The article, “Should Pets Inherit?” by Frances H. Foster, is an important practical piece for estate planners. His theme, that pets should be allowed to inherit to a similar extent as individuals, is well argued, but along the way, he points out important pitfalls to practitioners when planning for pet bequests.

In support of his argument, the author speculates that “American Inheritance Law is trapped in an outdated family paradigm. The paradigm assumes that the decedent’s closest relatives by blood, adoption or marriage are the most deserving recipients of the decedent’s estate. . . .” As most estate planners recognize, the paradigm may ignore who a decedent values the most. For example, under intestacy laws, a daughter who has abandoned her father throughout her father’s life would still inherit, while the significant other in that situation would not.

The author regards this family paradigm as “outdated, under inclusive, and discriminatory. Along those lines, the author pontificates that pets, often being the closest in affection for a decedent during a decedent’s lifetime, should clearly be allowed to inherit. He notes that 27% of American pet owners include their pets in Wills (in those cases in which their owners have Wills).

After demonstrating a strong case that pets should be allowed to inherit, that pets should be regarded as a level somewhat parallel to individuals, the author reviews state laws with regard to pets.

He notes first that under the Law of Wills, pets cannot inherit. Specifically, the general principle is that property cannot own property, and pets are property.

Second, he notes the technique around the Law of Wills, used by practitioners, is to leave cash to a friend with a request that they take care of the pet. He provides examples of why this does not always work. One example (not provided for in the article but observed by this reviewer) was a bequest of $50,000 to a friend to take care of the decedent’s seven cats "until such time as the last cat dies." Any remaining amount of the funds was to go to the decedent’s friend. Either intentionally, or due to serendipitous circumstances (the cats were very lonely?), all seven cats perished within one month of the decedent’s death, mostly by falls from the second story house window.

Third, the author concludes that common law trusts that have pets as beneficiaries will not work for a variety of reasons, including judicial interpretation of these trusts narrowly, with an intent to invalidate such trusts.

His conclusions is that practitioners should rely on pet trusts created and authorized by state statutes. He notes that 45 states (plus the District of Columbia) have enacted so-called pet trust laws to allow for said creation of trusts for a decedent’s pets. In these jurisdictions, individuals can establish trusts for non-human species, but the author points out areas of caution:

1. The drafting has to be tight and clearly express the pet owner's intent with the use of funds and trusteeship. He notes that there is still a bias toward narrow construction.

2. Certain statutes cap the amount that can be left in these trusts. Excessive amounts which will not be respected.

3. Drafting of a pet trust by an attorney is required, so that the trust formalities are adhered to; otherwise, he notes that the entire trust may be ignored.

4. The laws in each state vary; practitioners should consider the requirements of each specific state's statutes with domiciliaries in those states.

The author proposes various legislative reforms that are interesting, but not necessarily pertinent to a practitioner's everyday practice. Instead, the most important take away is the implied importance of pets in one's estate plan. After reading the article, a practitioner is almost inclined to include "care of pets" as a standard question in the estate planning questionnaire, and perhaps a standard trust in most estate planning forms. Perhaps planners should start considering this as a template.