with carrying a handgun. A designated recipient may be eligible to receive a handgun, but ineligible for a license to carry. This could potentially affect to whom your client wishes to give the handgun upon death or incapacity.

III. ISSUES WITH INDIVIDUAL OWNERSHIP OF NFA WEAPONS

A. Transfer

Transfer of a Title II NFA firearm to an individual is a long and tedious process. Because improper transfer can result in major fines and jail time, a personal representative must take the transfer of these weapons very seriously. Chapter 9 of the NFA Handbook describes the necessary steps to transfer NFA firearms. The NFA defines transfer as "selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of" an NFA firearm. Although the definition of transfer is fairly general, it only lawfully applies to NFA weapons that are registered to the transferor in the National Firearm Register and Transfer Record. Transferring, possessing, or receiving an NFA weapon that is not legally registered is a criminal act. Once a weapon has been determined registered, the administrative steps of transfer are as follows: completing ATF Form 4, paying of required taxes, and obtaining a signed law enforcement certification from the Chief Law Enforcement Officer of your jurisdiction. ATF NATIONAL FIREARMS ACT HANDBOOK 59-66 (Rev. Apr. 2009), http://www.atf.gov/publications/download/p/atf-p-5320-8/atf-p-5320-8.pdf. Form 4 can be downloaded from http://www.atf.gov/forms/firearms/. Applicants must submit duplicate forms with original signatures. An individual transferee must attach (1) a 2" x 2" photograph of the frontal view of the transferee taken within 1 year prior to the date of the application, and (2) two properly completed FBI Forms FD-258.

Although in theory these administrative steps are just tedious and lengthy, practically they have become unmanageable. Most notably, chief law enforcement officers have stopped signing the law enforcement certification without cause. This obstacle is particularly hard to overcome because there is no legal avenue or remedy to compel chief law enforcement officers to sign the certification.

B. Constructive Possession

Individual ownership of an NFA weapon may put your client's family at risk due to the doctrine of constructive possession. When an individual owns an NFA weapon, that individual, and only that individual may possess the firearm. *United States v. Turnbough*, No. 96-2531, 1997 WL 264475 (7th Cir. May 14, 1997), is the landmark constructive possession case. Although the case is not specific to an NFA firearm, the principles and issues are identical to those confronted with NFA firearms. Mr. Turnbough kept an illegal firearm in the home he shared with his girlfriend and his girlfriend's daughter. The court ruled that "the government may establish constructive possession by demonstrating the defendant exercised ownership, dominion, or control over the premises in which the contraband is concealed." The court does not require that the defendant exercised ownership, dominion, or control over the actual contraband itself. To be charged with and convicted of constructive possession or any violation of the NFA, the prosecution is not required to prove intent. Something as simple as a spouse knowing the

access code to the gun safe can lead to prosecution of both the spouse and the weapon owner. This is particularly important to understand due to the criminal penalties associated with unauthorized possession.

C. Death or Incapacity of the Individual Owner

Another common dilemma relates to the transfer of NFA weapons in a person's estate following death or incapacity. Because the registration information compiled in the National Firearms Registry and Transfer record is tax information, the personal representative of an estate is the only person to whom this information may be disclosed. Any unregistered firearms should be handed over to law enforcement immediately and cannot be retroactively registered by the estate. For registered firearms, the executor is responsible for completing the necessary steps to register the firearm to him/herself. That means the personal representative must comply with all of the requirements discussed in Part III(A). The estate planner should discuss these requirements with clients when determining who to name as the executor of their will.

Although technically the personal representative unlawfully possesses the firearm until the registration is cleared, ATF does allow the personal representative a reasonable amount of time to complete the transfer. Generally, the process should be completed prior to the end of probate. The personal representative is wholly responsible for the firearm registered to the decedent, therefore, the weapon should remain in the personal representative's custody and control. Although the personal representative may seek advice and support from a federally licensed firearms owner or dealer, he or she may not transfer the firearm to the licensee. If the personal representative were to transfer the firearm to a licensee for consignment or safekeeping, the personal representative would be criminally liable, because even consignment and safekeeping are transfers subject to the requirements of the NFA. However, the personal representative may seek assistance from a licensee to identify potential purchasers.

Although this process is burdensome for a personal representative, the benefit of a probate transfer is that the transfer is exempt from the $200 tax when transferred to a will beneficiary or, if the owner died intestate, an heir. ATF Form 5 is used when applying for a tax-exempt transfer to a beneficiary or heir. These procedures are the same as a transfer to any other individual. If the firearm is to be transferred out of the estate, the transfer is no longer tax-exempt and the transfer is subject to the requirements of ATF Form 4. If the firearm is unserviceable then the transfer is tax-exempt. ATF, TRANSFERS OF NATIONAL FIREARMS ACT FIREARMS IN DECEDENTS' ESTATES 1 (2006).

IV. THE GUN TRUST

The solution to most of the obstacles associated with acquiring an NFA weapon as an individual is simple. The National Firearms Act defines "individual" to include corporations, trusts, and other similar legal entities. Because it is lawful to transfer a registered NFA firearm to an individual, barring any specific state legislation stating otherwise, it follows that you can transfer a registered NFA firearm to a trust – a "gun trust." If drafted properly, an NFA Gun Trust should give guidance to the grantor, trustee(s), and beneficiaries of the trust to avoid any NFA violations. 27 C.F.R. § 479.11 (2003).

The Gun Trust expedites the purchase of firearms as well as provides a comprehensive estate plan to maintain ownership and ease transfer at death. Additional benefits of the gun trust include (1) ease of administration as no finger prints, photos, or law enforcement certification are required; (2) the ability of anyone acting as a trustee lawfully to possess the firearms held in trust; (3) removal of the weapons from probate proceedings; and (4) subject to the Rule Against Perpetuities, the trust continues to protect a client's assets if the transfer of NFA firearms is later prohibited. Although a traditional trust may satisfy the purchase requirements and even expedite the process, it will not provide for the complexities of the future nor comprehensively protect against unlawful possession in case of death or incapacity.

A. Why form a trust rather than a corporation or LLC?

A gun trust is often more efficient for the average firearms owner because these trusts usually do not need to submit state filing fees and may not need to file tax returns. Business entities such as corporations and LLCs are not private. Typically, information about the persons involved in these business formations is on the public record and these entities are usually required to file tax returns with the IRS. To change anything regarding whom can use, purchase, or possess the corporation's or LLC's firearms, the Secretary of State must be notified. With an NFA Gun Trust, however, there are no annual fees or documents that must be filed with the state. And, to amend an NFA Gun Trust, the gun owner merely changes the trust in compliance with the terms of the trust and Texas law making it easy to designate who can use, purchase, or possess the firearms.

B. Drafting an NFA Gun Trust

When creating a Gun Trust, it is important to help clients think through the specifics of their situation. Ultimately, this process requires your client to determine their present and future goals and with whom these goals relate. Sometimes it can be difficult to determine how someone would like property handled at death or incapacity, but it is important so that the trust can outline specific instructions and powers for the trustee in case of unplanned events. Considering that NFA weapons cannot be transferred like traditional personal property, without proper trust creation, the risk of criminal penalties and confiscation is significant.

Basic underlying principles of trust formation apply to the creation of a Gun Trust. When determining the people to involve, keep in mind that your client cannot be named as the only beneficiary if your client is also the sole trustee as then no trust will actually be created. Therefore, if the trust purchases a firearm, your client will be deemed an individual illegally possessing an NFA firearm. Also, be weary of including too many people in the trust because anyone designated as a trustee is free to use the firearms. This presents significant risks because each trustee is jointly and severally liable for all of the actions of co-trustees under the partnership issues addressed in the NFA.

One of the most important steps in creating a Gun Trust is determining the powers, duties, and other terms in the trust. Because the duties and terms are so drastically different from the traditional purposes for trust arrangements, it is ill-advised to include other assets in an NFA Gun Trust. Additional assets would only create confusion and unnecessary risk for the client.

A generic Gun Trust is almost impossible to create because of the variety of circumstances that present themselves in each client's life. But, there are a few key elements that should always be addressed. An NFA Gun Trust must include the following information to determine necessary actions to ensure proper transfer upon death or incapacity: whether it is permissible in the jurisdiction to transfer the items, whether the items are legal in the state to where they will be transferred, whether the beneficiary is legally able to be in possession of or use the items, and whether the successor trustee is given the ability to determine whether the beneficiary is mature and responsible enough to have control of the firearms. David M. Goldman, *How is a NFA Gun Trust Different than a Revocable Trust?* July 15, 2009, http://www.guntrustlawyer.com/2009/07/how-is-a-nfa-gun-trust-differe.html.

C. Generic Trust Forms When Drafting an NFA Trust

Clients may be tempted to use forms they find on the Internet or in bookstores to create a trust. Although this is risky conduct with regard to any property, there are substantial risks involved when NFA weapons are included in the trust property. For example, a significant number of these forms, when used for NFA weapons, fail to create a valid trust. If the trust does not legally exist, regardless of whether the ATF approved the transfer to the trust, your client, as an individual, would be deemed to be in unlawful possession of the firearm and would be subject to the penalties the NFA imposes. If a valid trust were formed, but exists with the terms of a generic trust instrument, the transfer of the weapon may be lawful but other problems may arise. Traditional trusts do not address death or

incapacity with regard to firearms and often instruct trustees to transfer the property in ways that create liability to the beneficiary, puts the assets as risk of seizure, and put both the trustee and beneficiary at risk of violating the NFA. David M. Goldman, *BATFE Seeks to Seize NFA Firearms from an Invalid Quicken Trust*, May 22, 2009, http://www.guntrustlawyer.com/2009/05/batfe-seeks-to-seize-nfa-firea.html.

Another short cut clients may be tempted to take is to use a free NFA Gun Trust Form provided by their gun dealer. Typically, gun dealers are not attorneys nor are they well versed in estate planning techniques. Therefore, not only are these forms inadequate in establishing even the most basic of trusts, they will not create the kind of trust necessary to protect NFA firearms.

There is a plethora of issues that can arise when using generic forms to create a trust consisting of NFA weapons. Most trust forms are set up for one settlor and one trustee. If you were to form an NFA Gun Trust under those limitations, you would completely defeat the trust's potential to protect against constructive possession. Another common issue with generic forms is that they create revocable trusts. Considering that the trust is the registered owner of the firearm, revocation of the trust would lead to unlawful possession by anyone possessing the firearms owned by the revoked trust. Traditional revocable trusts also risk being revoked by someone acting under the settlor's power of attorney. Sub-trusts for children are often created by these forms and should not be for NFA weapons because of their restrictive nature and the possibility that a minor may end up illegally owning the firearms. The language used in trust forms with regard to trust property usually permits the trustee to buy, sell, lease, or alter the property. If a trustee were to act according to the trust and without following protocol, the trustee would be subject to criminal penalties.

Although not a complete list of issues involving generic trust forms, it should be clear that the risks associated with making a mistake or improperly forming the trust agreement are severe. Remember, ATF approval of a purchase by a trust does not shield purchasers if a problem with the trust is later discovered. Basically, ATF assumes the validity of the trust but in no way guarantees the validity of the trust. David M. Goldman, *Why Do I Need an NFA Trust?*, Oct. 6, 2009, http://www.guntrustlawyer.com/2009/10/why-do-i-need-an-nfa-firearms.html

V. CONCLUSION

The Gun Trust has proven to be a powerful tool in estate planning when an estate contains NFA firearms. Not only does a properly drafted gun trust minimize the many risks associated with ownership, possession, and transfer, it insulates owners from future legislation. As legislation continues to become more restrictive, many Texans fear losing NFA weapons to government seizure and confiscation. Considering the least expensive legally registered machine gun sells for an average of $4,000, owners have a strong personal and economic interest in preserving their ownership and transfer rights.

Special interest groups are campaigning and lobbying Congress to prevent future transfers of Title II weapons. If this occurs, any weapons that remain part of the probate estate would be forfeited at death and any economic or personal value lost. The beauty of a Gun Trust is that an adult child, family member, or friend can easily be designated a co-owner of the trust. Being that the Gun Trust is the registered owner, the actual ownership of the trust can be easily changed. As long as the trust remains the registered owner, then no transfer, within the meaning of the NFA, has occurred. Therefore, future transfer legislation and restrictions are likely to be inapplicable.

Portions of this article are adapted from Gerry W. Beyer & Jessica B. Jackson, *What Estate Planners Need to Know About Firearms*, EST. PLAN. DEV. TEX. PROF., April 2010, at 1.

THE NFA GUN TRUST

DAVID M. GOLDMAN

STATE BAR OF TEXAS, WHAT EVERY TEXAS LAWYER NEEDS TO KNOW ABOUT FIREARMS LAW, Ch. 5 (2012).

I. INTRODUCTION

Traditional estate planning can be problematic when dealing with firearms. A gun trust is an estate planning document that has been designed to help you acquire, manage, use, and transfer all firearms including those restricted by the National Firearms Act of 1934 as amended (the "NFA") while protecting your family and friends from inadvertent violations of state and federal laws. *National Firearms Act of 1934 (NFA),* ch. 757, 48 Stat. 1236 (codified as amended at 26 U.S.C. §§5801-5872 (1996).

II. TYPES OF FIREARMS

Different types of firearms are regulated in very different ways. When confronted with a situation involving a firearm, first determine what type of firearm it is, then what law to apply. The three main types of firearms, for the purposes of this article, are Title II Firearms, Antique Firearms, and Title I Firearms.

A. Title II Firearms

Title II Firearms are guns and other items regulated by the NFA. People often mistakenly refer to these firearms as "Class 3 Firearms" or "Class III Firearms". The Bureau of Alcohol Tobacco Firearms and Explosives (the "BATFE" previously and still referred to as the "ATF"), provides resources on how to identify whether a firearm falls under NFA regulations. *See* http://www.atf.gov/publications/download/p/atf-p- 5320-8/atf-p-5320-8.pdf. The NFA regulates the sale, use, possession, and transfer of Machine Guns, Short- Barreled Shotguns and Rifles, Silencers, Any Other Weapons (AOW's), and Destructive Devices. The definitions of the above Title II firearms are as follows:

1. Machine Gun

The term "machine gun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person. 26 U.S.C. § 5845(b).

It is established that there are over 250,000 legally transferrable machineguns in the United States. The definition of a Machine Gun includes fully automatic rifles, shotguns, and pistols.

2. Short-Barreled Shotgun

A short-barreled shotgun is defined as "a shotgun having a barrel or barrels of less than 18 inches in length" or "a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length." 26 U.S.C. § 5845(a)(1)-(2).

3. Short-Barreled Rifle

A short-barreled rifle is defined as "a rifle having a barrel or barrels of less than 16 inches in length" or "a weapon made from a rifle if such

weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length." 26 U.S.C. § 5845(a)(3)-(4).

4. Silencer

A silencer (sometimes referred to as a suppressor) is "Any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembly or fabricating a firearm or firearm muffler, and any part intended only for use in such assembly or fabrication." 18 U.S.C. § 921(a)(24); 26 U.S.C. § 5845(a)(7).

5. Any Other Weapon

"Any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with a combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and shall include any such weapon which may be readily restored to fire. Such term shall not include a pistol or revolver having a rifled bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition." 26 U.S.C. § 5845(e).

Traditionally, AOWs included gadget devices, glove firearms, and Nazi belt buckle firearms. Today, AOWs also include cane, cell phone, crutch, and pen guns, pistols with a vertical/forward grip, and other disguised firearms. Also, the BATFE asserts that a pistol in a leather wallet holster, which permits the firing of the pistol, while still in a leather holster, is an AOW. Stephen Halbrook, FIREARMS LAW DESKBOOK, 458 (Thomson/West 2007).

6. Destructive Device

"(1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one- quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled." 18 U.S.C. § 921(a)(4); 26 U.S.C. § 5845(f).

However, "The term 'destructive device' shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684 (2),4685, or 4686 of title 10; or any other device which the Attorney General finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes." 18 U.S.C. § 921(a)(4).

B. Curios and Relics (Antique Firearms)

Some "Antique firearms," as defined by the NFA, are not subject to any regulations under the NFA, while the BATFE subjects other antique firearms to the NFA. *ATF Firearms Curios or Relics List*, 44-49 (Rev. Dec. 2007) http://www.atf.gov/publications/download/p/atf-p-5300-11/atf-p-5300-11.pdf. "The term 'antique firearm' means any firearm not designed or redesigned for using rim fire or conventional center fire ignition with fixed ammunition and manufactured in or before 1898 (including any matchlock, flintlock, percussion cap, or similar type of ignition system or replica thereof, whether actually manufactured before or after the year 1898) and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of

commercial trade." 26 U.S.C. § 5845 (g). A trust may not hold a Curios and Relics license.

C. Title I Firearms

Under Federal Law, Title I firearms are defined as **"**(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device." Such term does not include an antique firearm. 18 U.S.C. § 921 (a)(3). These Firearms include your basic rifles, shotguns, and handguns.

III. STATE LAW

Although the federal government has a comprehensive framework established to regulate the rights associated with certain firearms, state and local governments are not prohibited from imposing additional restrictions. It is important to keep up to date with the laws of the states in an attorney's practice, as an unknown change in the law may result in malpractice. Compliance with federal regulations is not a defense to violating local laws of gun purchase, sale, transfer, manufacture, and possession.

A. Limits of State Law

Generally speaking, most states prohibit Title II except when you comply with federal law. Some states prohibit some Title II firearms, while allowing other Title II firearms. Then there are the oddball states, which have regulations that prohibit certain types of Title II firearms in awkward ways.

[discussion of the law of other states omitted]

B. Silencer/Suppressor Regulations

Originally the NFA's goal in restricting silencers was to prevent poaching. As a result, many states originally imposed additional legislation to prevent hunting with silencers. The modern trend regarding to hunting with silencers has been to allow silencers when hunting. Often one must look at the state statute as well as the state's hunting regulations.

Like many states, Washington's old statute did not permit hunting with silencers. Some of the states that prohibit hunting with silencers allow it under certain circumstances, such as for varmint hunting. In order to illuminate the vast differences among states firearm laws, below are three lists that show where silencers are allowed to be owned, where silencers are allowed to be used for hunting, and where silencers are completely prohibited.

1. Ownership/possession of silencers

The following states allow for civilian ownership and/or possession of silencers:

- Alabama
- Alaska
- Arkansas
- Arizona
- Colorado
- Connecticut
- Florida
- Georgia
- Idaho
- Indiana
- Kansas
- Kentucky
- Louisiana
- Maine
- Maryland
- Michigan
- Mississippi
- Missouri
- Montana
- Nebraska
- Nevada
- New Hampshire
- New Mexico
- North Carolina
- North Dakota
- Ohio
- Oklahoma
- Oregon
- Pennsylvania
- South Carolina
- South Dakota
- Tennessee
- Texas
- Utah
- Virginia
- Washington
- Wisconsin

- West Virginia
- Wyoming

2. Silencers and hunting

The following list determines whether silencer hunting is legal, and if so, under what circumstances:

- Alabama, No: Reg. 220-2.02
- Alaska, all game animals legal
- Arizona, all game animals legal
- Arkansas, all game animals legal
- Colorado, all game animals legal
- Connecticut, No: c.26-75., see also Sec. 53a- 217e re negligent hunting offenses.
- Florida, No: Florida Fish and Wildlife Conservation Commission Code Prohibits silencer-equipped firearms when hunting game animals.
- Georgia, No O.C.G.A. 27-3-4 (2010)
- Idaho, All game animals legal
- Indiana, Unclear: IC 14-22-6-11 Silencers prohibited Sec.11, however under predator hunting "there are no restrictions on hunting hours or firearms for fox and coyote."
- Kansas, all game animals legal
- Kentucky, all game animals legal
- Louisiana, "nongame nuisance quadrupeds" only §116.1.
- Maine, No: ME §11214
- Maryland, all game animals legal
- Michigan, No
- Mississippi, All game animals legal
- Missouri, all game animals legal
- Montana, Montana statute classifies predators as coyote, weasel, (striped) skunk, and civet cat (spotted skunk). Predator shooting is not regulated by federal or state law or regulation.
- Nebraska, all game animals legal.
- Nevada, all game animals legal
- New Hampshire, No: 207:4
- New Mexico, all game animals legal
- North Carolina, all game animals legal
- North Dakota, all game animals legal
- Ohio, No: OH 1501 1:31-15-02
- Oklahoma, currently no under Oklahoma §29- 5-201; however, the law will change in the fall of 2012 to allow use of silencers for hunting.
- Oregon, all game animals legal
- Pennsylvania, all game animals legal
- South Carolina, all game animals legal
- South Dakota, all game animals legal
- Tennessee, all game animals legal
- Texas, Currently non-game animals only; however, the law will change in the fall of 2012 to allow the use of silencers for hunting if you have a special permit
- Utah, all game animals legal
- Virginia, all game animals legal
- Washington, all game animals legal
- West Virginia, all game animals legal
- Wisconsin, all game animals legal
- Wyoming, No: WY State Code 23-2-112

3. Silencers completely prohibited

Civilian Silencer ownership, possession, and use are completely prohibited in the following states:

- California
- Delaware
- Hawaii
- Illinois
- Iowa
- Massachusetts
- Minnesota (Dealers and police only)
- New Jersey
- New York
- Rhode Island
- Vermont

C. Texas

The Texas Legislature has not placed additional regulations or restrictions on Texas residents regarding Title II Firearms. In Texas, it is a defense to prosecution if you comply with the federal laws. Tex. Penal Code § 46.04(b). Estate planners in Texas only need to comply with federal law; however, it is still important to pay attention to new legislation in case stricter regulations are established in the future. This does not mean that a traditional trust is appropriate for Texas residents.

Title I firearms are usually regulated by state law. The state law in this category can be tricky and it is important to keep up to date with the changes in the law. The prospect of a client's future relocation is not typical an

important issue for estate planning lawyers. When clients are known to own firearms, the lawyers should talk about problems that might arise with a future move that involves a state change. Given that firearms are owned by so many clients, lawyers probably have a duty to ask and not rely on clients to casually mention firearms.

1. Purchase and Possession

The Texas Penal Code regulates the transfer and ownership of Title I firearms. Tex. Penal Code § 46.01 et seq. and Tex. Gov't Code § 411.171 et seq. It is unlawful to knowingly sell, rent, give, or offer to sell, rent or give any firearm to a person under 18 years of age, without written consent of his or her parent or guardian. Under Texas Law, it is also unlawful to sell, rent, loan, or give a handgun, shotgun, or rifle to any person if the transferor knows that the recipient intends to use the firearm unlawfully.

Texas law places additional restrictions on the purchase and possession of firearms on persons convicted of a felony or a Class A misdemeanor involving the person's family or household and persons subject to certain orders issued under the Family Code or Code of Criminal Procedure. Otherwise, Texas does not require its citizens to acquire any type of license to possess a rifle, shotgun, or handgun.

Texas also distinguishes between possessing a handgun and carrying a handgun. The Department of Public Safety regulates the issuance of licenses to carry a handgun. An applicant must submit the following to the Department: a completed application form, two recent color passport photographs, fingerprints, proof of age (at least 21), proof of residency in Texas, a handgun proficiency certificate from a qualified handgun instructor, an affidavit stating that applicant has read and understands the law concerning a license to carry and the laws on use of deadly force and that the applicant fulfills all eligibility requirements, and an authorization to access records. The license will be granted if the applicant meets the eligibility requirements including no record of felonies, certain misdemeanors, addictions, mental illness, and delinquency in child support payments or tax payments.

2. Inheritance

Estates have firearms; failure to ask about them does not help your clients nor limit your exposure. Although the risks and criminal penalties associated with the transfer of rifles, shotguns, and handguns are not as high as with Title II firearms, Texas estate planners should understand the laws set forth in the Texas Penal Code and Texas Government Code to provide sound estate planning advice for clients with firearms. Estate planners should be cautious as this may differ when beneficiaries are located in states other than where the firearms are stored. Not only will the successor trustee or personal representative have to comply with various state and federal laws regarding the ownership and legality of the firearms, but they will also have to comply with shipping and transportation restrictions. It may not be permissible to hand a visiting beneficiary a firearm that he or she will transport across state lines. As mentioned above, Texas law prohibits the transfer of firearms under certain circumstances. These circumstances also apply if the transfer of the firearm occurs through estate administration. Therefore, estate planners should be familiar with transfer limitations to plan for the distribution of firearms upon a client's death or incapacity. This requires performing a reasonable investigation into the background, status, and location of the designated recipient of the firearm.

To avoid issues if the designated recipient is ineligible at the time of the decedent's death, estate planners should encourage clients to include a provision naming alternative recipients. If alternative recipients are not named, then the personal representative must take possession until a proper beneficiary is determined and eligibility confirmed. It is estimated that more than forty percent of homes in the United States contain firearms. *Americans By Slight Margin Say Gun In the Home Makes it Safer,* Gallup Poll, Oct. 20, 2006. Hence, around forty percent of all estates have firearms. Estate planners need to be cognizant of the potential ineligibility of a successor trustee or

personal representative when their clients own firearms. Additionally when the estates are being administrated, estate planners may face additional liability if they fail to recognize that the personal representative or trustee that they represent is a prohibited person and they are charged with illegal possession of firearms and/or ammunition. Besides the criminal liability, these persons will face additional liability from the beneficiaries when the items and the vessels they are contained within are confiscated. Although the recipient is only required to meet the standards set forth in the state statute regarding a lawful transfer, it may be important to advise clients of the additional restrictions associated with carrying a handgun. A designated recipient may be eligible to receive a handgun, but ineligible for a license to carry. This could potentially affect to whom your client wishes to give the handgun upon death or incapacity. *What Estate Planners Need to Know About Firearms, Estate Planning Developments, Frost;* Gerry W. Beyer and Jessica B. Jackson (2010).

IV. FEDERAL LAW

In order to understand the purpose of an NFA Gun Trust, one needs to understand the basic current legal restrictions put on firearm owners by the federal government.

A. The History of the NFA

The NFA was originally enacted in 1934. The original laws, which are similar to the current NFA laws, imposed a tax on the making and transfer of firearms defined by the Act, as well as a special occupational tax (SOT) on persons and entities engaged in the business of importing, manufacturing, and dealing in NFA firearms. The registration of all NFA firearms with the Secretary of the Treasury was also required.

The NFA was enacted by Congress under its taxing authority; however, the NFA's underlying purpose was not related to revenue collection. Shown through legislative history, the underlying purpose was to curtail, if not prohibit, transactions in NFA firearms. These firearms were found to pose significant crime problems because they were frequently used in gang crimes. The $200 tax is still $200; however, the tax was considered quite severe and adequate to carry out Congress' purpose in 1934.

Under the 1934 structure, the NFA imposed a duty on persons transferring NFA firearms, as well as possessors of unregistered firearms, to register them with the Secretary of the Treasury. If the possessor of an unregistered firearm applied to register the firearm as required by the NFA, the Treasury Department could supply information about the registrant's possession of the firearm to State authorities. With this information, State authorities could use it to prosecute the person whose possession violated State laws. For these reasons, the Supreme Court of the United States held that a person prosecuted for possessing an unregistered NFA firearm had a valid defense to the prosecution — the registration requirement imposed on the possessor of an unregistered firearm violated the possessor's privilege from self-incrimination under the Fifth Amendment of the U.S. Constitution. *Hanes v. United States*, 390 U.S. 85, 90-100 (1968). The *Haynes* decision made the 1934 Act virtually unenforceable. *See National Firearms Act (NFA),* BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, http://www.atf.gov/firearms/nfa/.

B. Title II of the Gun Control Act (GCA) of 1968

Title II amended the NFA to cure the constitutional flaw pointed out in *Haynes*. First, the requirement for possessors of unregistered firearms to register was removed. Indeed, under the amended law, there is no mechanism for a possessor to register an unregistered Title II firearm already possessed by the person. Second, a provision was added to the law prohibiting the use of any information from an NFA application or registration as evidence against the person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration. In 1971, the Supreme Court of the United States reexamined the NFA and found that the 1968 amendments cured the constitutional defect in the original NFA. *U.S. v. Freed*, 401 U.S. 601 (1971). *See National Firearms Act (NFA),*

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, http://www.atf.gov/firearms/nfa/.

C. The Firearm Owners' Protection Act

In 1986, this Act amended the NFA definition of "silencer" by adding combinations of parts for silencers and any part intended for use in the assembly or fabrication of a silencer. The Act also amended the GCA to prohibit the transfer or possession of machineguns. Exceptions were made for transfers of machineguns to, or possession of machineguns by, government agencies, and those lawfully possessed before the effective date of the prohibition, May 19, 1986. *See National Firearms Act (NFA),* BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, http://www.atf.gov/firearms/nfa/.

D. Transfer of Firearms Subject to the NFA

Transferring Title II firearms to individuals is a tedious and long process. Individuals must take the transfer of these firearms very seriously because an improper transfer can result in criminal prosecution. Then necessary steps to transfer Title II firearms are described in Chapter 9 of the NFA Handbook. The NFA defines transfer as "selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of." 28 U.S.C. § 5845 (j) (2011). This broad definition of transfer only applies to Title II firearms that are registered to the transferor in the National Firearm Register and Transfer Record. Transferring, receiving, or possessing a Title II firearm that is not legally registered is a criminal act. Once the firearm is properly registered, the administrative steps to legally transfer are as follows: completing an ATF 5320.4 (Form 4), paying the required taxes, and obtaining a signed law enforcement certification from the Chief Law Enforcement Officer (CLEO) or a judge of your jurisdiction. Duplicate forms with original signatures must be submitted. An individual transferee must attach (1) a 2" x 2" photograph of the frontal view of the transferee taken within 1 year prior to the date of the application, and (2) two properly completed FBI Forms FD-258. *ATF National Firearms Act Handbook* 59-66 (Rev. Apr. 2009), http://www.atf.gov/publications/download/p/atf-p-5320-8/atf-p-5320-8.pdf.

The above administrative steps have become practically unmanageable; however, in theory they are just tedious and lengthy. Most notably, CLEOs have stopped signing the law enforcement certification regardless of cause. This obstacle is particularly hard to overcome because there is no legal avenue or remedy to compel CLEOs to sign the certification. *See Lomont v. O'Neill,* 285 F.3d 9, 15 (D.C. Cir. 2002).

An illegal transfer of a Title II firearm can lead 10 years incarceration, $250,000 in fines and the forfeiture of the firearm and any "vessel, vehicle, or aircraft" used to conceal or convey the firearm. 26 U.S.C.S. § 5861(d),(j); 26 U.S.C.S. § 5872; 49 U.S.C.S. § 781-788.

1. Restrictions on Age

Generally, laws that prohibit minors from engaging in certain conduct or possessing certain things define minors as younger than 18 years of age. In regard to certain firearms, such as handguns and title II firearms, it can be argued that a minor is someone less than 21 years of age because federal law mandates one must be 21 to purchase Title II items from a Federal Firearms Licensee; however, at 18 one can acquire Title II items from an individual (non FFL). 18 U.S.C. § 922 (b)(1). If an individual is 18 years of age or older but less than 21 years of age and the firearm is in the estate, the personal representative can fill out an ATF 5320.5 (Form 5), obtain approval from the BATFE, and then transfer it to the beneficiary. If someone is making the firearm him or herself or purchasing in a private sale then BATFE will approve if they are 18 as long as all other requirements are met.

In laymen terms, there are two main ways to get a Title II firearm under the age of 21: One, make one and fill out an ATF 5320.1 (Form 1), and two, fill out a Form 4 and buy it from a resident in your state. Someone under 21 but over 18 just can not buy them from a dealer.

2. Crossing State Lines

In order to determine criminal liability when crossing state lines with firearms, it often depends on what state you are entering and the

type of firearm(s) you are possessing. Generally speaking, in order to transfer Title II firearms across state lines you need to fill out an ATF 5320.20 (Form 20) prior to the transportation.

Contrary to popular belief, an NFA transfer does not always have to go through a dealer. As long as both parties are residents of the same state BATFE will approve private party transfers on an Form 4 in most circumstances.

E. Possession

Possession of certain firearms may be deemed criminal behavior under federal law. If someone purchases Title II firearms they are the only one permitted to use or have access to them. Many people incorrectly believe that it is ok to let others use their Title II firearms when in their presence, inside a fence, or when they can be seen. However, the NFA would consider this to be a transfer and in violation of the law. While most federal possessory crimes require a knowing or willful *mens rea* requirement, it seems likely that the type of firearm possessed plays a large role in agency and prosecutorial discretion. 18 U.S.C. § 924(a) (2006).

Under federal law, certain persons can't possess or receive firearms (whether Title I or Title II). 18 U.S.C. § 922 (d), (g) (2006). These individuals include convicted felons, persons either adjudicated a "mental defective" or committed to a mental institution, and persons convicted of misdemeanor domestic violence offenses. *Id.* at §922 (g). The list also includes categories of people that may not be so self-evident, including users of any illegal drug, dishonorably discharged veterans, and persons who have renounced their U.S. citizenship. *See id.* § 922(g)(3), (6)-(7); *see also* Nathan G. Rawling, *A Testamentary Gift of Felony: Avoiding Criminal Penalties from Estate Firearms*, 23 QUINNIPIAC PROB. L.J. 286 (2010) (discussing who may possess firearms, the various restrictions on transfer, and penalties for impermissible transfers). Furthermore, people under the age of 18 are not allowed to possess certain firearms unless they are under supervision of a parent or guardian.

Improper possession through constructive possession is a form of an unapproved transfer and a violation of the NFA. Furthermore, constructive possession can create liability even when the possessor does not have any actual access to the firearm. See, e.g. *U.S. v. Jenkins*, 299 U.S. App. D.C. 79, 981 F.2d 1281 (1992). As previously stated, when an individual owns a Title II firearm, that individual, and only that individual may possess the firearm. *United States v. Turnbough*, No. 96-2531, 1997 WL 264475 (7th Cir. May 14, 1997), is the landmark constructive possession case, even though it is not specific to Title II firearms, the principles and issues are identical to the ones confronted with Title II firearms. Mr. Turnbough kept an illegal firearm in the home he shared with his girlfriend and his girlfriend's daughter. The court ruled that "the government may establish constructive possession by demonstrating the defendant exercised ownership, dominion, or control over the premises in which the contraband is concealed." The court doesn't require that the defendant exercised ownership, dominion, or control over the actual contraband itself. To be charged with constructive possession or any violation of the NFA, the prosecution is not required to prove intent. *See* David M. Goldman, *Constructive Possession: NFA Trusts vs. Individual Ownership,* NFA GUN TRUST LAWYER BLOG, Aug. 5, 2009, http://www.guntrustlawyer.com/2009/08/constructive-possession-nfa-tr.html.

It seems constructive possession can occur fairly easily. For example, say John and John's friend Frank are out on John's farm doing some target practice. Frank pulls out his silencer. John is thinking about buying a silencer so he asks Frank if he could give it a try. As soon as Frank allows John to use the silencer, or even just hold the silencer, it would be considered constructive possession and in violation of the NFA. It seems as though it would not matter that Frank, whom is lawfully authorized to possess and use the silencer, is present. Another example would be simply allowing someone to have access to the firearms, such as if Frank kept his silencer in his gun safe and his spouse simply knowing the combination to the gun safe. This can lead to prosecution of both the spouse and Frank. One more fairly common example would be if Frank left his silencer in his vehicle, and then let John take the vehicle, without any intent

by either John or Frank to take the silencer. It does not matter whether John or Frank had knowledge that the silencer is in the vehicle. Whoever borrows the vehicle is still considered to be in constructive possession, of the silencer.

Depending on the type of firearm and the underlying facts, possession, whether actual or constructive, can lead up to 10 years incarceration, $250,000 in fines and the forfeiture of the firearm and any "vessel, vehicle, or aircraft" used to conceal or convey the firearm. 26 U.S. C. S. § 5861(d),(j); 26 U.S.C.S. § 5872; 49 U.S.C.S. §§ 781-788. Gerry Beyer, *What Estate Planners Need to Know About Firearms, Estate Planning Developments, Frost,* (2010).

F. Death or Incapacity of the Individual Owner

A common dilemma regarding the transfer of Title II firearms is the transfer that occurs in ones estate following death or when one becomes incapacitated. The registration information compiled in the National Firearms Registry and Transfer record is tax information; therefore, the personal representative of the estate is the only one this information may be given to. Unregistered Title II firearms are supposed to be given to law enforcement immediately and cannot be registered by the estate retroactively. If the firearm is registered, the executor is responsible for completing the necessary steps to register the firearm and transfer the firearms. The executor is the only person who may be in possession of the Title II firearm until the transfer is approved the BATFE. It is important that an estate planner discuss the requirements with their clients before determining who the executor of the will is going to be when Title II firearms are owned by the individual.

The BATFE generally allows the personal representative reasonable time to complete the transfer even though the personal representative technically unlawfully possesses the firearm until registration is cleared. A good rule of thumb is to try and have the process completed within one year. BATFE has given no indication as to what they consider reasonable. As such, a personal representative could find themselves illegally in possession of the firearms if the transfer process is unreasonably delayed. Because the personal representative is responsible for the firearm registered to the decedent, the firearm should remain in the personal representative's control and custody. The personal representative may seek advice or assistance from a federal licensed firearms owner or dealer to help identify potential purchasers; however, the personal representative is not allowed to transfer the firearm to a licensee for consignment or safekeeping because that would be considered transfers subject to the requirements of the NFA. In some cases, the personal representative may find themselves in possession of dealer samples or non-transferrable firearms that are subject to the NFA. In such cases, the personal representative should contact a firearms dealer that has a Class III SOT.

The benefit of the transfer is that it is exempt from the $200 tax when transferred to a will beneficiary or heir. The con of the transfer is the burdens imposed on the personal representative. A Form 5 is used when applying for a tax-exempt transfer to a beneficiary or heir. The procedures are the same as the procedures for transfers to any other individual. Out of state transfers are subject to the requirements of a Form 4 and no longer tax-exempt, unless the firearm is unserviceable. *What Estate Planners Need to Know About Firearms, Estate Planning Developments, Frost,* Gerry Beyer, Jessica B. Jackson (2010).

V. TYPES OF OWNERSHIP

There are three main ways that most firearms can be owned under Federal Law. The first is by an individual, the second is by a business entity, and the third is by a trust. The law allows for the registration of Title II firearms to a person, which is defined as "A partnership, company, association, trust, estate, or corporation, as well as a natural person." 27 C.F.R. 479.11 Over the years, gun owners have learned to use entities like a corporation or living trust to make it easier and more efficient to acquire Title II firearms in states where citizens are permitted to own them. Using an entity or living trust allow the gun owner to apply for a transfer of Title II items directly to

the BATFE without the requirement to have their CLEO to sign off. Using an entity likewise obviates the need to provide fingerprints and a photograph as well.

A. Firearms Owned by a Business

When explaining the pros and cons of a business entity owning a firearm, such as a corporation or LLC, and comparing it to an NFA Gun Trust owning a firearm, clients will almost always choose the NFA Gun Trust over the business entity. Even though it may be true that most types of business entities can be used to obtain Title II firearms, Gun Trusts are increasing in popularity due to the distinct benefits they provide.

Corporation's and LLC's are not private and much information about the individuals associated with them is contained in public records. Corporations and LLC's have annual state fees and other costs associated with the maintenance of the entity. They are often required to file sales tax and income tax returns. If a business was already is used to purchase Title II firearms, the business is at risk if the managers or anyone else ever misuse a firearm. Each manager of a corporation or LLC can purchase firearms and subject the entity to the penalties for violating the NFA. To make a change to the people authorized to use, purchase, or posses the firearms, the secretary of state may need to be updated with the changes in the management of the company. This can cost money and take a substantial amount of time to complete. In addition, business entities do not deal with incapacity or death.

Administrative dissolution is also a big problem associated with using a business entity. Administrative dissolution occurs when a business entity fails to keep up with the annual state filing requirements and the state begins to dissolve the company. This becomes a big problem for firearms that are owned by dissolved businesses because there is no owner of the firearms anymore, ultimately rendering them illegal firearms. Once the firearm becomes illegal they stay illegal, fixing the business's status does not make the firearms legal again.

B. Traditional, Generic, and Invalid Trusts

Traditional revocable trusts created by lawyers, individuals, or gun shops are not appropriate for firearms. Some lawyers use traditional revocable trusts while counseling clients who are buying Title II firearms. While a traditional trust can be used to purchase Title II firearms, there are many problems with using a traditional trust and therefore only a Trust that is specific for firearms should be used to avoid malpractice. Most trusts do not instruct how to purchase, who may use, or who may have access to Title II firearms. They also do not give the people involved with the trust enough information to properly sell or transfer assets. Upon incapacity, a traditional trust may require the sale of firearms or transfer to an ineligible individual or one who does not know the restrictions on these highly restricted firearms. Upon death, these all Title I and Title II firearms need to be transferred properly and only to those who are legally able to be in possession. Moreover, just because someone is legally allowed to posses a firearm does not make them an ideal beneficiary. In general, a traditional estate planning trust instructs individuals to often break the law when firearms are concerned.

A traditional trust allows the settlor of the trust to revoke the trust even if revocation would create an illegal transfer or possession of the previous trust assets. Also, a traditional trust allows a trustee to resign while they are still in possession of restricted firearms. A trustee may also find that with a traditional trust, an agent acting under a power of attorney may take actions that are in violation of the NFA and subject them to criminal penalties.

Most people using traditional trusts purchase Title II firearms incorrectly. They usually purchase them as an individual and then transfer the firearms into the trust. While the ATF may approve a transfer from the dealer to the trust, they never approved an individual transfer from the dealer nor a transfer from the individual to the trust. Each of these is a violation of the NFA.

Some gun owners, and even lawyers, turn to the Internet for information on how to handle

various legal issues with their firearms. Some turn to Legalzoom, Quicken, Inuit, or download a form from a firearms forum on the Internet. These do-it-yourself solutions are very risky due to the high regulations imposed on guns. Many trusts found on the Internet or from other sources have been found to be invalid for a wide variety of reasons. They also tend to have substantial problems when dealing with incapacity, death, and transfer of the firearms as they instruct the trustees to take steps that create liability to the beneficiary, put the assets at risk of seizure, and put both the trustees and beneficiary at risk of the penalties for violating the NFA. It is advised to seek legal advice from someone familiar with the NFA and other firearms legislation and not just someone who can create a trust. At this time the only online trust that is written specifically for firearms is based on a trust that was developed by David Goldman and can be found at http://www.guntrust.com.

Lately there have been many dealers and manufacturers providing trusts to customers or helping them to fill out the trusts in order to purchase firearms. It seems that firearm dealers and manufacturers provide these trusts in order to facilitate a sale, delivery, or simply keep gun owners happy. Most "gun shop trusts" are just generic living trusts that contain no guidance on any firearm laws that may create civil or criminal liability for the gun owner if the trust is administered incorrectly. Some trusts only deal with firearms subject to the NFA when many of the same issues exist for all firearms. It would be incorrect to assume that the purchaser of firearms subject to the NFA does not have additional firearms.

Most gun store owners do not realize that by providing advise on trusts or creating trusts for their clients, they are violating state laws dealing with the unauthorized practice of law. Not only is this a crime in many states, but it could also subject the gun stores to liability when customers follow the directions in the trust that would violate state or federal laws.

Many generic Internet trusts and "gun shop" trusts are not valid for administrative purposes, such as not being correctly signed or not being complete. The problem with using an invalid trust is that the trust may not technically exist. If the trust does not exist, even if the BATFE approves a transfer to the trust, you will be illegally in possession of the firearm and subject to the penalties of the NFA. This risks forfeiture of firearms, the homes and vehicles that they were stored in, as well as subjects individuals and their families to criminal penalties including fines and imprisonment. At the very least the gun owner will incur legal fees to correct the problem.

VI. THE SOLUTION – THE GUN TRUST

Gun Trusts have only been around since 2007, when Gun Trust Lawyer® David Goldman began studying federal firearms law and noticed the benefits a properly drafted trust could provide. A Gun Trust is a very specific trust that is designed to allow for the proper purchase, use, possession and transfer of firearms during life, incapacity, and after death. A Gun Trust holds Title I and Title II firearms for the benefit of the beneficiary, while giving possessory and use rights to the trustee(s); Since all firearms have similar issues regarding incapacity and death of the settlor, a Gun Trust should be used for any and all firearms.

A. Formation

When creating a Gun Trust, it is important that the specifics of the situation are thought through, ultimately requiring the determination of the present and future goals, and with whom these goals relate. In addition to the client's objectives, the drafter should see whom else needs to be involved with the trust to protect against constructive possession. It is important everyone realizes that without proper trust creation normal activities could create violations the NFA. Title II firearms cannot be transferred like other personal property during life, incapacity or in the event of death.

Basic underlying principles of trust formation apply when creating a Gun Trust. The people involved in the formation of a Gun Trust include a grantor (or settlor), trustee (or co-trustees), successor trustee, and a beneficiary. The grantor or settlor contributes the property

to the trust; the trustee is authorized to be in possession of and manage the trust property. The successor trustee takes the role of the trustee in the event the original trustee(s) no longer wishes to act as trustee, no longer is capable of acting as trustee, or dies. The beneficiaries are the ultimate receivers of the trust property.

After determining the present and future goals, and with whom they relate, one can determine who will fulfill the above roles for the Gun Trust. One of the most important parts of creating a Gun Trust are determination of powers, duties, and other terms in the trust instrument. *See* David Goldman, *What Is an NFA Trust?,* Oct. 8, 2009, http://www.guntrustlawyer.com/ 2009/10/what-is-a-nfa-firearms-trust.html. Gun Trusts create very different in dealing with duties from the traditional duties that deal with health, education, and support as related to traditional assets. Many of these should not be included in a Gun Trust because they would create confusion and unnecessary risk. Another reason general assets should not be placed in a Gun Trust is because the trustees are given the specific right to use the trust assets and generally the people you would allow to use your firearms are not the same people you want signing your checks or able to sell your home.

A Gun Trust should include information to help determine the necessary actions to ensure proper transfer in the event of death or incapacity. The Gun Trust should guide the successor trustee to determine whether the items are legal in the state where they will be transferred to; whether the firearms are permissible in that state; whether the beneficiary is legally able to be in possession of or use the items; and perhaps most importantly the successor trustee should be given the ability to determine if the beneficiary is mature and responsible enough to have control of the firearms. *See* David M. Goldman, *How Is a NFA Gun Trust Different than a Revocable Trust?* July 15, 2009, http://www. guntrustlaw.com/2009/07/how-is-a-nfa-gun-trust-differe. html. Providing for education and training to children or adults on proper firearm usage an additional provision that is starting to gain popularity among settlors. David M. Goldman, *Does the Definition of Education in Your Firearms and Estate Planning Trust Allow for Firearms Training?,* http://www.guntrustlawyer.com/2009/12/does-the-definition-of-educati.html.

B. Purchasing Using an NFA Gun Trust

A Gun Trust can expedite the purchase of firearms and can provide a comprehensive estate plan to maintain ownership and ease the transfer of firearms at death. Other benefits of Gun Trusts include, but are not limited to: no finger prints, photos, or law enforcement certification required; the ability of anyone acting as a trustee to lawfully possess the firearms held in trust; removal of the assets from probate proceedings; and continued protection of your assets if the transfer of Title I or Title II firearms is one day prohibited. A traditional trust may help purchase and expedite the process; however, a traditional trust will is not designed to help insulate or protect against future legislative or tax changes related to firearms ownership or possession.

C. Benefits of a Gun Trust

A properly drafted Gun Trust should give guidance to all the parties of the trust in order to help them avoid any state or federal firearms violations. A Gun Trust should also provide information to determine if it is permissible to transfer trust assets as the trust suggests, if the items are legal in the state where they will be transferred to, help determine if the beneficiary is legally able to be in possession of the firearms; and most importantly the successor trustee must be given the ability to determine on their own, when and if the beneficiary is mature and responsible enough to receive the firearms. While almost every aspect of a Gun Trust will be customized for firearms, the goals of the clients as collectors of firearms should be considered when making distributions and the trust should include powers that allow for unequal distribution of firearms to prevent the need to liquidate them for equal distributions.

D. Co-owners and Authorized Users

As previously mentioned, when an individual purchases Title II firearms in their individual

capacity, they are the only person allowed access or use of the firearm. If a Gun Trust is used to purchase Title II firearms, additional owners and authorized users can be designated. The owners and authorized users can be changed because the trust allows them to be added or subtracted. This can also eliminate some risks of constructive possession, simply by adding certain people to the Gun Trust so that they can be in legal possession of the firearms. Hence, where a family sets up a Gun Trust, all family members over the age of 18 could be designated trustees; thus enabling them to have possession of the firearm. The trust ultimately helps protect the owner and the owner's family from violating the NFA.

E. Gun Trust vs. Business Entity

As previously mentioned, a business entity used to purchase Title II firearms does not satisfy the many needs involved when owning an Title II firearm. Unlike with a corporation or LLC, a Gun Trust does not require any annual recording fees and documents do not need to be filed with the state. A Gun Trust does not pose the risk of administrative dissolution which creates an illegal possession of the firearms. To make a change to a Gun Trust, one simply amends the trust to change who can use, purchase, or possess the firearms without risk of criminal liability for violating the NFA. A Gun trust deals with the possibility of sudden death or incapacity of the firearm owner. A Gun Trust provides privacy and does not create additional scrutiny from the police, as opposed to a corporation or LLC where certain documents are contained in public record. There are many important distinctions between using a business entity as compared to using a Gun Trust that are important to both firearm owners and their families.

F. Multi Generational Asset Protection Gun Trust

A new type of Gun Trust is the Multi Generational Asset Protection Gun Trust, which brings unique benefits to the table. This highly customized Gun Trust is treated as a disregarded entity for estate and income tax purposes, resulting in no adverse tax consequences for over 99% of the United States Citizens.

The Asset Protection Gun Trust is designed to protect legitimate concerns of both the grantor and beneficiaries such as bankruptcy, creditor claims, divorce, and Medicaid issues. With a Gun Trust or revocable trust that held firearms, an individual in bankruptcy would generally loose their firearms or have to repurchase them from the trustee at fair market value. General creditors would also be unable to access the trust items. The Asset Protection Gun Trust can help provide protection from creditors of beneficiaries. Furthermore, the trust can help protect firearms from loss due to divorce, subject to the requirements of state law; however, this may require a separate agreement or a waiver of rights.

If the Asset Protection Gun Trust is timely done, it can prevent firearm owners from losing their firearms in order to qualify for Medicaid benefits. If a firearm owner needs an organ transplant or nursing home coverage, the Asset Protection Gun Trust can remove the valuable firearms from the firearms owners' asset analysis.

When properly structured, the Asset Protection Gun Trust can hold firearms for children, grandchildren and beyond. If your states, Rule Against Perpetuities ("RAP") does not provide for this, the clients can amend the trust to use the laws of a state that has abolished the RAP.

The Asset Protection Gun Trust is a unique trust that is based off common law principles. It provides many other benefits and should be considered and/or used depending on the specifics of the situation.

VII. ETHICAL AND MALPRATICE ISSUES

Vinaba Bhave once said, "A country should be defended not by arms, but by ethical behavior." As with any area of the law, certain ethical issues arise under certain situations. In the area of Title II firearms, ethical issues may be present without any knowledge of their presence, which may result in malpractice.

A. Sound Legal Advice

Both State and Federal firearm regulations can be very confusing, and it is common for many lawyers to not understand the intricacies of them. It is also common not to realize so many regulations apply to firearms. Firearms are a unique chattel that must be handled in a unique way.

When clients ask about firearms, many attorneys brush off the legal regulations, or do not even realize the regulations exist, and end up counseling their clients in an unethical manner. Laws are not known or are brushed aside especially when dealing with the interstate transfer of firearms. This is why you need to make sure you know the regulations, or are ready to refer your clients to an attorney that specializes in firearms, like a Gun Trust Lawyer®.

A lawyer who recommends or supplies a traditional trust for Title II firearms may be committing legal malpractice. Many so called "gun shop trusts" or trusts for Title II firearms do not properly deal with the purchase, possession, and use of Title II firearms. A lawyer using the traditional trusts may be instructing people to break the law upon the incapacity or death of the settlor.

Dealers or manufacturers providing "gun shop trusts" to customers, when their trusts are not valid, are acting in an unethical manner and may be subject to liability, such as engaging in the unauthorized practice of law. *In The Florida Bar Re Advisory Opinion—Nonlawyer Preparation of Living Trusts*, 613 So.2d 426 (Fla.1992), the Florida Supreme Court held "the assembly, drafting, execution, and funding of a living trust document constitute the practice of law. If a dealer provides a traditional trust they may create future liability. If a dealer provides a trust they should be careful not to fill out the trust for the client or provide legal advice as most states would consider this the unauthorized practice of law.

1. BATFE Inconsistency

Attorneys should air on the safe side when interpreting and applying federal firearm regulations. Over the years, the BATFE has been inconsistent with their interpretation and enforcement of the regulations. Sometimes the BATFE will interpret a regulation one way and then later interpret it another way, ultimately making their earlier interpretation worthless. Conservative tactics are strongly recommended when trying to figure out close calls of federal firearm regulations and the practicing attorney should always keep in mind that getting away with relying on a BATFE decision one day does not necessarily mean they can rely on it another day. While you may be right in your interpretation, consider your client sitting in jail and paying tens or hundreds of thousands of dollars to defend a position that could have been dealt with in a few words or actions. The BATFE is not an agency your client wants to find themselves at odds with.

2. Estate Planning Opportunities

Firearms are commonly left in estates to be dealt with by the trustee or personal representative. Trustees or personal representatives are often afraid of firearms left behind because they do not know whether the firearm is legal or carries liability that will attach to the new owner. For these reasons, many firearms never show up in probate, ultimately resulting in their mysterious loss. This creates an incredible opportunity to remove a personal representative or trustee for their breech of fiduciary duties for the missing firearms.

Many attorneys that practice estate planning know that it is often difficult to try and get a trustee or personal representative removed because they are suffering from a drug addiction. While many judges will not remove solely on the basis of having a drug addiction, they may reconsider if the estate has firearms. Bringing this up to a judge may increase an attorney's chance of getting a trustee or personal representative removed.

B. Estate Administration

An attorney working with an estate should first determine whether there are firearms in the estate, and if so, whether the firearms are subject to the NFA. If the firearm is subject to the NFA, the attorney should then determine whether or not the firearm is properly registered

and stored. If the registration cannot be found, the attorney should write the BATFE in order to determine the firearm's status. BATFE, *ATF National Firearms Handbook,* (April 2009) available at http://www.atf.gov/firearms/publications/firearms/nfa_handbook/. If their National Firearms Registration or Transfer Record (NFRTR) does not show that the firearm is registered, the BATFE will request the administrator or executor of the state to contact the local BATFE field office, so the firearm can be destroyed. 26 U.S.C.S. § 5841. While most attorneys are good intentioned and would comply with the BATFE's request, they may be doing a disservice to his/her client. The average machinegun has a value in excess of twenty-thousand dollars, and some are worth more than two-hundred thousand dollars each. The parts to some of these machine guns may be just s valuable.

In cases where the facts are complicated, not clear, or deviate from situations regarded as straightforward by the BATFE, the attorney should advise the heirs to retain an attorney who is experienced in NFA law, such as a Gun Trust Lawyer®. This would be advisable in cases where (1) the firearm is rare or valuable, and/or (2) the firearm as regarded as a family heirloom.

Allowing the BATFE to destroy a firearm once it is determined to be contraband may be considered malpractice. The BATFE generally wishes to destroy the entire firearm; however, this is not always necessary. The BATFE National Firearms Handbook provides in part, "The preferred method for destroying a machinegun receiver is to completely sever the receiver in specified locations by means of a cutting torch that displaces at least one quarter inch of material at each cut location." BATFE, *ATF National Firearms Handbook,* (April 2009) available at http://www.atf.gov/firearms/publications/firearms/nfahandbook/. But, "A machinegun receiver may also be properly destroyed by means of a saw cutting and disposing of certain removed portions of the receiver." *Id*. at 22. Required standards for the destruction of specific machine gun receivers are published by the BATFE. *Id.* at Appendix B (ATF Rulings 2003-1, 2003-2, 2003-3, 2003-4). Destroying only the receiver would allow the estate to sell the "parts," which may constitute a large sum of money. As an alternative to destruction, the estate may also consider donating the firearm to a museum, which has its own pros and cons.

As more and more war veterans grow old, the issues of machine guns brought back from those wars will require estate attorneys to deal with the complex legal issues involved. Attorneys should be aware that heirs may believe certain firearms are just firearms, when in reality they fall into strict regulations that can bring large punishments. The fact that the BATFE has known since 1981 that more than 100,000 Title II firearms are registered to deceased persons seems very troublesome; yet, the BATFE has failed to take any action regarding this massive group of firearms. Deron Dobbs, Status Report National Firearms Registration and Transfer Record, 15 (1981), available at http://www.nfaoa.org/documents/DeronDobbs.pdf. The issue of firearms in estates can be very troublesome, and attorneys with little or no knowledge of firearms law should be prepared to contact an attorney that specializes in Firearms, such as a Gun Trust Lawyer®. Grandpop's Machine Gun in the Chest, Joshua Prince (2007).

VIII. CONCLUSION

The Gun Trust is a powerful tool in asset protection, estate planning, and probate avoidance. As legislation continues to become more restrictive, many Americans fear losing Title II firearms to government seizure and confiscation. A number of special interest groups are campaigning and lobbying Congress to prevent future transfers of Title II firearms. If this occurs, any firearms that are part of the probate estate are forfeited at death. Any personal or economic value becomes worthless. The beauty of a Gun Trust is that an adult child, family member, or friend can easily be a co-owner of the trust. Because the Gun Trust is the registered owner, the actual ownership of the trust can easily change while the trust remains the registered owner, ultimately rendering transfer legislation and restrictions inapplicable. If you are interested in providing Gun Trusts to your clients who are owners of Title I or Title II

firearms and have questions regarding the formation of Gun Trusts contact a Gun Trust Lawyer® at 877-7GUN-LAW or by visiting http://www.GunTrustLawyer.com.

Estate Planning Council of Central Texas

Digital Assets, Pets, and Guns:

Estate Planning Does Not Include Just Grandma's Cameo Brooch Anymore

Gerry W. Beyer
Governor Preston E. Smith Regents Professor of Law
Texas Tech University School of Law

$5 million for illegal drug distribution?

Ashawna Hailey
Died October 14, 2011

2

Tan skin for book bindings?

Donal Russell
Died February 3, 1994

3

Eat my cremains?

John De Mol

4

Digital Assets

5

Overview

- What are "digital assets" and "digital estates"?
- The importance of planning for these assets.
- How user polices impact the planning process.
- How Federal law impacts the planning process.
- Methods to plan for digital assets.
- Obstacles to planning for these assets.
- Fiduciary access to digital assets.
- Thoughts for the future.

6

Definition of Digital Assets

"Text, images, multimedia information, or personal property stored in a digital format, whether stored on a server, computer, or other electronic device which currently exists or may exist as technology develops, and regardless of the ownership of the physical device upon which the digital asset is stored. Digital assets include, without limitation, any words, characters, codes, or contractual rights necessary to access the digital assets." [proposed Oregon statute]

7

Digital Assets -- Personal

- Types of Files:
  - Documents – word processing, pdf, etc.
  - Photos
  - Music (mp3)
  - Videos
  - Spreadsheets
  - Tax records and returns
  - PowerPoint presentations
  - e-mail and text messages
  - e-books

8

Digital Assets -- Personal

- Location of files:
  - Computer
  - Smart phone
  - Tablet
  - e-reader
  - Camera
  - Memory cards or USB flash drives
  - CDs and DVDs
  - Online in the cloud

9

Digital Assets -- Personal

- Gaining access:
  - Password to start device.
  - Password to access operating system.
  - Password to open document.
  - Password to access website where material stored.

10

Digital Assets – Social Media

11

Digital Assets – Financial Accounts

- Examples:
  - Bank accounts
  - PayPal
  - Bitcoin
  - Investment and brokerage accounts
  - Utility bill payment (water, gas, telephone, cell phone, cable, and trash disposal)
  - Loan payments (mortgage, car, etc.)
  - IRS e-filing

12

Digital Assets – Business Accounts

- Examples:
  - Customer information databases (names, addresses, credit card numbers, order history, pending orders, etc.).
  - Inventory.
  - Client records (attorney, CPA, etc.).
  - Patient records (physicians, dentists, etc.).
  - eBay accounts.

13

Digital Assets – Internet Sites

- Domain Names
- Blogs

14

Digital Assets – Loyalty Program Benefits

- Examples:
  - Frequent flyer points.
  - Credit card "cash back" or "reward points"
  - Business "points," discounts, or vouchers.

15

Digital Assets -- Others

16

Importance of Planning

- 1. Make things easier for your family and executor when you die or become disabled.

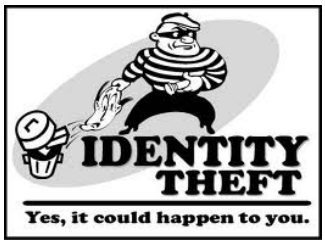
Life
100% fatal

Disability > 90 days
60% chance

17

Importance of Planning

- 2. Prevent identify theft.



18

Importance of Planning

- 3. Prevent Loss to Estate

19

Importance of Planning

- 4. Avoid Losing the Deceased's Story

20

Importance of Planning

- 5. Protect Secrets from Being Revealed

21

Deceased User Policies
Terms of Service

- May govern what happens upon death.
- Did decedent *really* know or agree?

22

Deceased User Policies
Ownership vs. License

iTunes

amazonkindle

Flixster

23

Federal Law
The Acts

- Stored Communications Act
- Computer Fraud and Abuse Act

24

Federal Law Interface with User Agreements

- Agreements often prohibit user from granting others access to account.
- Thus, revealing user name and password may be in violation of federal statutes prohibiting access without lawful consent.

25

Federal Law Interface with User Agreements

- Some proposed statutes provide that they supersede any contrary provision of the user agreement.
- Raises issues such as:
  - Interference with contract rights.
  - Are terms of service against public policy and thus unenforceable?
  - Effect of choice of law provisions.
  - Constitutionality of such provisions.

26

Planning Suggestions

- 1. Specific Disposition According to Provider's Instructions

Select data to be shared with this trusted contact

Once your account has timed out, your trusted contact can download your data for 3 months.

Select all

+1s
Blogger
Contacts
Drive
Mail
Reader
YouTube

27

Planning Suggestions

- 2. Backup to Tangible Media

28

Planning Suggestions

- 3. Comprehensive Inventory -- Contents
  - Detailed form in the Appendix to the article

29

Planning Suggestions

- 3. Comprehensive Inventory -- Storage
  - Trusted person
  - Encrypted
  - Safe deposit box
  - Online password storage
  - Warning: Potential of violation of federal law:
    - Stored Communications Act
    - Computer Fraud and Abuse Act

30

Planning Suggestions

- 4. Provide Immediate Access to Portions of Digital Estate

shutterfly where your pictures live

DropShots

YouTube

Same warning as previous suggestion if service not designed for multiple users.

31

Planning Suggestions

- 5. Authorize Agent to Access Digital Assets

32

Planning Suggestions

- 6. Digital Asset Trust
  - Client transfers digital asset to trust
    - Digital asset must be transferable
    - Practical for valuable assets
    - Perhaps useful for license-based assets that expire upon "death"
  - Digital asset titled in the name of trustee of the trust.
  - Upon client's death or disability, trustee handles the asset according to the client's stated instructions.

33

Planning Suggestions

- 7. Will
  - Do not include user names and passwords as will becomes public record.
  - Useful to transfer digital asset upon death.
  - But, asset may be governed by user policy:
    - Not transferable.
    - Ends upon death.
    - Analogous to a non-probate asset.

34

Planning Suggestions

- 8. Online Afterlife Company
  - Storage for user names and passwords.
  - Send messages upon death.
  - Send messages thereafter.
  - Warning: Must use due diligence to investigate. Can they do what they claim and will they be in existence when needed?

35

Obstacles to Planning

- 1. Safety
  - Computer or papers can be stolen.
  - Encryption can be broken.
  - Internet storage can be hacked.

36

Obstacles to Planning

- 2. Hassle -- Information changes rapidly:
  - Accounts opened.
  - Accounts closed.
  - Passwords change.
  - Equipment is bought and sold.

37

Obstacles to Planning

- 3. Uncertain Reliability of Afterlife Companies and Ability to do What Promised

38

Obstacles to Planning

- 4. Potential Federal Law Limitations
  - Can a fiduciary force a turnover?
  - Will provider disclose voluntarily?

Sahar Daftary

39

Fiduciary Access to Digital Estate

- 1. First Generation State Law
  - E-mail coverage only

40

Fiduciary Access to Digital Estate

- 2. Second Generation State Law
  - Records stored electronically

41

Fiduciary Access to Digital Estate

- 3. Third Generation State Law
  - Broader coverage to include social media and microblogging

42

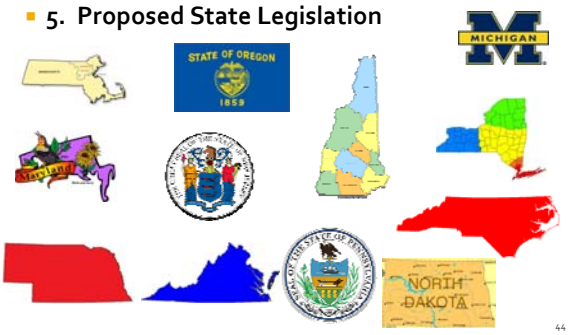
Fiduciary Access to Digital Estate

- 4. Specialized State Legislation
  - Only if deceased account holder is a minor.

43

Fiduciary Access to Digital Estate

- 5. Proposed State Legislation



44

Fiduciary Access to Digital Estate

- 6. States Studying the Issue

45

Fiduciary Access to Digital Estate

- 7. Fiduciary Access to Digital Information Act
  - Drafting committee is working on model act.

46

Thoughts for the Future

- 1. Amend federal statutes
- 2. Enact comprehensive state legislation
- 3. Providers Gather User's Actual Preferences

47

Questions?

48

Pets

49

Pet Ownership in America Today

- 71.1 Million households own at least one pet (63% of all households)
  - Dogs = 43.2 million households
  - Cats = 37.7 million households
  - Fish = 14.7 million households
  - Birds = 6.4 million households

50

Best Cat Ever!

51

Potential Benefits of Pet Ownership

- Unconditional love
- Companionship
- Lowered blood pressure
- Lessened risk of heart disease
- Improved concentration and mental attitude
- Shortened recovery time after hospitalization

52

Treatment of Pets

- Surveys reveal:
  - 79% sleep with pets
  - 70% would rather be stranded on desert island with pet than spouse
  - 31% take off work to be with a sick pet
  - 68% dress up pets for the holidays
  - Huge rewards for return of lost pets or locating person who kills pet

53

Famous Examples

- Leona Helmsley & Trouble

54

Famous Examples

- Dusty Springfield & Nicholas

55

Famous Examples

- Doris Duke – dog

56

Underserved area of estate planning

- Vast majority of people do not have wills.
- Of those with wills, only a small percentage plan for their pets.
- What planning is done, is often inadequate.

57

Short-Term Care Planning

58

Short-Term Care Planning

- 1. Animal Card
  - Carry in wallet to alert emergency personnel

WALLET ALERT CARD

In the event of an emergency, please call the emergency caregivers for my pets listed on the back of this card

THE HUMANE SOCIETY OF THE UNITED STATES

PET OWNER'S NAME

I HAVE _____ PETS IN MY HOME

PET'S NAME TYPE OF ANIMAL

Front

59

Short-Term Care Planning

- 1. Animal Card
  - Carry in wallet to alert emergency personnel

EMERGENCY PET CAREGIVERS

NAME

DAYTIME PHONE EVENING PHONE

NAME

DAYTIME PHONE EVENING PHONE

NAME

DAYTIME PHONE EVENING PHONE

IF THEY ARE NOT AVAILABLE, PLEASE CALL MY *(circle one)*

PET SITTER VETERINARIAN BOARDING KENNEL

NAME PHONE NUMBER

Back

60

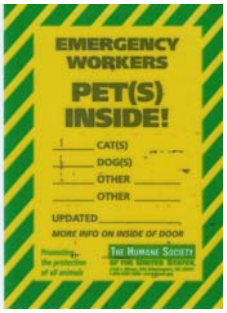
Short-Term Care Planning

- 2. Animal Document or Notebook
  - Detailed information
  - Easy for caregiver to find
  - Consider keeping near food
  - Include all important information and documents

61

Short-Term Care Planning

- 3. Door Sign



62

Short-Term Care Planning

- 4. Durable Power of Attorney
  - Authorize agent to spend pet owner's money for pet care.
  - Authorize agent to place pet with caregiver and to pay caregiver's expenses and/or a fee.

63

Long Term Planning Overview

- 1. Traditional Pet Trust
  - Effective in all states.
  - Caregiver/Beneficiary receives funds for pet care in accordance with pet owner's (settlor's) directions.
  - Comprehensive plan
  - Analog to gift in trust for children
  - The "gold standard" of pet planning

64

Long Term Planning Overview

- 2. Statutory Pet Trust
  - Authorized in 46 states and D.C.
  - Simple plan
  - Statute provides operation and enforcement provisions
  - Analog to Uniform Transfers to Minors Act gift for children.
  - The "better than nothing" pet plan.

65

Traditional Pet Trusts – Factors to consider

- 1. Inter Vivos or Testamentary
  - Inter Vivos
    - Avoids delay and gap in pet's care.
    - Increased lifetime costs and hassles.
  - Testamentary
    - Probate of will required.
    - De minimus lifetime expense.

66

Traditional Pet Trusts – Factors to consider

- 2. Designate Caregiver/Beneficiary
  - Interview carefully.
  - "Test" animal in person's household.
  - Name alternates.
  - Never name trustee as destroys checks/balances.
  - Consider animal care panel to select alternate caregivers.

67

Traditional Pet Trusts – Factors to consider

- 3. Nominate Trustee
  - Individual or corporate?
  - Compensation?
  - Name alternates

68

Traditional Pet Trusts – Factors to consider

- 4. Transfer animal to trust – "animal funding"
  - Inter vivos = deliver animal to trustee along with appropriate ownership documents.
  - Testamentary = specific bequest of animal in pet owner's will to the trustee, in trust.
  - Trust then provides for trustee to deliver custody (not ownership) of animal to the caregiver/beneficiary.

69

Traditional Pet Trusts – Factors to consider

- 5. Transfer other property to trust
  - Factors:
    - Type of animal
    - Life expectancy
    - Potential of expensive medical costs
    - Fee for trustee and/or caregiver
    - Liability insurance injuries pet causes
    - Health insurance for pet
    - Size of pet owner's estate
  - Warning
    - Do not transfer unreasonably large amount of property as it triggers contests by heirs and beneficiaries.

70

Traditional Pet Trusts – Factors to consider

- 6. Describe pet's standard of living
  - Daily care
  - Routine medical care
  - Emergency care
  - End of life plans
  - Should be specific, detailed as to each pet

71

Traditional Pet Trusts – Factors to consider

- 7. Specify distribution method for pet's care
  - Fixed sum
    - Simple
    - Not account for change in circumstances
  - Fix sum and give the trustee discretion to pay additional expenses.
  - Expense reimbursement only

72

Traditional Pet Trusts – Factors to consider

- 8. Consider additional distributions for caregiver/beneficiary
  - Distributions may increase quality of care.
  - Distributions decrease amount available for pet care.

73

Traditional Pet Trusts – Factors to consider

- 9. Limit duration of trust
  - Comply with your state's version of the Rule Against Perpetuities.

74

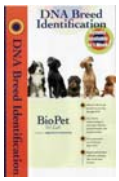
Traditional Pet Trusts – Factors to consider

- 10. Designate remainder beneficiary
  - Consider charity which benefits same type of animal.
  - Do not name caregiver as then caregiver lacks incentive to keep animal alive.

75

Traditional Pet Trusts – Factors to consider

- 11. Identify animal to prevent fraud
  - Special Identifying marks
  - Tattoo
  - Microchip
  - DNA



76

Traditional Pet Trusts – Factors to consider

- 12. Require trustee to inspect animal
  - Random unannounced at-home visits.

77

Traditional Pet Trusts – Factors to consider

- 13. Provide instructions for final disposition of pet
  - Pet cemetery
  - Cremation
  - Memorial site on Internet

78

Statutory pet trusts

- "I leave $10,000 in trust to care for Rover."
- Statute "fills in the blanks"
  - Person to enforce
  - Use of money
  - When trust ends
  - Distribution of remaining property

79

Other Planning Options

- 1. Outright gift of animal and money
  - Risky and uncertain, but cheap and easy.
- 2. Transfer to life care center
  - Good for hard-to-place animals (exotics, farm animals, etc.).
  - May require significant "endowment."
  - Quality varies tremendously so due diligence is essential.

80

Questions?

81

Guns

82

Prevalence of Weapon Ownership

- 43% of Americans keep a gun in their home.
- Over 250,000 machine guns and other NFA weapons are registered.

83

Planning for Non-NFA Weapons

- Non-NFA Weapons
  - Revolvers
  - Pistols
  - Rifles
  - Shotguns

84

Planning for Non-NFA Weapons

- Beneficiary must be able to possess under state law. For example:
  - Client does not know beneficiary intends to use weapon in unlawful manner.
  - Beneficiary is not under 18.
  - Beneficiary not convicted of felony or certain misdemeanors.

85

Planning for Non-NFA Weapons

- Planning advice
  - Conduct background check of intended beneficiary to be certain beneficiary could possess the weapon.

86

Planning for Non-NFA Weapons

- Planning advice
  - Name alternate beneficiary if intended beneficiary is ineligible.

87

National Firearms Act of 1934

- Enacted in response to violence that accompanied Prohibition.
- Governs:
  - Purchase
  - Sale
  - Transfer
  - Ownership
  - Use
  - Possession

88

Other Relevant Federal Laws

- Gun Control Act of 1968
- Firearm Owners' Protection Act of 1986
  - Transfer of machine guns lawfully possessed as of May 19, 1986 still allowed.

89

NFA ("Title II") Weapons

- 1. Machine Guns

Weapon that can automatically fire more than one shot without manual reloading by a single pull of the trigger.

90

NFA ("Title II") Weapons

- 1. Machine Guns

Includes parts that convert weapon into a machine gun such as a sear.

91

NFA ("Title II") Weapons

- 2. Short-Barreled Shotguns and Rifles

barrel less than 18" in length or total length less than 26"

92

NFA ("Title II") Weapons

- 3. Silencers

93

NFA ("Title II") Weapons

- 4. Any other weapon

  Concealed and gadget weapons

94

NFA ("Title II") Weapons

- 5. Destructive devices

95

Transfer of NFA Weapons

- Long and tedious process
  - Complete ATF Form 4
  - Pay $200 tax
  - Obtained signed law enforcement certificate
  - Duplicate set of forms with original signatures
  - Photos of applicant
  - Two FBI Forms FD-258 (fingerprints)

96

Transfer of NFA Weapons

- Result if transfer not properly done
  - Up to 10 years in prison
  - Up to $250,000 in fines
  - Forfeiture of weapon
  - Forfeiture of any vehicle used to convey or conceal the weapon

97

Possession of NFA Weapons

- Only the owner may possess.
- Innocent possession is in violation of federal law.
- Constructive possession is in violation of federal law.

98

Upon Owner's Death if No Planning

- Determine if weapon was registered
  - Locate registration document.
  - If cannot, contact ATF to see if it was registered.

99

Upon Owner Death if No Planning

- Unregistered NFA weapon discovered
  - Turn over to law enforcement immediately
  - Estate cannot register the weapon retroactively
  - If not act quickly, family members could be deemed in possession and in violation of federal law.

100

Upon Owner Death if No Planning

- Registered NFA weapon discovered
  - Personal representative responsible for transferring to beneficiary, assuming beneficiary is capable of owning the weapon.
  - Has reasonable time to transfer.
  - The $200 tax is not levied on this transfer.
  - Transfer process is very burdensome on PR.

101

Gun Trusts

102

Gun Trusts

- The NFA allows NFA weapons to be registered in the name of a trust.

103

Transfer of Weapon to Gun Trust

- Gun owner may apply directly to ATF for transfer of weapon to a gun trust.

  This means the following formalities are ***not*** needed:
  - Signature of a law enforcement officer or judge
  - Photos
  - Fingerprints

104

Key provisions of gun trust

- 1. Effective for both regular weapons and NFA weapons.

105

Key provisions of gun trust

- 2. Trustee has possessory and use rights
  - The trustees may legally possess and use the weapons in the trust.
  - Successor trustees have the same rights.

106

Key provisions of gun trust

- 3. Useful for previously owned and newly acquired weapons
  - Settlor can transfer currently owned weapons to the trust.
  - The trust can purchase additional weapons.

107

Key provisions of gun trust

- 4. Trustee determines if ultimate beneficiary is a proper owner
  - If person can own weapon, is the beneficiary sufficiently mature and responsible?
  - If not, settlor provides instructions on what trustee should do with the weapon.

108

Key provisions of gun trust

- 5. Reduces constructive possession risks
  - The settlor gives the trustee the ability to add and remove authorized users (trustees).

109

Key provisions of gun trust

- 6. Multiple-generation protection possible
  - If the gun owner wishes to keep the weapons in the family, consider forming trust in a state that has abolished the Rule Against Perpetuities.

110

Key provisions of gun trust

- 7. Possible protection from future transfer restrictions
  - Federal laws may be changed to restrict transfer.
  - Because the trust is the owner, no transfer occurs even though trustees and beneficiaries may change.

111

Options to Avoid

- 1. Ownership by business (corp., LLC, FLP, etc.)
  - Not private so much information on public record.
  - Additional hassles and expenses to create and administer.

112

Options to Avoid

- 2. Folding guns into trusts holding other assets
  - NFA weapons have unique rules so trustees need specialized knowledge.
  - Traditional trusts may provide for disposition of assets in a way that would be improper for NFA weapons.

113

Options to Avoid

- 3. "Internet" and "gun shop" trusts
  - Not prepared with sufficient expertise.
  - No personalized advice to carry out the client's intent.

114

Questions?

115