



When I think back to law school, one of the cases we read which struck me perhaps as being among the more “unjust” was the case of Roxy Russell in my wills and trusts course, *Estate of Russell*, 69 Cal. 2d 200; 444 P.2d 353; 70 Cal. Rptr. 561. In this seminal case on the validity of a bequest to an animal in a will, the California Supreme Court held that the testatrix’ gift of half of everything she owned, “real and personal” to her Airedale dog, Roxy Russell, was invalid and void. The court based its holding on the fact that Section 27 of the California Probate Code enumerated those entitled to take by will and that “Dogs are not included among those listed in Section 27. Not even Airedale dogs.” This came as a particular blow to me, an ardent animal lover, not to mention, the former owner of an Airedale.

I came to recognize of course that the law views all animals as property, and that you cannot leave property to property, which would have no legal standing to enforce the bequest. Nonetheless, I wondered what would have become of Roxy had the gift been valid—the life she could have led!

Flash forward about ten years. I had been in private practice for sometime and had been taking one of my current dogs to St. Francis Hospital as a therapy dog to visit the elderly. Several people there expressed a concern for their pets, and asked how they could continue to provide care for their pets after they had died. I researched the laws regarding pet trusts and was faced with the realities of the *Russell* case as well as other issues including those involving the common law rule against perpetuities (under the law trusts must be measured in human lives, not the lives of the pets they would be intended to benefit) and honorary

# Can Spot Get the Porsche? A Look at Hawaii’s New Pet Trust Law

By Emily Gardner, Esq.

trusts (which are generally deemed unenforceable). I found, however, that several states had recently adopted laws validating trusts for pets and domestic animals. Why couldn’t we have a similar law in Hawaii?

## Enter HB 1453

This year the Hawaii State Legislature unanimously passed HB 1453, which validates trusts for domestic and pet animals extending beyond the death of the transferor. The bill was signed by Governor Lingle on June 24<sup>th</sup>. The new law is modeled largely after similar laws that have been enacted in other states, and is an amendment to the Hawaii Probate Code (H.R.S. § 560).

The language of the law provides that “a trust for the care of one or more *designated* domestic or pet animals shall be valid, “and “terminates when no living animal is covered by the trust.” The law is to be construed liberally to bring a transfer within compliance and to presume against the honorary nature of its disposition. In addition, under the new law, extrinsic evidence is admissible to establish the transferor’s intent. Moreover, section 7 of the law expressly exempts the trust from the operation of the Uniform Statutory Rule Against Perpetuities. This is particularly relevant to the owners of birds and reptiles, many of which have life expectancies far exceeding 21 years. Thus, many of the former problems involved in recognizing testamentary gifts to pets have been allayed by the new law. There are still issues concerning the proper funding of a pet trust.

Sometimes we hear news about eccentric people who leave millions for the care of their dog or cat. The new law contains safeguards to prevent testators from making unreasonable gifts to their pets, which may subject it to criticism. Under section 5 of the law, the court may reduce the amount of property transferred into the pet trust if it determines that the amount “substantially exceeds the amount required for the intended use and the court finds there will be no substantial adverse impact in the care, maintenance, health, or appearance of the designated domestic or pet animal.” Thus, section 5 provides some guidance, albeit rudimentary, as to how a pet trust can be funded.

In determining what would not be an unreasonable amount under the law, you may

want to consider how much is spent each year for food, veterinary care, grooming and other expenditures for the designated pet(s), multiply it by the number of years the pet(s) are expected to live and pad it by an amount needed to cover unforeseen emergencies, catastrophic illnesses, etc. This is merely a suggestion as to how to go about funding a trust. Each situation will be unique and will necessitate consideration of the specific pet(s) involved, their current standard of care and the wishes of the owner for their continued care. So, once you’ve funded the trust, how does it all work?

Under the new law, people would designate a trustee to manage the fund set aside for the care, support and medical needs of their pet(s). They can then name the trustee or another caretaker to have physical custody of the pet. In practice, it is probably best to have different individuals serve as the trustee and the caretaker so as to avoid any conflict of interest. It is also probably a good idea to provide the trustee with the power to appoint an alternate caretaker in the event the designated caretaker is unwilling or unable to serve. Lastly, under the new law people can name a third party to sort of keep an eye on things, to make sure the trust is operating according to the testator’s wishes. This third party, referred to as “an enforcer” may petition to the court for proper enforcement of the trust in the event it is determined the trust is not operating properly. For example, an enforcer could petition the court if he or she knew that the pet which was the beneficiary of the trust had died, but the caretaker continued to draw funds for its care and was therefore spending the residuary, or if the enforcer learned the caretaker was spending trust proceeds for his or her benefit and not the benefit of the designated pet(s).

At the death of the designated pet(s), section 2 of the new law provides for the disposition of the remainder of the trust in one of three ways: 1) the remainder can go to a person or charitable organization designated in the trust instrument; 2) if there is no such person or organization designated, the remainder can go to the general residuary beneficiary of the trust; or, 3) if there is no other beneficiary, the remainder will go to the heirs of the person who established the trust according to Hawaii law.

*Continued on next page*

Emily A. Gardner, Attorney  
**Clay Chapman Iwamura Pulice & Nervell**  
Topa Financial Center, 700 Bishop Street, Suite 2100, Honolulu, HI 96813  
Phone: (808) 535-8462 :: Fax: (808) 535-8444  
E-mail: egardner@paclawteam.com  
www.animallawhawaii.com

## *A Look at Hawaii's New Pet Trust Law*

*Continued*

More than 56% of Hawaii homes own one or more pets, and as a recent Ward Survey shows, 96% of Oahu residents surveyed agreed that animal companionship is a very important quality of life issue. There are many good, caring intelligent people in Hawaii who want to provide for their pets and domestic animals through the creation of a trust. Prior to this new law, there was no legally enforceable means for them to do so. People generally had to rely on making conditional gifts as part of their will or trust and then "hope" they would be followed. Such conditional gifts are still a valid option and may meet the needs of many people, especially those with committed family members and/or friends, where compliance with the conditions of the gift is not an issue. In considering a pet trust, you should consider what you are comfortable with emotionally and financially.

The new law will provide pet owners with more certainty that their wishes regarding their pets' care will be followed and may be especially appealing to single, elderly and childless couples, many of whom pets are the only "family" they have. It seems only right that people should be able to have the peace of mind that comes from knowing that their beloved family members will be properly cared for after they no longer can care for them.

In reaching this conclusion, I am reminded of the words of Senator George G. Vest, of Missouri, who when representing a client who was suing a neighbor for killing his dog said when addressing the jury:

The best friend a man has in the world may turn against him and become his enemy. His son or daughter that he has reared with loving care may prove ungrateful. Those who are nearest and dearest to us, those who we trust with our happiness and good name, may become traitors to their faith...

The one absolutely unselfish friend that a man can have in this selfish world, the one that never deserts him, the one that never proves ungrateful or treacherous, is his dog. Gentlemen of the jury, a man's dog stands by him, in prosperity and poverty, in health and sickness. He will sleep on the cold ground, where the wintry wind blows and the snow drives fiercely if only he may be near his master's side. He will kiss the hand that has no food to offer; he will lick

the wounds and sores that come in encounter with the roughness of the world. He guards the sleep of the pauper master as if he were a prince...<sup>1</sup>

Shouldn't the law permit people to care for those most dear to them in the event of their untimely demise—even if those are dogs, cats or birds, rather than people? I think so, and am glad the people of Hawaii now have this right. I can only hope that somewhere, Roxy Russell is smiling.

*Emily Gardner is an attorney specializing in animal law. In addition to her law degree, Emily holds an M.S. in zoology. For help in establishing a pet trust, or any other animal-related legal issue, contact her office at 735 Bishop Street, Suite 402, Honolulu, HI 96813, Tel: 540-0200 or at [www.animallawhawaii.com](http://www.animallawhawaii.com).*

<sup>1</sup> See *Capers Estate*, 34 D.& C 2d 121, Orphans' Court, Pennsylvania, 1964, as reported in *Animal Law*, Frasci, Pamela D., Waisman, Sonia S., Wagman, Bruce A., and Beckstead, Scott, Carolina Academic Press, Durham, North Carolina, 2000, at 715.