To Trust, Or Not To Trust - That Is the Question
By Matt Anderson

I’m often asked by clients whether or not they should establish a revocable living trust as part of their estate plan. Lately, it seems more people think it’s unnecessary – they believe federal estate taxes won’t be an issue as long as their estate is valued at less than the $5.25M federal estate tax exclusion or combined $10.5M exclusion for married couples. Although this assessment is generally correct, estate taxes are usually unaffected by the existence of a revocable living trust and therefore shouldn’t be an overriding consideration in whether or not to establish the trust. Let’s talk about some of the issues that should be considered in this decision-making process.

Avoidance of Probate
Establishing a living trust requires one to transfer ownership of their assets to the trust. Since probate only pertains to individually owned assets, there are no longer any assets to pass through the probate court process. Bypassing probate provides many benefits. For one, property passing through probate is a matter of public record, meaning anyone can read the will, a list of beneficiaries and assets, and even the breakdown of who is gets what. Probate can also be a time-consuming process that delays the availability of assets to your beneficiaries for months, or even years. It can be especially cumbersome if you own property in multiple states, as probate will be required in every state where real estate is owned. Lastly, probate can be costly. In some states, it can be as high as 6% of the value of the probate estate.

Incapacity Planning
An overlooked benefit of a revocable living trust is the ability to manage assets when age or illness makes it impossible for the individual to do so on his or her own. Without a living trust, individually owned assets need to be managed through a conservatorship or the use of a durable power of attorney. A conservatorship requires the court appointment of an individual to manage the assets of an incapacitated person. A conservator must provide regular accounting records to the probate court and is limited in their flexibility to manage the assets. For this reason, a conservatorship is generally complicated and expensive. A durable power of attorney can provide many of the same management benefits of a living trust; however, the holder of the power generally has less flexibility than the trustee of a living trust. The holder of the power of attorney is not the owner of the assets. Because ownership of property held in a living trust is owned by the trustee, the trustee has greater discretion and flexibility in dealing with those assets. Even though a living trust offers better management than a power of attorney, a power of attorney is still recommended to deal with property that may not have been placed in the trust.

It should be noted that the existence of a living trust does not eliminate the need for a will – it’s possible that assets will not make it into the trust due to oversight or the desire to retain some assets in individual name. These assets will be subject to probate and distributed through the will. The type of will that is used in conjunction with a living trust is called a “pour-over” will: personal effects and household items will be distributed via the will, and all other assets will be poured into the pre-existing living trust.

In conclusion, a revocable living trust may provide many advantages over traditional will planning. Establishing a trust is likely to involve some up-front costs in order to prepare the documents and transfer assets into the trust. A consultation with an attorney is recommended to discuss the cost and benefits.