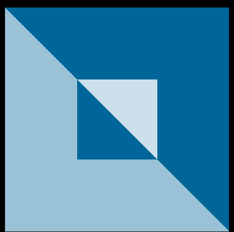

Law Offices of John L. Laster

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John L. Laster

Spring 2010

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Observations from the (Almost) Empty Nest

A word from Attorney John L. Laster

The Laster household is about to enter a new phase -- empty-nesters -- and it's causing serious thinking for my wife and me. Since 2001, our bright and talented daughters have been leaving our home, flying toward exciting and meaningful new challenges (which sometimes look a little scary to those who love them).

As they enter adulthood, we enter life without daily involvement with them. As they become legally responsible for their own decisions, we become less the safety net than we were when they were, say, five years old. From an estate planning perspective, we have never thought about them as potential decision-makers – simply because they were too young. We never had to consider if there were reasons to name them or not to name them as agents under powers of attorney or successor trustees or executors.

Paradoxically, these young adults are leaving Virginia just as they become legally able to make decisions for us should we become incapacitated. They could also now legally handle our estates if we died. Do we want to name them instead of the folks we have relied on until now?

One of my "rules" for picking agents under powers of attorney is, as many of you know, "a good agent is an available agent." Is it fair to ask young adults to drop everything to come back? And, even if it's OK with them, is it the right thing for us? But if we don't name them, aren't they more likely to get their noses out of joint – at just the wrong time?

Evolving parent-child relations brings new estate planning challenges.

Their being young adults also raises the "trust or no trust" question. How should we be structuring the trusts for them? Do we / they even need trusts? And if we think that

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Pet Trusts: No Longer in the Dog House Chris Tomlin

Many of us have always felt a special attachment to our pets, who, as we care for them, nurture them, and enjoy their companionship, come to feel like part of the family. When designing an estate plan, many pet owners want to make sure that, if their pets survive them, these pets will enjoy the same care and comfort as before. How best to accomplish this goal can vary under the circumstances. Sometimes the pet owner has friends or family members who are willing and eager to welcome the pet into their homes. In this case, we can include a clause in the pet owner's Will that gives the pet to a particular caretaker. Sometimes, pet owners will also choose to give the caretakers a cash gift, to cover any expenses they might incur while caring for the pets. Of course, under an arrangement like this, there is no way to guarantee that (i) the appointed caretaker will actually take custody of the pet; (ii) the appointed caretaker will treat the pet properly; or (iii) the funds given to the caretaker will actually be used on behalf of the pet.

As for ensuring that your pet receives proper care, this is difficult to guarantee, although choosing trusted caretakers and providing them with specific directions can go a long way. Many pet owners have found it helpful to create a specific document with instructions and

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Executor, Executrix, Administrator, Administratrix Personal Representative,

All of these terms describe the person in charge of handling a deceased person's estate. Why so many different terms? The differences are sometimes jurisdictional — Virginia uses the term Executor, while Maryland and DC both use Personal Representative. The term Administrator is used when the deceased person died without a will. The suffix "ix" is used when the Executor or Administrator is

Just Compensation: A guide to compensating your fiduciary

Chris Tomlin

When clients come to our office to discuss their estate planning goals, many of them have already given some thought to the persons they would choose to serve in a fiduciary capacity – as the trustee of a trust, executor of an estate, or as an agent under a power of attorney. We hear "My sister is really organized and good with money, so she should serve as trustee of my children's trust" or "My son has never been detail-oriented – I don't think he should handle my estate." But one issue that clients seldom consider beforehand is whether, and how, their fiduciaries should be compensated for the time spent handling their affairs.

Being selected as a fiduciary is an honor – it means that someone in your life trusts your judgment, your honesty, and your ability to get things done – but with this honor comes great responsibility and, more often than not, a great deal of **work**. As such, it is typical to provide for some method of compensating fiduciaries for their time and effort.

To provide some context, our local jurisdictions provide for the following compensation to Executors, based on a percentage of the assets in the estate (see table to the right):

Virginia

5% of the first $400,000

4% of the next $300,000

3% of the next $300,000

2% over $1,000,000

Maryland

9% of the first $20,000

3.6% of everything over $20,000

District of Columbia

Reasonable compensation

Alternately, if you specify the amount of compensation in your will, that compensation schedule (if reasonable) will be given effect. It should be noted that, in some cases, basing compensation on a percentage of the assets might not be desirable. Sometimes, a fairly small estate will require an amount of work that is completely out of proportion with the estate's value, in which case a flat fee or hourly billing might be more appropriate.

(Trustee compensation is typically taken on an annual basis, since trusts are more likely to last for a number of years, and shrink or grow in size as years go by. Depending on the circumstances, trustee compensation of 1% annually is generally considered reasonable.)

Some of you might be wondering, "What if my fiduciary doesn't want any compensation?" This is not uncommon – fiduciaries often consider their duty to be a "labor of love," and resist the idea of taking compensation. Also, some fiduciaries feel that taking compensation may cause friction between them and the beneficiaries, whose inheritances may be reduced by the amount of any compensation taken. Indeed, a fiduciary can always choose to waive compensation; this decision should be made on a case-by-case basis. We suggest leaving it up to the person whom you trust.

One thing that many people are inclined to do, but which we discourage, is to leave their appointed fiduciary a specific gift in their Will, to thank them for serving as Executor. However, this technique might backfire, and have the effect of benefiting someone who never serves as Executor. This is because just naming someone as Executor does not mean that they are legally required to serve in that role. If you name your friend Peter as Executor, and give him a gift in your Will of $20,000 to thank him for his service, Peter can then decline the invitation to serve as Executor, but still collect his money. You might be thinking "Couldn't I just make the gift to Peter conditional – so it only takes place if he actually serves as Executor?" This could be tricky too, for Peter could get appointed as Executor by the court – thus satisfying the condition necessary to receive his gift – and then resign before completing the administration of your estate. (This is not to suggest that Peter is a conniving friend – he may simply have other things going on in his life that prevent him from taking the time to serve as Executor.) On balance, it usually makes more sense to provide for straight compensation based on performance.

In many circumstances it makes little sense to take compensation for handling an estate, primarily when the Executor is also a beneficiary. Beneficiaries do not pay federal income tax on inherited money, whereas money received as Executor compensation is considered taxable income. Therefore, a beneficiary who also serves as Executor might be better off taking the inheritance and skipping the compensation. For this reason, when drafting a will for a client, we often specify that the client's spouse and children will serve *without* compensation.

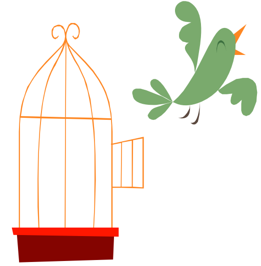
While many individual fiduciaries have been known to waive compensation, it is rare for a "corporate" fiduciary to do so, since they are in the business of providing such services. A corporate fiduciary is a bank, trust company, or attorney who serves in a fiduciary capacity, usually as or a trustee or an executor. Corporate fiduciaries generally have a published schedule of rates for their services; these rates can vary considerably depending on the amount and nature of the property in question. If you are interested in appointing a corporate fiduciary, we would be happy to discuss different options with you.

Providing appropriate compensation for your fiduciary might also lead to more effective help from that person. By nature, people are more inclined to spend time and energy on things they are getting paid for than things they are not getting paid for — particularly when these things might distract them from other obligations. Whatever your circumstances, we encourage you to consider the time and energy that your fiduciaries may expend on your behalf, and to choose a compensation structure that makes sense based on the

Observations from the (Almost) Empty Nest *(continued from pg. 1)*

trusts are still a good idea, then, realistically, who's going to be the trustee? We have seen what happens to young people during their 20's – some are incredibly sober with their money; others treat it like the contents of a plastic water bottle. It's hard enough for us to decide when to help our children with money; how can we expect someone else to do it for us? (One way of handling this problem is to not die or become incapacitated – which is an OK plan – but it cries out for a backup.)

So, our estate planning needs have changed, but they still require our thoughtful attention. Think about whether the same may be true for you!



Sometimes it can feel like they are going to fly away and never come back.

Pet Trusts: No Longer in the Dog House (continued from front page)

recommendations on how best to care for their pets (daily routines, food and diet, grooming, medical care, burial instructions, etc.), which can be provided to the caretakers ahead of time.

Ensuring that the money you set aside is spent on behalf of your pets can be very tricky. If you leave money outright to your pets' caretakers, with the expectation that it will be spent for the pets, the caretakers are under no particular obligation to do so. (Indeed, an unscrupulous pet caretaker could use the pet money to fund, say, a family vacation.) Or, a caretaker could take custody of the pet, only to have the pet die several months later, leaving the caretaker with a "windfall" of the money remaining from the original cash gift.

To the rescue comes the "pet trust." Most states, including the three local jurisdictions, now permit the creation of pet trusts. Historically, attempts to create a trust for the care of an animal would fail for a variety of reasons, mainly because the trusts lacked a human beneficiary who could appear before a court to enforce the terms of the trust. Now, concerned pet owners can provide for their pet using a pet trust, which gives them the peace of mind that any money earmarked for pet care will actually be used for that purpose.

There are several roles that come into play when administering a pet trust: (i) a Caretaker, who takes custody of the pet and cares for the pet on a day-to-day basis; (ii) a Trustee, who manages the trust funds and, as needed, distributes money to the Caretaker; and (iii) an Enforcer (a/k/a Protector), who has the role of monitoring the caretaker and trustee to make sure the pet is receiving proper care, and that the trust funds are being managed properly. It is the Enforcer who has the power to enforce the terms of the trust by appearing before a court. If no Enforcer is appointed in the trust, a person interested in the welfare of the pet can be appointed by the court for this purpose.

In many ways, a trust established for the care of an animal beneficiary is not unlike a trust established for the care of human beneficiary. In both cases, funds are set aside for a particular purpose, and a trustee manages the funds and makes distributions according to the terms of the trust. However, a pet trust involves a few unique considerations, some of which we address below. We currently contemplate the following issues, among others, when designing a pet trust.

1. **Size of Trust**. Choosing how much money to put in your pet trust can vary considerably depending on the number of pets, the type of pets, the pets' medical needs, the pets' standard of living, and the lifestyle of the caretaker. Bear in mind that medical care for most pets can be quite costly, as can "doggy day care," pet grooming, dog walkers and kennels, which may be needed if the caretaker is busy with work or travel obligations and cannot always provide these services personally. Also, placing *too much* money in a pet trust may ruffle the feathers of your other beneficiaries and inspire them to challenge the terms of the trust. A judge faced with such a challenge has the power to reduce the size of the pet trust to a more reasonable level. For this reason, we often include a "statement of purpose," which gives pet owners a forum to explain their intent in creating the pet trust and discourage any challenge to its size or existence.

2. **Compensation**. Although your chosen Caretaker, Trustee, and Enforcer might scoff at the idea of being paid to care for a pet, we recommend providing for some sort of compensation, which will discourage your pet's fiduciaries from neglecting your pet, and give them a greater incentive to keep your pet alive and healthy.

3. **Remainder Beneficiaries**. It is important to clarify who will receive any funds remaining in the pet trust once the pet is no longer living. In some cases, it might not be wise to direct these funds

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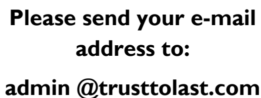

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Pet Trusts: No Longer in the Dog House (Continued from pg. 3)

to the Caretaker or Trustee, as this will give them a disincentive to spend generously for the pet's benefit, and even to keep the pet alive. (Although we hope that your chosen fiduciaries are not quite so avaricious.)

4. **Backup Caretakers and Trustees**. Your chosen Caretaker might be unable to care for your pet, in which case you should provide for a backup. If no friends or family are comfortable serving in this role, you may wish to name a local no-kill animal shelter to take the pet as a last resort. Likewise, it is always a good idea to name a backup Trustee.

5. **Proper Care.** Our pet trusts currently provide a standard list of behaviors and practices that would constitute proper care of a pet (e.g., regular bathing and grooming, exercise, healthy diet, etc.). These are intended as guidelines for the Caretaker. Most pet owners are acutely aware of their pets' particular likes and dislikes, and can "personalize" this section with their own input, or include a separate memorandum spelling out standards of care, along with information about preferred veterinarians or other pet care professionals.

6. **End-of-life Decisions.** As painful as it might be consider this possibility, it can be helpful to outline the circumstances under which you authorize the Caretaker to have your pet euthanized. (Our pet trusts typically require a letter from a veterinarian who has examined the pet and believes that euthanization would be the most humane course of action.) Some pet owners have specific wishes about the disposition of their pets' remains (e.g., cremated and preserved in an urn, buried at the family farm, etc.). This would be an appropriate place to express these wishes, and to authorize the Trustee to spend trust funds for this purpose.

7. **Disappearance or Absence.** Unfortunately, pets sometimes become lost or missing. In case this happens, it is a good idea to permit your pet's Caretaker to use trust funds in an attempt to recover the pet. (You would be amazed at the sorts of methods that exist nowadays to find lost pets!) Furthermore, a pet trust is only permitted to last for the lifetime of the pet – if your pet goes missing for an unreasonable amount of time, under circumstances that give no indication as to whether the pet is still living, you may wish to specify a time period after which your trustee can dissolve the trust.

Certainly, a pet trust is not for every pet owner, and the costs of designing and administering the trust should always be taken into consideration. Regardless of whether you choose to create a pet trust, it is important to make some type of arrangements for the future care of your pets. Many of us assume that a friend or family member will step in and care for our pets, which unfortunately is not always the case. We encourage you to