

Common Trust Pitfalls

Avoid two common pitfalls if you create an irrevocable intervivos trust. First, reserve no power to revoke, rescind or amend the trust, or retain any rights – directly or indirectly – to reclaim property that you transfer to the trust. Attach no strings to the assets that you transfer to the trust.

Second, retain no authority on how your trust or its property is to be managed or invested. And reserve no significant power over the trust. You cannot be the trustee, nor should your spouse, relative, or personal friend. Courts closely examine relationships between the grantor and trustee to determine whether the trustee is only the grantor's alter ego. Unless your trustee is independent, the courts can ignore your trust and your creditors can claim the trust assets. A corporate trustee, such as a bank or trust company would not be considered your alter ego. Therefore, their trusteeship will better protect your trust.

Because of these irrevocable trust disadvantages, most people choose other methods to protect their assets. It also explains the popularity of limited partnerships and LLCs which provide excellent asset protection, are revocable, and lets you control your assets.

Revocable trusts (particularly the living trust) are far more common than irrevocable trusts. A revocable trust can help you with your estate planning, but not asset protection. Creditors can claim assets in a revocable trust as easily as assets titled to you individually. If you can revoke or modify your trust, your creditors can claim the assets for their own benefit.