MEMORANDUM

Barber Emerson, L.C.

ADVANTAGES AND DISADVANTAGES OF A REVOCABLE TRUST

ADVANTAGES:

1. **Avoiding Probate**. Because a living trust requires the person establishing the trust (the "Settlor") to transfer ownership of his property to a trustee, no property remains at death to pass through probate, since probate only pertains to individually-owned assets. As a result, a decedent's property held in trust can usually be made available to benefit the trust beneficiaries more quickly than can property passing through probate pursuant to a decedent's will and assets that need immediate care, such as closely held business interests, can be handled in a timely manner. The avoidance of probate is particularly advantageous if the decedent's property includes real estate in several different states. Probate is required in every state where an individual owns real estate, therefore, transfer of the real estate to a living trust would avoid these ancillary probate proceedings. A more important result, however, is that a living trust avoids many of the costs usually associated with probate administration. Since administrative costs can often reach six percent (6%) of the total value of a decedent's estate, substantial savings can occur.

A living trust cannot, however, avoid all death costs, as estate taxes are usually unaffected by a living trust, and legal services are also required for the purpose of preparing estate tax returns and coordinating the transfer of assets from the trust to the beneficiaries. Nonetheless, a living trust can provide significant savings in settlement costs, particularly if substantially all of a decedent's assets have been transferred to the living trust.

2. **Managing Property During One's Lifetime**. A living trust can help answer the difficult question of how to manage one's assets when age or illness prevents continued personal supervision of those assets. The three most common methods of providing such management are a conservatorship, a durable power of attorney, or a living trust.

A conservatorship requires the judicial appointment of a conservator to manage the assets of an incapacitated person. Because court supervision is required, a conservator's flexibility is limited, a conservator is also subject to regular accounting requirements to the probate court. Consequently, a conservatorship is both cumbersome and expensive.

A durable power of attorney can be used to provide many of the same management benefits as a living trust. However, the person holding the power of attorney does not have the ownership of property on behalf of the person giving the power, therefore cannot manage the property with the same flexibility as can a trustee. Moreover, under a power of attorney, the person giving the power continues to own the assets, thus requiring probate administration of those assets at the time of death. Even though a power of attorney should not be a substitute for a living trust, it should be used as an additional estate planning tool to deal with property that may not have been placed in the trust.

The living trust offers the best management vehicle of the three alternatives. Because the Settlor's assets are transferred to the trustee, the trustee has both flexibility and discretion in dealing with those assets. Although broad flexibility and discretion given to another person with respect to one's assets may be troubling, such flexibility and discretion are usually not given to the other person until the Settlor becomes disabled or otherwise wishes to terminate his management of the trust property. The Settlor's continued involvement is possible because the Settlor can be named as the trustee of his trust to serve until he becomes disabled or otherwise wishes to have another person or institution manage the property. As a result, the Settlor need not look to another person to provide management services until required by either the Settlor's physical or mental condition.

3. **Privacy**. Probate court files in Kansas are open to public scrutiny. The use of a revocable trust hides the nature and beneficiaries of a person's estate and avoids the publicity that may result from scrutiny of the probate file.

DISADVANTAGES:

1. **Immediate Cost**. The trade-off for the ultimate savings resulting by avoiding probate is the immediate cost of establishing the trust. Not only must the trust documents be prepared, but all of the Settlor's assets must be transferred to the trustee. Transferring assets requires preparing deeds, transferring stock certificates, changing registration on certificates of deposits, brokerage and bank accounts, and assigning contractual interests to the trustee. Careful documentation is required to accurately and thoroughly complete these transfers. The usual cost range for preparation of trust documents and transferring assets to the trustee is from $1,000 to $2,500. This amount should be contrasted with the ultimate savings derived from avoiding probate.

2. **Title to Trust Assets**. Since a living trust requires the Settlor's assets to be transferred to the trustee, the Settlor's relationship to the trust property is

technically changed. The change involves the Settlor's property being owned by the Settlor or another trustee as "Trustee of the John Doe Revocable Trust." Consequently, checking accounts must be established in this name, and all deposits made and checks written accordingly. Similarly, when assets are acquired or sold, they must be acquired or sold in the name of the trustee.

3. **Bookkeeping**. Orderly bookkeeping is required for the trust. For one who has maintained good records, trust bookkeeping requirements create few problems. The primary bookkeeping responsibility is to ensure that all assets are owned by the trust, and that accounts are maintained in trust form.

4. **Tax Planning Limitations**. A living trust reduces the number of tax planning opportunities that otherwise would exist at the time of the Settlor's death. The existence of a probate estate involves a new taxpayer with a separate personal exemption, tax rate structure, and deduction opportunities. Post-mortem tax planning involves the use of the estate as a separate taxpayer and can often yield significant tax savings that are not possible with a living trust. The savings will not, however, approximate the overall savings from avoiding probate.

5. **Cost of Settling Estate Even With a Trust**. Even though a living trust is used, legal and accounting services are still necessary at the time of death. Examples common to both estate settlement by use of a revocable trust and by probate are the following: (a) settling disputes among heirs or beneficiaries; (b) settling claims of creditors; (c) valuing the decedent's assets for federal estate tax purposes; (d) preparing the federal and Kansas estate tax returns; (e) resolving federal and estate audits of income and estate taxes; (f) transferring assets; and (g) income tax planning.

6. **No Tax Benefits**. A living trust provides no tax benefits. Since the Settlor retains complete control over the trust property, including the right to revoke it, the trust property will be includable in the Settlor's estate for federal estate and Kansas estate tax purposes. Similarly, there are no income tax benefits from a living trust, but there are also no disadvantages. If the Settlor is the trustee, all trust income is reported on the Settlor's individual income tax return under the Settlor's social security number. No separate taxpayer identification is required until a non-Settlor becomes the trustee.

8. **Will is Still Required**. Establishing a living trust does not eliminate the need for the Settlor to have a will. In few instances are all assets transferred to the trust, either due to inadvertence or the Settlor's desire to retain some assets outside the trust. If assets exist outside of the trust at the time of the Settlor's death, those assets are subject to probate and must be disposed by the Settlor's will. The kind of

will usually used in conjunction with a living trust is a "pour-over" will. A pour-over will may dispose of certain items of tangible personal property, including personal effects and household goods, and then may dispose of the residue of the decedent's property by pouring it over into the pre-existing living trust. As a result of this pour-over technique, all assets end up in the living trust as the receptacle for disposing of the Settlor's property.