

“I shall be considered incapacitated when my successor trustee and a physician who has personally examined me state in writing that I am unable to conduct ordinary financial affairs due to a mental or physical disability.”

During your incapacity, you may want Trust assets to be used exclusively for your benefit. Or you may direct the trustee to support or make early gifts to future beneficiaries to protect their inheritance. You may express a strong preference for staying in your home with appropriate care for as long as possible, rather than moving to a nursing home. In short, you can provide a road map to guide the trustee on how to use your assets during your incapacity.

Getting Married? Mazel Tov! (Congratulations!) Revocable Trusts and Prenuptial Agreements

You have some valuable assets and are about to get married. Do you ask your spouse-to-be to sign a prenuptial agreement? You may cringe at the thought of putting the nascent relationship at risk by bringing up what can be a hot button issue and disclosing all your assets prior to marriage (required for a valid prenup), not to mention lawyers representing adverse interests, but you are also disturbed by the possibility of losing half the value of your existing assets. Revocable living Trusts can help ensure that the assets you own prior to marriage remain yours in the event of a divorce.

It's all about the bookkeeping, and it must be precise. Before you wed, place your assets into a Trust, making them easily identifiable. These preexisting Trust assets, accumulated prior to marriage, must remain segregated from those you acquire during marriage for them to be protected. Once you are married, commingling your preexisting Trust assets with those of your spouse exposes them to greater risk. Assets can always be removed from your preexisting segregated Trust, but if you move those assets back into the preexisting Trust or add new assets to it, that is “commingling,” which may endanger all of the assets of the preexisting Trust should you ever divorce. If your preexisting segregated Trust assets produce reinvested income or realized capital gains that add to your marital tax liability, perfect your paper trail and account for such additional marital tax burden by withdrawing the increased tax liability from the preexisting segregated Trust and adding that amount to the marital pool.

This method of protecting the assets you own prior to marriage is not foolproof, but it is a useful mechanism to erect a wall around those assets. Also consider that courts sometimes refuse to enforce prenuptial agreements for a variety of reasons. Purely from a legal standpoint, it is best to use both methods—asset segregation and prenuptial agreements—or just don't get married.

If you are writing a prenuptial agreement or have an existing one, make sure it does not conflict with your Trust, and if your Trust exists before signing off on the prenuptial, reference the Trust directly in the prenuptial.

Advantages of Probate

Although most people think of probate as a mojo killer and something best avoided, it can serve positive functions. The following are common advantages of probate:

- Creditors' claims can be cut off within an abbreviated period—usually six to twelve months, depending on the state—provided proper notice of death is given to creditors (actual notice to known ones and court-sanctioned newspaper publication notice to unknown ones). In contrast, creditors' claims against a Trust are treated like claims against an individual and can remain valid for years. You can negate this disadvantage of the funded Trust through a simple probate conducted on nominal assets. It works like