

Planning ahead for puss

By Ruth Pollard, Assistant Director Legal Services, Specialist Services, NSW Trustee & Guardian

Most of us remember the story of Puss-in-Boots. The youngest son of a miller receives his inheritance – a wily feline who insists on wearing boots. In a chain of events, Puss pulls con-tricks on the king and in the end helps his master win the hand of the princess, plus he gets to live in a huge comfortable estate. Puss does pretty well because the old miller had planned ahead.

Plan now

Australia has an ageing population with increasing trends in dementia, stroke, and cancer. Coupled with this is a widespread lack of knowledge about preplanning documents. Governments, health professionals and lawyers alike are worried about the fact that so few of us bother to plan ahead: there is a very low uptake of powers of attorney, enduring guardianship appointments, and to a lesser extent, wills.

When you die, your cat could do very well but it all depends on you making plans now. Unless you have a plan in place things could get very messy and complicated, and both your family and your cat could have a nasty and unexpected experience. Planning ahead by making a will, power of attorney, an enduring guardianship appointment and an advance care directive is a very important step for everyone.

Wills

A will is a very important legal document that allows us to set out how and to whom we want our assets distributed when we die. Even when you have a valid will, it's important to review it every few years and definitely when your circumstances change, for example, both marriage and divorce affect a will.

The hallmarks of a valid will

It is important for a will to be properly drafted to ensure that it is valid. The person making the will must have testamentary capacity and the will must be properly signed and witnessed. Testamentary capacity means that the testator – that is, the person making the will:

- understands the nature and effect of making a will
- understands the extent of the property they are disposing of under the will (ie the value of their estate) and
- understands that certain people can make a claim on their estate if they are not properly provided for in the will or under the laws of intestacy if there is no will.

Section 6 of the *Succession Act 2006* provides that a will is not valid unless it is:

- in writing, and
- signed by the testator, in the presence of two or more witnesses who are not beneficiaries.

Gifts can go astray

The legal rules relating to construction of wills must be followed. For example, we might feel that we want to leave gifts to a charity or non-government organisation. Gifts to such groups can go astray if your will does not cover contingencies, such as having additional directions should the group or organisation not exist when you die.

The basic technical point is the clauses for a gift should be constructed so that the gift does not lapse or adeem. Gifts should be either vested or contingent, and if contingent then provision made if the gift fails to ultimately vest. The perpetuities rule must be followed, words of limitation should be noted, and consideration should be given as to whether beneficiaries receive their gifts as a class or the gift is given jointly, or whether an accruer clause is to be used or, if not, then proper substitutional provisions are made. This might sound like gobbledegook but these legal terms have been used deliberately to demonstrate that making a will is not straightforward.

If a will fails to meet legal requirements it may be invalid and – as will occur when a person fails to make a will – their assets will be distributed according to the intestacy laws.

Beware of will kits

Using a will kit or DIY-wills can be fraught with problems. A common error is where the testator puts the name of the beneficiary in the space provided for the name of the executor and omits inserting details for the beneficiary. In effect this means the whole estate is left to nobody – it is the same result as not making a will – the assets pass under the laws of intestacy.

What about the costs?

Making a will, power of attorney or enduring guardianship appointment doesn't have to be expensive. A will should be drawn up by a solicitor who is experienced in will drafting, maybe an accredited specialist in this area of law. The NSW Law Society offers a referral service which will identify experienced solicitors in your area. Don't be afraid to inquire about costs.

For older people receiving the age pension or who hold a Commonwealth seniors health card, the Legal Pathways program offers low fixed fees for preparing wills, powers of attorney and enduring guardianship appointments. For more information contact COTA NSW on (02) 9286 3860 or outside Sydney phone 1800 449 102.

Dying without a will (intestacy)

If a person does not make a will, when they die their assets will be distributed according to the intestacy laws set out in the *Succession Act 2006* (NSW). The intestacy laws do not include provisions for friends, charities or pets.

In 2010 the NSW intestacy laws were changed and the terms “domestic partner” (replacing the term “de facto partner”) and “multiple spouses” were introduced. A situation involving multiple spouses may emerge where a married couple separate but not divorce and then subsequently enter de facto relationship/s. For the purposes of the intestacy laws, on death they are said to have multiple spouses.

Spouse is defined as a married person, or a domestic partner (a de facto partnership of at least two years or one that has resulted in the birth of a child. A domestic partner may be someone of the same or opposite sex). ‘Issue’ means all lineal descendants. If a person dies leaving a spouse or multiple spouses but no issue, the spouse/s inherit the whole intestate estate.

If a person dies intestate leaving a spouse or spouses as well as any issue of one or more spouse/s, then the spouse/s inherit the whole intestate estate.

However, if there are children of a relationship other than the spouse/s, for example, issue of an ex-spouse or ex-domestic partner, the estate is divided according to a formula between the spouse/s and all the issue, as follows:

A. One spouse receives or spouses share between them:

- a legacy of \$350,000 as adjusted by the Consumer Price Index in accordance with a set formula
- the intestate’s personal effects
- one-half of the remainder of the intestate’s estate

B. All children, including those of the other relationship, as well as children of the spouse/s, receive the remaining part of the estate.

Where multiple spouses survive the intestate their entitlement is shared:

- in accordance with a written agreement they make between themselves or
- in accordance with an order of the Supreme Court or
- equally between them.

Where the intestate leaves no spouse only issue, the issue are entitled equally.

If the intestate dies without spouse/s or issue then the distribution pattern is as follows:

- parents
- siblings (if one or more of the siblings has died, their share will pass to their issue)
- grandparents
- aunts and uncles
- first cousins, but not second or more distant cousins.

How your puss could inherit boots

There are over 38 million pets of various species throughout Australia: 63 per cent of Australian households care for a pet and 91 per cent of Australians say they feel very close to their pet. Many

consider their pets a beloved family member and some think of them as their children.

Regrettably, many humans forget about their pets when it comes to their own mortality. Making provision for our pet requires thought, and it can be a little complicated as animals do not have the same status in the law as humans.

However, there are several things we can do to ensure our pet is provided for after we die, basically summarised as four options:

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

Testamentary trusts

Under Australian law domestic pets are considered to be personal property. This presents difficulties in making them a beneficiary of a trust. It is an essential ingredient of a trust that there is a beneficiary: that is, the person who receives a benefit from the trust, who can ensure the trustee carries out the terms of the trust and, if the trustee fails to do so, the beneficiary can take action against the trustee. An animal cannot do this.

However, the law has allowed some leniency in the application of the ‘beneficiary principle’ in relation to trusts for the care and maintenance of animals. Over the past 200 years, a number of such trusts have been recognised as being valid by the courts provided trustees are willing to carry out their obligations. It has been said that a trust for the care and maintenance of an animal is no more than a non-binding direction, a request, made to the executor of the will.

The legal profession views these cases with caution and solicitors may warn clients that they are unsafe to rely on. However, if other options are not acceptable and the establishment of a trust is what you want to do, there are a few rules to follow and some basic measures to consider.

- The duration of the trust must not breach what the law refers to as the rule against perpetuities. In NSW, this means that a trust for the care and maintenance of a pet should be terminated within 80 years of the date of the testator’s death. While most pets live for less than 80 years, there are some birds and reptiles that live for over 100 years

- Even though the law allows a trust for the maintenance, care and support of a pet, the trustees cannot be compelled to carry out its terms; they must do so willingly. Therefore, you should discuss the trust with the person you wish to appoint as executor and trustee of your will, and make sure they are willing to carry out its terms. If they are not, then you should appoint someone who is.

It is also important to provide for a substitute trustee in case the person you nominate dies before you do, or they die during the term of the trust. If you don’t provide a substitute, the trust may fall into the hands

of someone who has no interest in upholding its terms. This is where the appointment of a professional trustee such as NSW Trustee and Guardian or other trustee company may be appropriate. These organisations have experience in dealing with these types of trusts and are willing to ensure the terms are carried out, provided a guardian is appointed to provide a home and physical care of the pet. It is a good idea to leave written details about your pet and veterinary documents with your will so that your trustee has all the important information about your pet's needs.

- It is very important to give careful consideration to the appointment of the person or organisation who will provide the physical care and maintenance of your pet. Again, it is important to make provision for a substitute carer in the event the first nomination is unable to care for your pet. It is prudent to obtain the consent of those people you wish to appoint as carers before you make your will. Ensure you nominate people who will care for your pets as you do.

- You need to ensure there will be sufficient assets in the trust to last your pet's lifetime. Remember that care costs will include veterinary bills, food or special dietary needs, grooming, board, toys, any possible travel expenses and special veterinary care if your pet develops an illness or age-related disorder.

If you are unsure of an amount of money to set aside for the trust, talk to your vet or one of the animal charities. The trustee will manage the trust assets and pay over the income and/or capital of the trust to the carer who provides the care needs of your pet. If the trust runs out of funds, it will be up to the carer to decide whether or not to continue caring for your pet at their own expense. If there are funds left over in the trust when your pet dies, your will should spell out where you want that money to go, for example, to nominated persons or a charity.

- Some people have been known to establish testamentary trusts that provide the carer of the pet with an interest in the deceased person's home for the life of the pet, as well as a fund for the pet's care and maintenance. Such a trust must contain watertight provisions concerning occupation of the premises; whether or not it can be sold and another purchased in its stead; who will pay for the maintenance of the property and all outgoings; the care of your pet; and provision that the carer take the pet to the vet for regular check-ups, vaccinations, grooming etc and for the vet to provide a report to the trustees so they can be certain the pet is being cared for according to your wishes.

Legacy programs

A few animal charities operate legacy programs. Where a legacy is provided these charities offer to either rehome your pet or house your pet at a facility they operate especially for the pets of people who have passed away or are unable to care for their pet due to age or illness.

It is recommended that you phone the charities and make an appointment to visit the facilities to ensure your

pet would be happy with the accommodation and what assurances can be provided in relation to your pet's lifetime care.

If you would like the charity to try to find a new home, you must consider whether or not your pet could be rehomed. Older animals are less likely to be rehomed. While many pets recover from the grief of their carer's loss and enjoy the company of another person, there are a few who might not make the adjustment.

It is important to give the charities caring for your pets as large a legacy as possible to allow them to provide proper and adequate care. It is always a good idea to instruct your solicitor to link the legacy to the Consumer Price Index.

Legacy to friends or family

If you have a trusted friend or family member who will love and care for your pet in a way you approve of, this option may work very well. A simple clause leaving your pet and a sufficient legacy to the carer you nominate will enable the carer to use the funds from the legacy for your pet's care and support.

Make sure you discuss the idea with the carer of your choice to find out whether they are willing to accept the responsibility. Also discuss with them the updating of their own will to provide for your pet in case the pet outlives them.

There are cases where people have been given a legacy to care for a pet but euthanase the pet and spend the money on themselves. So leaving a legacy like this requires great trust on your part – reflect on whether you really can trust the friend or family member to carry out your wishes, remembering they won't be legally obliged to do so.

Euthanasia

Although in the US there have been a number of cases taken to court where the inclusion of a euthanasia clause has been held invalid on the basis of cruelty and against public policy, such clauses do not appear to have been tested in the NSW Supreme Court.

There are people who would prefer their beloved pet to be euthanased on their death. They do not wish the animal to suffer the grief of separation, being unsuitably rehomed, or ending up in a pound or shelter. There are some pets who would not adapt to a new environment.

If you think euthanasia is the right choice it is still important to discuss this with the nominated executor of your will as that is the person who will have to arrange for your pet to be euthanased when the time comes.

There are people, even though not animal lovers, who would not wish to carry out such a direction.

Take time to consider which option best suits your pet. Then see a professional to discuss the issues and have your will professionally drafted to ensure it is valid and will be carried out according to your wishes.

Power of attorney

A power of attorney is a legal document which allows the person making the power of attorney ('the principal') to appoint another person ('the attorney') to take care of

their financial affairs should the need arise. The types of matters usually managed under a power of attorney are buying, selling, leasing and mortgaging real and personal property; banking; buying and selling shares; borrowing or lending money; taking or defending legal proceedings in the principal's name; and signing documents. A power of attorney may be 'general' or 'enduring'.

A general power of attorney is useful for short term appointments, for example, if the principal is going overseas and needs someone to look after their financial affairs or sign documents in their absence.

A general power of attorney terminates if the principal loses mental capacity.

An enduring power of attorney will not cease to operate if the principal loses mental capacity. In fact, the main purpose of the enduring power of attorney is that it be put into operation or continue in operation when the principal becomes incapable of managing their financial affairs. An enduring power of attorney is made as a safeguard, just in case the principal suffers future mental incapacity due to an unforeseen accident or dementia. Due to the increasing lifespan of our population and the number of people suffering age-related illnesses, the enduring power of attorney is increasingly popular.

It is important to remember that *any* power of attorney can be revoked *at any time while the principal has mental capacity*. Both general and enduring powers of attorney cease to operate on the principal's death, at which time, the will comes into effect.

It is very important to appoint an attorney who is trustworthy and financially savvy. An attorney has a duty to act in the principal's best interests and must avoid any conflict between the principal's interests and their own.

No matter what the circumstances it is always a good idea to appoint a substitute attorney just in case the first appointed attorney dies or is unable or unwilling to accept the appointment. NSW Trustee and Guardian or other trustee companies exist in perpetuity so they are always around and this is why some people choose to appoint them as the attorney.

If a person has not made a power of attorney and they become incapable of managing their affairs, an application for a Financial Management Order can be made to the New South Wales Guardianship Tribunal or Supreme Court Equity Division – Protective. In most instances, the applicant is a family member, friend, social worker or health care professional. A Financial Management Order is the legal decision that appoints the NSW Trustee and Guardian, or a private individual under the directions and authority of the NSW Trustee and Guardian, to manage the financial affairs of the incapable person.

Enduring guardianship

An enduring guardian is chosen to make personal, health and lifestyle decisions on behalf of their principal when they are no longer capable of doing this for

themselves.

The appointment of an enduring guardian can be done by filling in a "Form of Appointment of Enduring Guardian".

The sorts of decisions they can make include:

- where the principal will live, for example, whether the principal is to go into a nursing home, and if so, which nursing home
- health care consultations and plans, for example, GP, dentist, other health care professionals
- consent to medical or dental treatment on the principal
- the personal services the principal receives, for example, meals on wheels or home care.

A guardian does not have to be given all these functions: some can be deleted, or functions may be added to the enduring guardianship form. For example, if the principal doesn't get on with certain family members, the guardian can be given authority to make decisions about the people the principal will have contact with. The guardian can be given directions as to how to exercise particular decision-making functions, for example, the current GP is to continue to provide medical services and no new GP is to be consulted.

The appointment of the enduring guardian takes effect only if the principal loses capacity to make their own personal, health or lifestyle decisions. The appointment can be cancelled at any time provided the principal still has capacity.

If the principal gets married, the appointment is automatically cancelled (unless the person they marry is the person who was appointed as guardian).

Making an enduring guardianship appointment is important for people who don't have a strong network of supportive family and friends. People may even be unsure whether their family or friends would make decisions about their health and lifestyle in the way they would want them to. While for many people informal arrangements are fine, for those who don't wish to leave the decision-making to chance a formal appointment is a good idea.

If a person has never had capacity or becomes incapable and hasn't made an enduring guardianship appointment, there are informal arrangements that may suffice. For example, there might be family members and friends who can make health and lifestyle decisions on behalf of the person without capacity. Such informal decisions can be made by what the law recognises as a 'person responsible'. A 'person responsible' is defined as either:

- the legally appointed guardian of the incapable person or, if there is no guardian
- their spouse or de facto spouse or same sex partner, or if there is none
- their unpaid carer or, if there is no carer
- a relative or friend who has a close relationship with the incapable person.

Advance care directives

An advance health care directive is a document that states a person's wishes or directions regarding their future health care and medical treatment if they lose capacity. It generally applies to end of life care and would include your instructions to doctors and health care workers about treatments you would or would not want in certain circumstances. It is not the same as enduring guardianship but it can guide an enduring guardian, family members and health care providers about the person's views on medical intervention and treatment.

In NSW, advance care directives are binding and can be relied on.

What happens to my pets before I die should something happen and I can't care for them?

The documents outlined above are mainly designed to provide for our own personal care and the management of our finances. However, I believe they can be a means by which our pets are cared for also. If we appoint as our guardian and attorney people who we trust and who know how we would want our pets cared for, these documents can help. Make specific mention of your cat in your enduring guardianship appointment and power of attorney document (or in a document which can be annexed to these providing instructions to your guardian and attorney). Set out how you want your money used to provide for your pet and how you want your pet cared for if you are not able to do so. Ensure your guardian understands your pet is important to you, and that, wherever possible your lifestyle accommodates your pet. There is a lot of material about pets having positive effects on people's health and happiness, which makes pets a lifestyle matter. Caring for a pet requires money, and this is where an attorney will need directions in the power of attorney document to ensure adequate funds are made available for pet care.

What happens to your cat if you require supported-care living and your pet cannot come with you? This is something you should discuss with your appointed attorney and guardian at the time you make the appointment. Another option is to be in contact with an animal charity before any of these things happen and arrange with the charity that your attorney or guardian can contact them if the unexpected happens and your pets need care. You might also investigate whether there are any care facilities in your area that would let you take your pet.

Other important information

You should ask yourself: what would happen if I had an unexpected accident, stroke or died suddenly? Would anyone know I have a cat in my house in need of food, water and attention?

It is important to inform family, friends, neighbours, and even work colleagues what to do about your pet in case of an emergency or should anything happen to you. It may be up to one or several of these people to do something while your attorney, guardian or executor or trustee is contacted.

The legal process of administering an estate can take several months and your pet cannot be left without care and support.

For the sake of your beloved pets, it's very important to see a professional and plan ahead.

Ruth Pollard has worked at NSW Trustee and Guardian as a solicitor for 24 years. Ruth studied Animal Law in 2005 at the University of NSW, which was the first law school in Australia to teach animal law. She contributed to the Animal Law Guide NSW; Law Society NSW Young Lawyers Animal Law Committee and wrote for them, with the support of the NSW Trustee and Guardian, the brochure "What about me? Your pets and your will". Ruth and her husband live with seven cats and two dogs in what they describe as 'Noah's Ark Hotel'.

Contacts & resources

NSW Trustee and Guardian www.tag.nsw.gov.au or 1300 364 103

Law Society of NSW www.lawsociety.com.au or 9926 0333

COTA NSW Pathways Project <http://cotansw.com.au/programs/legal-pathways-project/> or 9286 3860 or outside Sydney 1800 449 102

For a factsheet on **planning for your cat**, please visit Cat Protection's website or phone our office on 9519 7201. For information about Cat Protection's legacy rehoming or bequest programs, please refer to our website, phone our office, or email kristina@catprotection.org.au

Rest assured: a legal guide to wills, estates and funerals in New South Wales
www.legalanswers.sl.nsw.gov.au/guides/wills_estates/index.html

What about me? Your pets and your will
www.tag.nsw.gov.au/pets-and-your-will.html



Molly's owner had made arrangements with her solicitor so that when she passed away, Cat Protection would take Molly in. We found Molly a quiet home with a lovely couple who wanted to help Molly overcome her grief and be happy again.