

Planning for Incapacity with Living Trusts
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Living trusts offer many advantages. One of them is providing for the management of assets when the person who created the trust is incapacitated. However, this is only true for assets that are moved into the trust first. Simply creating a trust without moving assets into the trust will not provide this benefit.

Let's look at how this might work. Mary Jones creates a living trust, naming herself and her son William as co-trustees of the trust. William's reliability must be beyond question; unreliable co-trustees could easily mismanage or even steal from the trust.

Mary then moves some or all of her assets, including her financial accounts, into the trust – a very important step. She also arranges for her regular income to be automatically deposited into the trust accounts.

A few months later, Mary suffers a stroke and becomes incapacitated. She can't write or communicate, and has a very limited understanding of what's going on. Because she moved her financial accounts into the trust, William (as co-trustee) is able to manage Mary's finances through the trust. He may use the money in trust accounts to pay Mary's bills. If Mary's income automatically gets deposited into trust accounts, William will also be able to manage that income.

If Mary hadn't established the trust and moved her financial accounts into it, institutions where Mary's accounts are located might not work with William or other family members. Even if Mary appointed an attorney in fact through a durable power of attorney, it's possible that the financial institutions might choose to ignore the power of attorney.

This could create a number of problems. No one would know the value of Mary's assets; it would be difficult or impossible to manage Mary's affairs. There would be no access to Mary's assets to pay her bills. Mary's bills, such as insurance, mortgage, taxes and utilities might not get paid, resulting in foreclosure, interest and penalties for unpaid taxes, termination of insurance coverage, utilities being shut off, or collection action against Mary. Family members would not know what Mary could and could not afford.

Without the trust in these circumstances, a family member might need to make an application to the probate court to appoint a conservator of the estate for Mary so that her bills could be paid and her assets managed. Involuntary conservatorship proceedings in the probate court can be time consuming and expensive. This adds to the stress that Mary's family must deal with in addition to the significant challenges posed by Mary's stroke and resulting legal incapacity.

Living trusts are not appropriate for everyone. Attending “free seminars” promoting “one size fits all” living trust packages is NOT a good reason to pay for a living trust. Only after consulting a qualified, ethical attorney who will first carefully examine, understand and explain your options, can you make an informed decision whether a living trust is appropriate for you.

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