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the Arkansas offices of
ILP+ MCCHAIN MILLER NISSMAN, Attorneys

The Arkansas Living Trust Book

Avoid Probate. Protect Your Family.

INCLUDES THESE TOPICS AND MORE:

- Probate and Three Really Good Reasons to Avoid It
- How a Living Trust Really Works
- What a Living Trust Does NOT Do
- What to Do With IRA Accounts (and Other Tax Qualified Retirement Plans)
- Can a Living Trust Impact the Estate Tax My Heirs May Have to Pay?
- How Can a Living Trust Protect Your Spouse (And Your Assets) from the Next Spouse if You Die First?
- How Can a Living Trust Protect Your Heirs from Divorce & Lawsuits and Their Own Immaturity?

By Stan Miller
Estate Planning Team Leader at **ILP+ ARKANSAS**,
the Arkansas Offices of ILP+ MCCHAIN MILLER NISSMAN, Attorneys

Questions?
Call us toll free at
(800) 827-7784
or visit us at
www.ilparkansas.com

+ ABOUT THE AUTHOR

Stan Miller
Estate Planning Team Leader at
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+ Practice Concentration & Professional Experience

Stan Miller is one of the pioneers in living trust planning in Arkansas. He is the Estate Planning Team Leader at **ILP+ ARKANSAS**, an estate and business planning law firm based in Little Rock, Arkansas. He is also a founder and principal of WealthCounsel, LLC, a leading provider of education and living trust drafting software to over 2000 law firms nationwide.

Stan is known for his ability to talk to clients in understandable language without using legalese. He speaks nationally to professionals on estate planning and asset protection issues.

He is married and is the proud father of two sons, Matthew and Jonathan.

You can learn more about Stan and see a video interview with him at:

www.ilparkansas.com/stan-miller-little-rock-ar-lawyer

+ ILP + ARKANSAS

ILP+ ARKANSAS is the Arkansas affiliate of the ILP+ MCCHAIN MILLER NISSMAN law group. The firm provides a variety of estate planning, business planning and tax solutions for clients worldwide. It has offices in Little Rock and in St. Croix in the United States Virgin Islands.

You can learn more about the firm at: www.ilparkansas.com

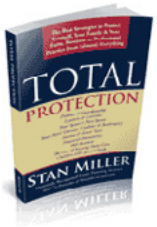
+ Educational Experience

- Vanderbilt Law School (J.D., 1975)
- Arkansas Polytechnic University (B.A., 1971)

+ Professional Affiliations

- Arkansas Bar Association
- Member of STEP
  (Society of Trust and Estate Practitioners)
- WealthCounsel
- ElderCounsel
- The Advisors Forum

+ Upcoming Books



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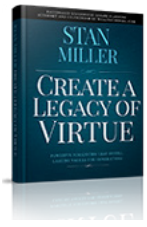

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STAN MILLER

Estate Planning Team Leader at **ILP+ ARKANSAS**, the Arkansas Offices of ILP+MCCHAIN MILLER NISSMAN, Attorneys

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Georgetown University

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Practice Development. Susannah has experience in both the legal and financial industry. She honed her leadership skills in the Junior League of Little Rock.

Arkansas State University

PATRICK MURPHY

Attorney. A Little Rock native with an LLM in Taxation from SMU, Patrick is passionate about protecting clients but finds time to play tennis and travel.

Southern Methodist University Dedman School of Law

> *I have worked with many law firms across the country over the last 35 years. Stan and the other professionals and staff are top in their field. Not only do they do a superior job but they make everyone feel welcome. Stan is a creative problem solver and is recognized by his peers as a major thought leader.*
>
> –Jerry Roberts (McKinney, TX)

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I. INTRODUCTION

In the last 30 years, **living trusts** have replaced wills as the preferred foundation estate planning document. This has happened as more and more people have discovered the significant benefits of living trust planning. Just as in a will, a living trust allows you to designate who will receive your assets when you die. And it also can designate the person or persons who will be responsible for taking charge of your assets, paying your debts and making certain the distributions to beneficiaries are properly made when you die.

But unlike a last will & testament, a living trust can provide personal protection for you in the event you become incapacitated without the need for a guardianship proceeding. And then, when you do pass, the property you have which is titled in the trust will not be subject to **probate**, a court-supervised legal process that is both expensive and time consuming. It is also flexible, so you can include provisions in your living trust that can leave assets in further trust to beneficiaries and protect them from divorce, lawsuits, bankruptcy and their own immaturity. Because a living trust is never filed in the public records, a living trust keeps the details of your estate private.

Creating a living trust is no more complicated than making a will.

Key Benefits of a Living Trust

- **Immediately transfers property to loved ones.**
- **Avoids court-supervised probate and significant legal fees.**
- **Is totally private (in contrast, probate is a matter of public record).**
- **A useful tool in avoiding the Estate Tax.**
- **Can be changed or revoked at any time.**
- **Transfers responsibility for management of your property if you become physically or mentally incapacitated.**
- **Can include provisions to protect assets if your spouse remarries.**
- **Can include provisions that will protect your heirs' inheritance from divorce, lawsuits, bankruptcy and youthful immaturity.**

II. SUMMARY COMPARISON CHART

Last Will and Testament	ILP + ARKANSAS Living Trust
Assets can be tied up in court for one year or, many times, much longer.	Quickly transfers property to your beneficiaries upon your death.
Can consume a large percentage of your estate's value in fees and court costs.	Avoids Probate Court, saving your family legal fees and court costs.
Is totally public.	Is totally private.
Does appoint a testamentary guardian for minor children and specifies last wishes.	Every living trust plan includes a pour-over will that nominates legal guardians for minor children.
Does nothing to protect you if you become physically or mentally incapacitated.	Protects you if you become physically or mentally incapacitated by naming successor trustee to take over management.
Can be amended or revoked at any time.	Can be amended or revoked at any time.

> *"We would like to thank Stan and his firm for helping us set up our trust. We did not know when or how to being with the trust process and he made the process easy and stress free. We feel we now have secured and protected our assets for generations to come. We can call at any time and speak to anyone on staff and be treated like we are family and the only client they have. We highly recommend his firm to anyone looking for asset security and protection.*
>
> –Darell and Kelly Hertenstein (Greenbrier, AR)

III. HOW PROPERTY PASSES WHEN YOU DIE

There are only four ways property is owned:

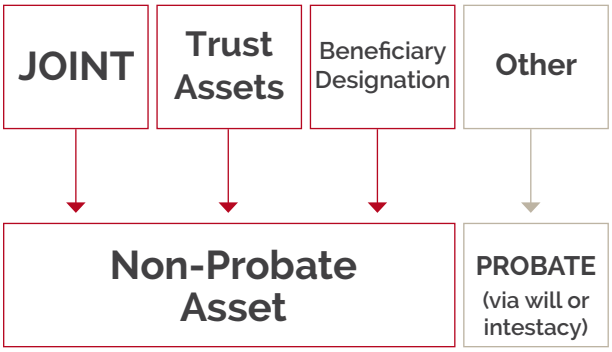
- **Joint Property**
  Here, we are referring to property that is owned in a form known as *"Joint with Right of Survivorship."* In this form of ownership, if one joint tenant dies, the property becomes the property of the other joint tenant immediately upon death. There are some hidden dangers in this form of ownership which we discuss in a video on our website which you can find here:

  www.ilparkansas.com/living-trust-planning

- **Trust Owned Property**
  This property passes according to the instructions in the trust.

- **Beneficiary Designation Property**
  This includes property such as bank accounts, IRA accounts (and other kinds of retirement accounts), life insurance policies and annuities. Also, Arkansas law now provides for the use of *"Beneficiary Deeds"* for real property. It is a simple technique that can be useful in some situations. A living trust is preferable, in our opinion, because it allows you to leave the property to heirs in a way that protects it from divorce and lawsuits.

- **Other Property**
  This category includes any property that is owned entirely by you. It includes real estate titled solely in your name, stocks, bonds, brokerage accounts, savings bonds and mineral interests.



A Dangerous Misperception....
Many people assume that when they execute their will, the will provides for the disposition of all their property. This is not true, and can create results that are very different than the person wanted. For example, if you want your IRA account to pass to a certain person, you need to name that person in a beneficiary designation with your bank or broker. Your will does not control who gets your IRA account when you die.

IV. WHY DO WE HAVE PROBATE COURT?

Probate is the court supervised legal process through which your property is distributed to your beneficiaries. Probate provides a necessary function to benefit the families of individuals who did not plan properly.

During the probate process, the court system must determine the validity of your will, appraise and inventory all of the assets in your estate (money, securities, real estate or other items of value), make sure your outstanding debts are paid, and then distribute whatever is left according to the instructions in your last will & testament. If you did not have a last will & testament, your assets will be distributed according to the Arkansas Intestacy Statute.

Most people think of probate as something that happens when you don't make a will, but that is a common myth. Having a will does not mean that you avoid probate. In fact, if you have a will based estate plan, and you own property titled solely in your name (that doesn't pass by beneficiary designation), then your will must be probated in order for your heirs to receive good title to your property after you die.

My Friend's Definition of Probate:

> *A lawsuit you file against yourself, with your money for the benefit of your creditors and your disgruntled heirs.*
>
> - Peter Parenti

Probate does serve a useful function even for people who do proper planning. The probate process does effectively cut off any claim of a potential creditor of the estate within 6 months of the time the probate notice is published in the newspaper. When we work with an estate of someone who has potential claims that could be made against their estate (an architect or doctor, for example) we will frequently find a very small asset to probate for the sole purpose of eliminating the risk that the claim could be brought against the estate years later.

V. THREE REASONS TO AVOID PROBATE COURT

- **Probate is Expensive**
  This chart shows the fees that attorneys and personal representatives are permitted to charge without proving the amount of work they have done. If more than a normal amount of work is done, the court will authorize higher fees.

+ The Cost of Probate (Ark Code Ann § 28-48-108)

Gross Estate	Personal Rep. Fees	Attorney Fees	Total Fees
$100,000	$3,150	$4,250	$7,400
$250,000	$7,650	$8,375	$16,025
$500,000	$15,150	$17,750	$32,900
$750,000	$22,650	$24,000	$46,650
$1,000,000	$30,150	$40,250	$70,400
$1,350,000	$40,650	$47,250	$87,900
$2,000,000	$60,150	$60,250	$120,400
$3,000,000	$90,150	$80,250	$170,400
$5,000,000	$150,150	$120,250	$270,400

- **Probate is Time Consuming**
  In many cases, probate can take a year or longer, so the settlement (and emotional closure that comes with a final settlement) is delayed.

- **Probate is Public**
  Anyone who wants to look at (or even copy) your file can. So your assets, your debts and the beneficiaries who will receive your assets are disclosed to the world.

> *"My wife and I came to Stan Miller lost with the legal and personal decisions that needed to be resolved. We finished this process with confidence, flexibility and peace of mind; all thanks to the professional service given by Stan and his team.*
>
> –Ben Rothwell (Little Rock, AR)

VI. PUBLIC VS. PRIVATE

A quick Google or Bing search for "wills of famous people" will generate dozens of hits. There you can read the details of the wills of these deceased persons, some of which are rather quirky. You can also find out what they owned and how much money they owed when they died. Does it matter if your private matters are made public? It should. Many unscrupulous sales people scour through the probate records looking for widows and children as sales prospects. We think there are good reasons to keep your private matters private.

You can see below the difference between the way The Sopranos star James Gandolfini's estate was handled and the way Apple founder and CEO Steve Jobs' estate was handled. We know a lot about Mr. Gandolfini's estate because his probate file in New Jersey is a matter of public record. We know nothing about Mr. Jobs' estate because it was kept private with his living trust estate plan.

Public

James Gandolfini

Although only pieces of Gandolfini's estate are public, including his will and the $7 million life insurance policy left to his son, it appears he was a generous and considerate man. He bequeathed two nieces half a million dollars apiece, his godson $100,000, $200,000 went to a close friend and an equal amount was left to his assistant.

- Gail Buckner - Your Money Matters
Published July 15, 2013 - FOXBusiness

Private

Steve Jobs

Steve Jobs appears to have protected his estate with living trusts.

- Forbes

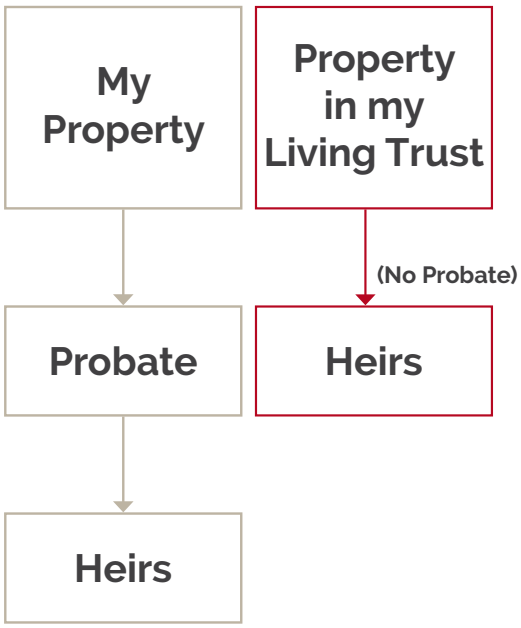
If you plan with a Living Trust, you can leave property to the people you care about without subjecting them to delays, expense, and hassle of probate court.

VI. HOW DOES A LIVING TRUST WORK

+ What is a Living Trust?

When you create a Living Trust, you are creating a separate legal entity to hold the property you choose to transfer to your trust. Our clients tell us they like the fact that they now have their assets (bank accounts, stock certificates, real estates, etc.) consolidated into one convenient "container". It does make tracking assets and personal record keeping much easier.

One of the common questions we hear is this: *"If I transfer my property to a living trust, can I get access to it if I need it?"* Our answer always is *"Of course."* It's your property. As the creator or "trustmaker" or "grantor" of the trust, you retain total control over your trust assets by appointing yourself as the initial trustee of the trust. You can do anything you choose with the property in the trust – this includes transferring the property out of the trust.



The main benefit of creating a living trust is that the property you transfer to the trust is not subject to the probate court system. By avoiding probate court, your assets can pass immediately to your beneficiaries as soon as your successor trustee prepares the necessary transfer documents.

Compared to passing property with a last will & testament, transferring property through a living trust is fast, easy, inexpensive and private.

> *As a widow, I'm grateful to see the plans my husband envisioned years ago be continually implemented in a caring manner.*
>
> –Pamela Rusher (Jonesboro, AR)

+ The Trust Agreement

A Living Trust is created with a document known as a Trust Agreement. This is the legal document that names your beneficiaries, describes your trust property, and provides for the terms of its transfer. The living trust is managed by one or more trustees. In most cases, you will want to designate yourself as the initial trustee. You will also need to designate an individual or institution (such as a bank trust department) to succeed you as a "successor trustee". You can always change the named individual or institution whenever you'd like. The trustee is responsible for managing the property transferred into the trust.

+ What Happens When You Become Incapacitated or Die?

Upon your incapacitation or death, the person you assigned to succeed you as trustee (the successor trustee) immediately takes over management of the trust and sees that all of your instructions are carried out. This avoids the need for a court-supervised guardianship proceeding — or what we call "living probate." Your successor trustee does not have the authority to change the trust. Your trust becomes irrevocable at the time of your incapacitation or death. In other words, you can amend your trust while you're alive and competent but it cannot be amended by anyone else.

+ Your Living Trust is Flexible

The flexibility of a living trust is one of its many advantages. You can change your mind, make amendments, or terminate the trust anytime you wish. You can add property to your trust, transfer ownership of trust assets back to yourself, add or remove beneficiaries, name a new successor trustee, and sell, give, or mortgage property owned by the trust.

When the time comes, the transfer of your property will take place between the members of your family and the successor trustee that you name. In most cases, the settlement of your trust when you die is simple and can be accomplished with minimal legal fees. The transfer of assets to beneficiaries is kept confidential because a living trust does not become a matter of public record. This is important, because it is a common sales practice for many sales people to systematically review probate records (including the asset inventory that is required to be filed) to identify sales opportunities to your family members.

+ You Don't Lose Your Homestead Exemption or Tax Benefits of Home Ownership

Arkansas has a fairly generous homestead exemption that prevents judgment creditors from taking your home if you have a judgment entered against you. The Arkansas Supreme Court, in June of 2010, in the case of *Fitton* v. *Bank of Little Rock* made clear that you will not lose your homestead protection if you transfer your home to a living trust. There are also tax benefits to home ownership such as the deductibility of mortgage interest and preferential capital gains treatment when you sell your home. You retain all those benefits when you transfer your residence to a revocable living trust.

+ Living Trusts and The Estate Tax

The United States imposes a tax on the right to transfer property at death (and also by gift during lifetime). In past years, the tax has impacted a significant percentage of Arkansas families. That is less true now because the tax law change that occurred in the early morning hours of January 1, 2013, made the exemption that could be applied against the tax permanent at five million dollars. The exemption is also now subject to an inflation adjustment provision, so in 2015, the exemption is actually $5,430,000 per person.

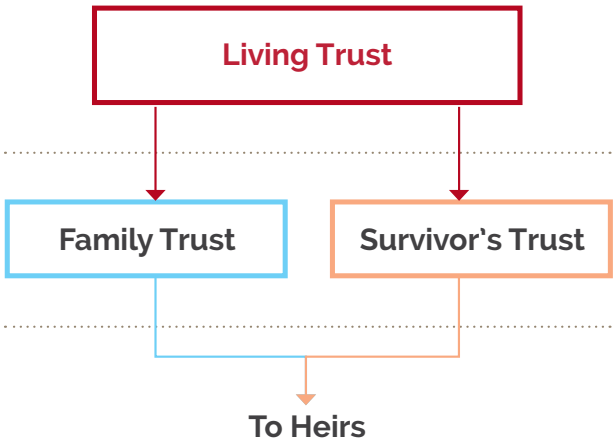
Some people have the belief that if they transfer their property into a living trust that it will protect their property from the estate tax. This belief is clearly incorrect. A living trust, by itself, does not protect your property from the estate tax because when you transfer your property to a living trust, you retain the power to withdraw it from the trust. If you retain this power, the property will be subject to estate taxation if your estate is large enough to be subject to the estate tax. There are other kinds of trusts that do provide estate tax protection, but a living trust is not one of those kinds of trusts.

However, there are certain kinds of provisions that can be incorporated into a trust for a married couple that can have a beneficial estate tax impact. But this requires a bit of explanation.

The same legislation that created the permanent five million dollars exemption also made the exemption "portable." Let me explain: up until this legislation was signed into law, if one spouse died and left all of their estate to the other spouse, the Estate Tax exemption belonging to the deceased spouse was lost because it was not transferrable.

A very common practice in the decades before this law change was the creation of what we estate planners called **A/B trusts**. The A/B trust structure was created in the living trust of a married couple. This trust provided that when one spouse died, the assets of that spouse would be transferred to a "By-Pass Trust" or "B" trust. We commonly referred to this trust as a "Family Trust." In this way, the deceased spouse's exemption was applied against his or her assets and actually used. The "B" trust was designed to meet particular requirements of the tax law that would prevent the assets in the "B" trust from being counted as belonging to the surviving spouse at the second death.

That arrangement looked something like this:



> *Being in the brokerage business I have worked with several estate planning attorneys and Stan Miller is by far the best I have worked with. His knowledge, experience, attention to detail and respect for the client's time and individual needs is what I look for when recommending someone to my advisors and their clients.*
>
> –William McLemore (Little Rock, AR)

By using this technique, a married couple could eliminate the estate tax on almost 11 million dollars.

The new tax law I mentioned, however, made the exemption transferrable to a surviving spouse if the surviving spouse followed a simple procedure after the death of the first spouse. This provision in the law is called the **"portability"** provision. The "portability" provision of the law arguably eliminates the need for the use of the A/B structure as I demonstrated in the illustration above. We don't fully trust the strategy of relying on the "portability" feature of the new law. In our opinion, there are too many ways the benefits of portability can be inadvertently destroyed. So we continue to recommend the use of the traditional A/B trust structure for our married clients who have estates that approach the value of the single exemption ($5 million).

Most of our clients do not have estates that approach $5 million, but many of them still have an A/B trust structure built into their living trust (or will) estate plan. We are encouraging those clients to revisit their plan and consider simplifying it to remove the A/B structure. Removing this unnecessary complexity can reduce the cost and hassle of administering the estate after death, and simplification also has some positive tax benefits as well (see the discussion later on "Basis Step-Up.")

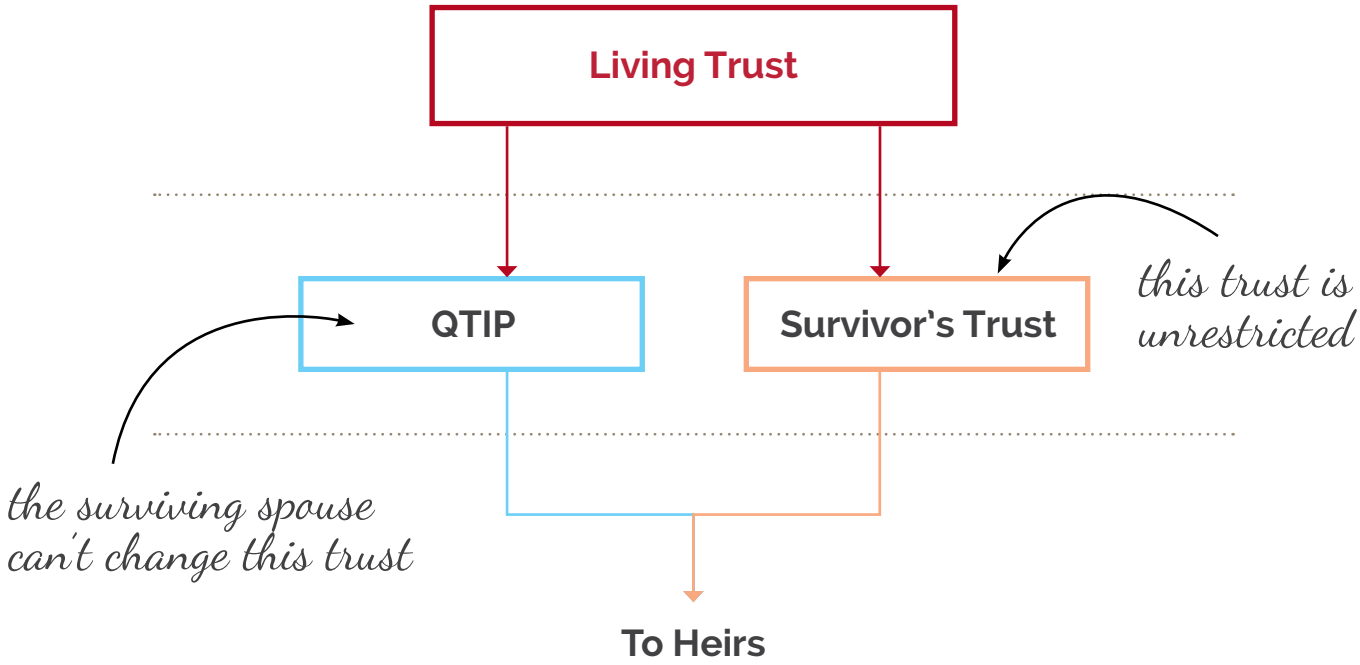
What should you take away from this discussion?

- **A living trust does not, by itself, reduce the estate tax, but that doesn't matter to most people because their estate is less than $5 million**
- **Married couples with less than $5 million and have an A/B trust in their estate plan should consider revising their plan to simplify it.**
- **Married couples with more than $5 million should have an A/B trust in their estate plan in order to make certain their estate tax exemption is fully preserved.**

+ Protecting Your Assets from Your Spouse's Next Spouse

One very common objective we hear from clients is the desire to protect their assets if their surviving spouse marries again after they die. This is a legitimate planning objective. Most of us know about situations where an elderly family member remarried and then left all of his or her assets to the new spouse — and left nothing to the children of the first marriage. A fairly simple structure can be added to a living trust that will accomplish that objective. The structure would provide that the portion of the living trust belonging to the first spouse to die (usually one-half) will pass to a separate trust. That trust will be designed to qualify for the estate tax marital deduction, and the assets will be included in the surviving spouse's estate for estate tax purposes when the survivor dies. The key point here is that the assets will pass to the children of the first marriage and the survivor can't change that element of the plan.

Here is an illustration that shows how this works:






+ Protecting Your Beneficiaries

Most of our clients want to protect the inheritance their heirs receive from being lost if the heir gets a divorce, gets sued, has a business failure or is simply too young or immature to manage an inheritance. The law in Arkansas is very clear that when an inheritance is left to heirs in trust, those assets are beyond the reach of a divorcing spouse, a judgment creditor, or a creditor in bankruptcy. This is true, even if the heir is serving as his or her own trustee. These trusts are called "Testamentary Trusts" and they are designed as part of your living trust estate plan. We like to think of these trusts as a kind of safe or vault for the inheritance.

If your heir lacks personal maturity or financial skill, you can name another person or persons, or a financial institution, to serve as the trustee over the heir's trust. Sometimes we design these trusts so that the heir serves alongside another person for a period of years in order to insure that the heir gains experience managing the trust assets before the heir is allowed to serve as the sole trustee of his or her own trust.

We have been trust lawyers long enough to see what happens when this kind of trust structure is tested. Our consistent experience has shown us that this kind of planning really works.

VII. LIVING TRUSTS & INCOME TAX FILING REQUIREMENTS

Your living trust does not file a separate return. Under IRS rules, a living trust qualifies as a "Grantor trust." Under the Grantor trust rules, the trust is "disregarded" and all the items of income or expense are reported on the Trustmaker's Form 1040, as if the trust did not exist for tax purposes as long as the trust retains its "Grantor trust" status.

In order to report on Form 1040, the Grantor and/or Trustee must comply with a couple of fairly simple requirements. The Trustmaker must provide the Trustee (who is usually the same person) with a Form W-9 (the form that individual taxpayers use to provide third parties with the taxpayer's social security number). The Trustee then provides the Trustmaker's social security number (as reflected on the form W-9) to all parties making payments to the trust. While those parties may make the payments to the trust, they issue a Form 1099 to the Trustmaker that reflects the payment made by the payer to the trust. The Trustmaker reports the payments made to the trust and reflected on the form 1099 on his or her form 1040 individual income tax return. That way the income items are paid to the Trustee but are reported by both the payer and the Trustmaker to the IRS under the Trustmaker's social security number.

These rules apply even if the Trustmaker is not serving as Trustee of the trust. However, if the Trustmaker is not the Trustee, the Trustee must also provide the Trustmaker with a statement that: (1) shows all items of income, deduction, and credit of the trust for the taxable year; (2) Identifies the payor of each item of income; (3) Provides the Trustmaker or other person treated as the owner of the trust with the information necessary to take the items into account in computing the Trustmaker's or other person's taxable income; and (4) Informs the Trustmaker or other person treated as the owner of the trust that the items of income, deduction and credit and other information shown on the statement must be included in computing the taxable income and credits of the Trustmaker or other person on the income tax return of the Trustmaker or other person. Provided that statement is provided, the trust does not need to file a separate tax return.

> *"Stan has always been a leader in the estate planning world. You can rest assured that he knows the latest in planning solutions.*
>
> –John Santi (Germantown, TN)

VIII. UNDERSTANDING BASIS STEP-UP

While the estate tax is no longer a threat to most Arkansas families, the capital gains tax has become a much bigger issue. I'm not going to explain all the ins and outs of the capital gains tax in this booklet. But I do want to point out — in a slightly over-simplified way — that when an asset (such as real estate or stocks) is sold, there is a tax due that is based generally on the difference between what you paid for that asset and the sale price. The amount you paid for something is called its "cost basis" or simply "basis." This is a somewhat more complicated calculation if you sell property that has been depreciated or that has been the subject of some other tax treatment at purchase.

I wanted to include a discussion of basis in this booklet because many clients we see make the mistake of giving their appreciated assets away during their lifetime. When they do, the donee of the gift takes the asset with the donor's cost basis. However, if the donor keeps the asset, the asset receives a "step-up" in the cost basis to an amount that is equal to the value of that asset on the date of the donor's death. The asset can then be passed down to the beneficiary and subsequently sold without incurring any capital gains tax on the pre-death gain.

Here is an example to illustrate how this works:

Suppose Andrew owns Wal-Mart stock which he purchased several years ago for $10 per share. Today, that stock is trading at—lets say--$75 per share. If Andrew sells the stock today, the capital gain will be $65 per share,and the tax rate on that gain for an Arkansas resident could be as much as 28.7% or $18.65 per share. If Andrew gives the stock to his grandson, and the grandson sells it, he gets the same result. However, if Andrew keeps the Wal-Mart shares until he dies (and the shares were traded for $75 on that date) and leaves the shares to his grandson in his living trust or will, the grandson can later sell the shares, and the first $75 per share he receives is tax free.

When your living trust owns an asset on the date you pass, that asset is treated in the same way as if you owned it yourself. So there is no income tax or capital gains tax advantage or disadvantage in creating a living trust.




IX. WHO ARE THE PLAYERS IN YOUR LIVING TRUST

Trustmaker: the person who creates the trust. The trustmaker is also someone referred to as the *"Grantor"* or *"settlor"*.

Trustee: the person designated to manage the trust assets. In a revocable trust, the *trustmaker* and the trustee are usually the same person.

Successor Trustee: the person who will manage the trust assets if the trustmaker dies (or becomes incapacitated). The Successor Trustee is in charge of managing the assets in your trust for the benefit of the trust beneficiaries as well as transferring the assets as directed by the trust.

Trust Protector: this is an established concept in other English speaking countries, but it has only recently found its way into use in the United States. This is a position that can be created in your living trust giving someone you know and trust the power to make changes to your trust long after you have passed. It adds additional flexibility to your living trust and also can provide some tax advantages.

Distribution Advisor: this is a useful position especially when you name a corporate trustee who may not know your heirs well. The corporate trustee can manage the assets, but trusts the advice of the Distribution Advisor on the making of distributions to your beneficiaries.

Beneficiaries: the people or entities who will receive the property in your trust. The trustmaker (you) is the original beneficiary, and those who receive benefits after your passing are known as "remainder beneficiaries".

> *"Most clients only get one chance to go through the estate planning process. That said, when they sit down with someone to craft a plan, it needs to be done right – the first time. Without exception my and my client's expectations have been met when meeting with Stan. Thank you.*
>
> –Brennan McCutchen (Benton, AR)

X. TYPES OF LIVING TRUSTS

A living trust is often called a "revocable living trust" because it allows you to revoke or change the terms of the trust however you choose as long as you are alive and mentally competent. Contrast this with an irrevocable trust, which is a trust that cannot be changed, at least not by you, the Trustmaker.

Irrevocable trusts are very useful tools in many situations. However, we are not discussing irrevocable trusts here. Our focus in this booklet is on revocable living trusts.

Living Trusts Come in Three Types:

+ Individual Trusts

This is a trust created typically by an unmarried individual.

+ Joint Living Trust

This is the most common version of living trust created by married couples. We recommend it when most of the assets are viewed by the married couple as being joint assets and all the children belong to both the husband and the wife.

+ Separate Living Trust

This is generally the preferred type of living trust for a married couple if they regard their property as separate (rather than joint) and in those situations where one or both of the couple have children from a prior marriage.

> *As you go through life and experience some of the challenges, it becomes apparent that a terrific lawyer—one that is smart, competent, and takes your specific needs very personally – will be a great sense of comfort and security. Stan Miller has been that person to me for over 35 years. There are very few weeks that go by that I don't think about and appreciate my relationship with Stan and all of the help he has given me over the years.*
>
> –Bill Barnes (Mt. Ida, AR)

XI. WHAT ASSETS WILL YOU WANT TO TRANSFER TO YOUR LIVING TRUST?

Generally speaking, a trust is created as a will substitute to hold all of the property you have which has economic value, unless there are tax reasons not to transfer it. That would include your home, your investment accounts (including stocks, bonds and mutual funds), investment real estate, closely-held business interests, money market accounts, brokerage accounts, mineral interests, patents and copyrights, jewelry and antiques, precious metals, works of art, and other collectibles.

The following assets are commonly transferred to a Living Trust:

- **Checking and Savings Accounts** (although these accounts are frequently held in our client's individual name with a beneficiary designation card providing that the account is paid to the trust at death. This is commonly referred to as a "POD" designation)
- **Real Estate** - including any real estate located in other states (to avoid multiple probates)
- **Savings accounts**
- **U. S. Savings Bonds**
- **Brokerage, mutual fund and other financial accounts**
- **Promissory Notes Receivable or Contracts**
- **Oil, Gas and Other Mineral interests**
- **Proceeds from life insurance policies and annuity contracts**
- **Stocks or bonds held directly in certificate or book form**
- **Your Interest in a closely-held business**
- **Partnership and Limited Liability Company (LLC) Interests**
- **Your Tangible Personal Property (including antique automobiles, art, and jewelry)**

What if the Property is Subject to a Mortgage or other Indebtedness?

Often items are put into a living trust that are not yet owned free and clear. A good example is a home subject to a mortgage. Generally, the transfer of your residence to a living trust will not give your lender the right to call the mortgage. There is a provision in Federal Law that makes that clear. However, sometimes we have found that it is easier to leave your home out of the trust until the mortgage has been put on the property and then to transfer the mortgaged property to your trust using an unrecorded deed or a beneficiary deed.

XII. WHAT ASSETS SHOULD NOT BE TRANSFERRED TO YOUR LIVING TRUST?

Certain types of property should not be transferred to your living trust because the transfer will create serious tax consequences. You may choose to leave other assets out of your trust because it's simply easier to handle them outside of your trust.

These include the following:

- **Personal checking accounts** — typically these are transferred to your trust via a pay on death (POD) designation which you sign at your bank.
- **Automobiles – Arkansas law makes it easy to transfer an automobile when you die.**
- **IRAs, 401(k)s, Keogh, and other tax-deferred retirement plans.** Special planning is required for any kind of tax qualified retirement account. See the discussion in the next section.
- **Pension accounts, life insurance policies and annuities.**
- **Property held in joint tenancy.** Property held as "Joint Tenants with Right of Survivorship" passes to the surviving joint tenant when you die. This form of ownership has some real convenience, but there are also some hidden dangers.

  Watch our video on this topic in the Living Trust University section of our website at:

  www.ilparkansas.com/living-trust-planning

XIII. SPECIAL PLANNING IS REQUIRED FOR IRA AND OTHER TAX QUALIFIED RETIREMENT ACCOUNTS

The account holder of any kind of tax-qualified retirement account cannot change the ownership of that account during their lifetime without destroying the tax-deferred status of the account. This means that your IRA or other tax-qualified account cannot be retitled into your living trust (or to any other person, for that matter). Because you can't transfer ownership of your account, this means that you have to also have a plan in place that allows someone you trust to manage that account for you if you become incapacitated. We handle this with the use of a General Durable Power of Attorney in which you will name the same sequence of individuals (or corporate fiduciary) whom you named as trustees of your living trust to serve as your agent.

At death, your account passes to the person or persons you named as the beneficiary on the account card. However, leaving IRA accounts to individuals in Arkansas can create real asset protection risks for the beneficiary. IRA accounts are not fully protected under Arkansas law (as they are in Texas and in several other states). You will also want to preserve your beneficiary's right to "stretch-out" the IRA over his or her lifetime to avoid having to pay tax on the account all at once. So, we usually recommend one of two solutions:

- **Name the beneficiary's trust created in your living trust as the beneficiary**
  (This option does require some special drafting in your living trust to make certain your trust satisfies the "conduit" requirement)
- **Name a Stand-Alone Retirement Trust as the beneficiary of your trust.**

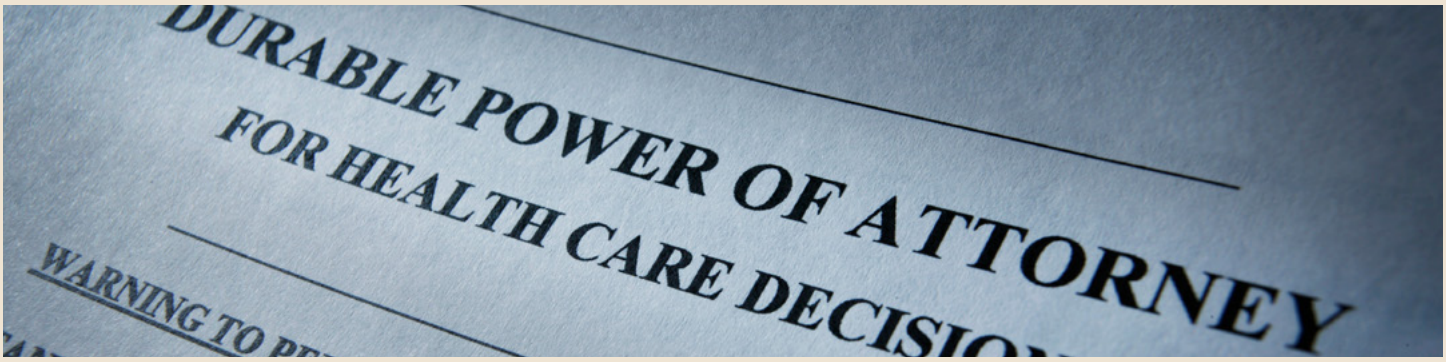
You can learn more about the options available for retirement plan beneficiary designations on our website at www.ilparkansas.com/ira-protection-planning.

A Stand-Alone Retirement Trust is usually the best choice to name as beneficiary of you tax qualified accounts. Learn more about these very powerful trusts on our website at:
www.ilparkansas.com/ira-protection-planning.

XIV. WHAT IF I OWN FIREARMS

Certain kinds of firearms (but not all firearms) require special planning. If you own any class III firearms, you may need a Gun Trust to provide you with the protection you need and to allow those firearms to be passed down to the next generation without disruption. Learn more about firearms planning and Gun Trusts by watching the video on our website at:

www.ilparkansas.com/wws-firearm-gun-trust-planning



XV. OTHER DOCUMENTS YOU WILL NEED IN A LIVING TRUST PLAN

A. A Pour-Over Will

Every living trust should include what is called a pour-over will. A pour-over will transfers or "pours" into your trust any assets not already owned by your trust at the time of death. This includes property such as checking accounts, cars and real estate you purchased but forgot to transfer to your living trust. Assets passing under your pour-over will do, however, have to go through the probate process. As long as your property is not held in joint tenancy or subject to other contractual arrangements, a pour-over will ensures that your assets are distributed to your heirs according to the terms of your trust.

A pour-over will allows you to name a guardian for minor children. Any living trust plan should include a pour-over will.

B. A General Durable Power of Attorney

You may have assets that you cannot transfer to your trust (an IRA, for example) or assets you choose to not transfer to your trust during your lifetime (such as your checking account). If you become incapacitated so that you cannot manage these assets yourself, you need a legal document that gives someone you choose the power to immediately manage those assets for you. This legal document is called a General Durable Power of Attorney. It needs to have the "durable" feature included so that it continues to work for you even if you are incapacitated. The common garden variety power of attorney typically does not have this feature. The "agent" you name in the document is typically exactly the same person or sequence of persons you named to serve as successor trustee of your living trust.

C. Health Care Decision Documents

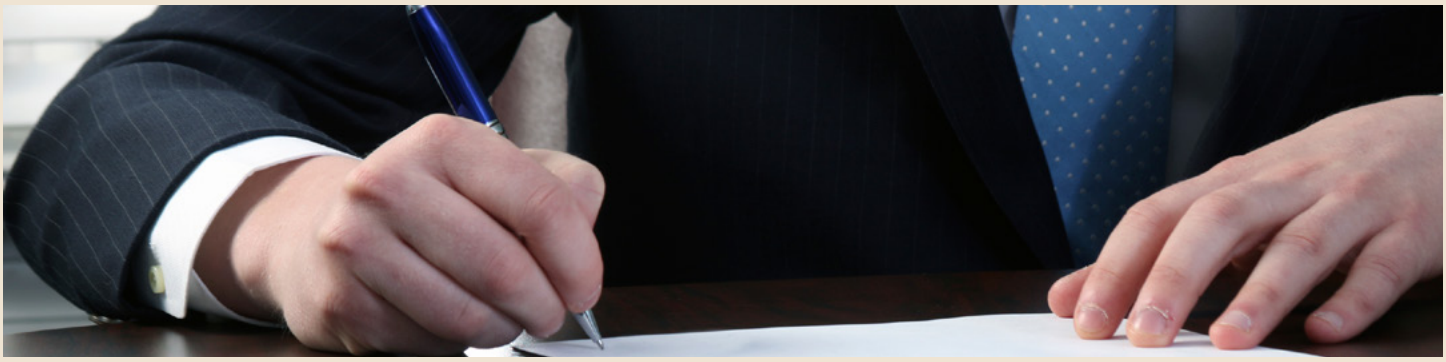
- **Health Care Power of Attorney**
- **HIPPA Authorization**
- **Living Will**

D. Other Documents ILP+ ARKANSAS Provides

We do some things most other law firms don't. In addition to all the standard living trust documents, we provide our clients with several additional tools that make your estate plan more understandable and useful to you and your family. These include:

- **A color PowerPoint flow chart showing how your plan works at each stage**
- **A Memorandum providing for the disposition of your tangible personal property**
- **A comprehensive set of memorial instructions making it easy for you to provide information and instructions about your funeral and burial wishes**
- **A Legacy Organizer—a tool we developed to help you get your information organized and made accessible to the persons who will need that information should something happen to you** - we provide a place for things like your computer and cell phone passwords and your frequent flyer account information.
- **24/7 worldwide electronic access to all your legal and health care decision documents.** Each account has 30 gigabytes of storage, so you can also use it to store other important papers such as your passport, retirement papers—any document that would be difficult to replace if your house was destroyed by a fire or tornado.

> *"Our financial services firm has worked with estate planning clients for nearly 17 years which mandates our partnering with estate attorneys. Our attorney relationships were inconsistent at best until 2012 when we had the opportunity to meet and work with Stan Miller and his team. Partnering with Stan and his team has elevated our firm's estate business, and offers our clients years of estate planning expertise and, more importantly, passion for our clients' situations. Stan and his team take a professional and personal approach with respect to our clients' individual circumstances and concerns, and how these issues could ultimately affect their families. Our clients have total satisfaction knowing that Stan and his team's recommendations are "exclusive" to their personal situation as opposed to a "one size fits all" approach. Stan and his team have "completed" our firm's resume with respect to estate planning expertise.*
>
> –Darren Ford (Monroe, LA)



XVI. CHANGING A LIVING TRUST

+ Amending or Restating Your Living Trust

Change in life is inevitable. There are many life changes that will require amending your living trust. A revocable living trust may be amended or revoked anytime as long as you live. This flexibility is one of the reasons that living trusts are so popular.

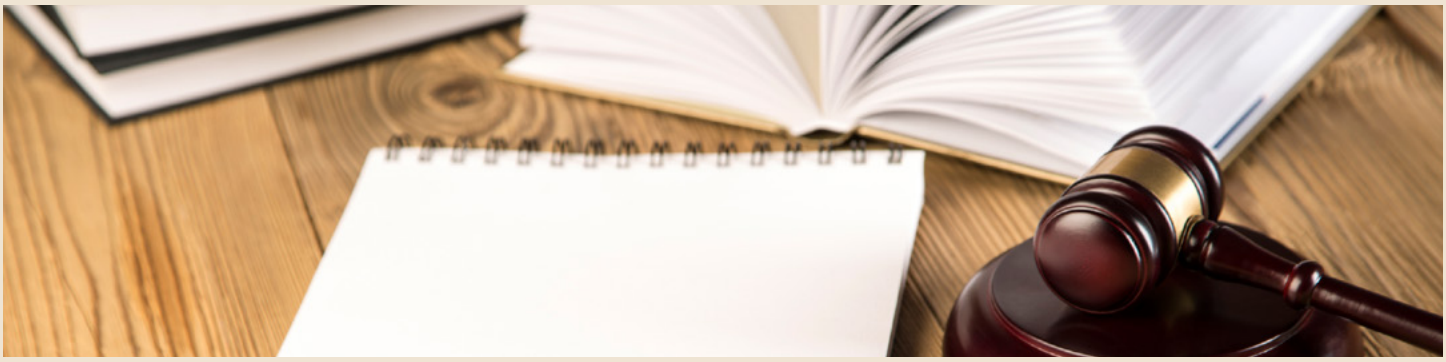
There are any number of reasons to amend your living trust. Sometimes, when there are a lot of changes to be made, or if you have amended your trust several times, it is easier and less confusing to simply "restate" your trust. When we do this, we do not change the name of your trust, but we replace the trust language with new language. Because it's the same trust as before, it does not affect the title to property you have transferred to your trust. Reasons to consider amending or restating your trust are:

- **Law changes** — the January 1, 2013 change in the estate tax law is a good example of this.
- **Family changes** — births or deaths; estrangements or reconciliations.
- **Asset changes** — your estate grew in size, for example, so now we need to consider the estate tax as a factor in your planning.
- **Your desires change** — you may have made a specific provision for a beneficiary, and now you have changed your mind.
- **Your beneficiaries change** — perhaps you discover your grandchild is a special needs child and you want to include a special trust for that grandchild in your living trust.

+ Revoking a Living Trust

A living trust can be revoked at any time. In some cases, you may need to make so many amendments that it's simply more practical to restate your trust entirely. For example, you will need a new living trust if you get divorced.

If you have a individual living trust you may amend or revoke it yourself. If you are married, and you have a separate living trust, you have the power to amend or revoke your trust. However, if you are married and have a joint living trust, the trust cannot be amended or revoked unless both you and your spouse agree.



XVII. WHAT LIVING TRUSTS DON'T DO

Living trusts are very useful and powerful estate planning tools. However, they are not the right tool to accomplish every estate planning objective. Some objectives you may have will require the use of other tools. However, even when we use other tools in an estate plan, we almost always recommend that the client also create a living trust to handle the assets the client will continue to own and control.

There are four things living trusts do not do. It is important to understand this if any one of these four things is an important planning objective for you. Please know that there are other legal tools that do accomplish these objectives.

- **Living Trusts do NOT Provide You with Additional Asset Protection**
- **Living Trusts do NOT Protect Your Assets from the Estate Tax**
- **Living Trusts do NOT Protect Your Assets from the Arkansas Medicaid "Spenddown Rules" that Determine if the State Medicaid Program will Pay for the Cost of Nursing Home Care**
- **Living Trusts do NOT Protect Your Assets from Your Spouse Claiming His or Her Elective Share** [You will need a Pre-Nuptial Agreement to gain that protection — see *In Re Estate of Thompson*, 2014 Ark. 237 (2014)]

> *Stan has been my attorney for estate planning and asset protection for fifteen years. He has always listened to me to first assess my goals, then advised me with those goals in mind. His plans have always been extremely thorough and have accomplished my needs. He always explained why he was setting up my business in a certain way so that I could continue to carry forward his plan. I can recommend with confidence Stan Miller for estate planning and asset protection work.*
>
> –Alan Ribble (Texarkana, AR)




Questions?
Call us toll free at

(800) 827-7784

or visit us at

ilparkansas.com

NO FEE SURPRISES.

We do not charge a fee for our first visit to discuss a living trust estate plan.
If you decide we are a fit for you, we will quote you a fixed fee to create your living trust. Our fees vary depending on the complexity of your plan. But you always know in advance exactly what our fees will be.

A living trust is the most powerful basic estate planning tool that exists today.
We pioneered the use of living trusts in Arkansas. We can help you create a living trust estate plan that provides you with the protection and peace of mind you want.

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