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## Is It Time for Wyoming to Update Its Fraudulent Conveyance Laws

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# WYOMING LAW REVIEW

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## IS IT TIME FOR WYOMING TO UPDATE ITS FRAUDULENT CONVEYANCE LAWS?

*Elaine A. Welle\**

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### I. INTRODUCTION

We have all heard stories of unscrupulous debtors who hide their assets or convey their property to evade seizure by creditors. For instance, a debtor who has defaulted on loans gives her assets to a friend or relative to

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put them beyond the reach of her lenders.<sup>1</sup> A husband contemplating divorce secretes away funds.<sup>2</sup> A wealthy individual transfers money to an offshore account to thwart creditors.<sup>3</sup> An insolvent debtor sells his property at a fraction of its cost or under suspicious circumstances.<sup>4</sup>

Attempts to hinder, delay, or defraud creditors are not new.<sup>5</sup> For centuries, debtors in financial distress have endeavored to escape paying their creditors by employing fraudulent devices.<sup>6</sup> The law has done its best to respond by crafting legislation that permits courts to set aside fraudulent transfers.<sup>7</sup> Yet, over the years, due at least in part to the boundlessness of

1. See, e.g., *In re Estate of Reed*, 566 P.2d 587, 590-91 (Wyo. 1977) (finding debtor's renunciation of bequest on the same day judgment was entered against debtor constituted a fraudulent conveyance); *Wyoming Stockmen's Loan Co. v. Johnston*, 240 P. 449, 450, 452, 454 (Wyo. 1925) (setting aside as fraudulent debtor's conveyance of deed to half-brother for no consideration when she continued to occupy the premises); *First Nat'l Bank v. Swan*, 23 P. 743, 750-51 (Wyo. 1890) (finding insolvent debtors transferred property to relatives to defraud creditors).

2. See, e.g., *Breitenstine v. Breitenstine*, 62 P.3d 587, 591-92 (Wyo. 2003).

3. See, e.g., *id.* at 592-93.

4. See, e.g., *Culver v. Graham*, 21 P. 694, 697-98 (Wyo. 1889) (involving an insolvent debtor who conveyed property to a third party for consideration that was never paid, then the following day the third party reconveyed the property to the debtor's wife).

5. As long as there have been cunning, conniving, collusive, and guileful debtors, there have been fraudulent transfers. As Max Radin observed:

Defaulting debtors are apparently as old as the institution of property and that may be almost, if not quite, as old as human society itself. And the fraudulent debtor, the one who strips himself of his property so that his creditor may not get his debt paid, is also an ancient phenomenon.

Max Radin, *Fraudulent Conveyances in California and the Uniform Fraudulent Conveyance Act*, 27 CAL. L. REV. 1, 1 (1938).

6. For example, one can find provisions voiding fraudulent conveyances in early Roman law, thereby indicating the practice was notorious enough to warrant express legal prohibitions centuries ago. See Max Radin, *Fraudulent Conveyances at Roman Law*, 28 VA. L. REV. 110 (1931).

7. The origins of our modern fraudulent transfer laws may be traced back to the Statute of 13 Elizabeth enacted in 1570. See 13 Eliz., ch. 5 (1570) (Eng.). American jurisdictions embraced the English law of fraudulent conveyances, adopting the Statute of 13 Elizabeth by statute or through common law. 1 GARRARD GLENN, *FRAUDULENT CONVEYANCES AND PREFERENCES* § 58 (rev. ed. 1940). In 1918, the National Conference of Commissioners on Uniform State Laws (NCCUSL or Commissioners) revised and codified American fraudulent conveyance law with its promulgation of the Uniform Fraudulent Conveyance Act (UFCA). UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 268, prefatory note (1999). In response to changing legal and commercial environments, NCCUSL rewrote and revised its fraudulent transfer statutes, thus replacing the UFCA with the Uniform Fraudulent Transfer Act (UFTA). *Id.* at 268-71. As of this writing, forty-five states and the District of Columbia have enacted fraudulent transfer statutes based upon NCCUSL's model codes. For a list of states adopting the UFCA and the UFTA, see tables in 7A pt. 2 U.L.A. 1, 26 (Supp. 2004).

human ingenuity and the "fertility of man's invention,"<sup>8</sup> debtors have devised new schemes to defeat their adversaries.<sup>9</sup> In fact, "asset protection" has become a cottage industry.<sup>10</sup> For a fee, lawyers and financial advisors will assist you in protecting your assets by moving them beyond the reach of potential creditors.<sup>11</sup>

Banks, credit card companies, and financial institutions are not the only victims of these asset protection strategies. Creditors come in all shapes and sizes. Such fraudulent schemes can defeat a custodial parent seeking child support, a former spouse attempting to obtain court-ordered maintenance payments,<sup>12</sup> a construction worker trying to get a paycheck from his previous employer, a small business owner's efforts to be paid for supplies sold on credit, or your neighbor's ability to collect a tort judgment against a hit and run driver. As a result, there are not only significant economic costs, but social costs as well, when debtors hinder, delay, or thwart creditor collection efforts.

Despite the need for effective laws to curb such deceptive practices, Wyoming is one of only three states that continue to retain uniform fraudu-

8. Letter from Lord Hardwicke to Lord Kaims (June 30, 1759) (observing that "[f]raud is infinite" given the "fertility of man's invention"), *quoted in* 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA 184 n.1 (9th ed. 1866).

9. *See, e.g.*, Fed. Trade Comm'n v. Affordable Media, L.L.C., 179 F.3d 1228, 1231-32 (9th Cir. 1999) (involving promoters of allegedly fraudulent investment scheme who attempted to use overseas trust account with "event of duress" clause to prevent investor recovery by placing funds beyond the jurisdiction of U.S. courts).

10. Over the last decade, trillions of dollars have flowed into offshore asset protection trust accounts. Eric Henzy, *Offshore and "Other" Shore Asset Protection Trusts*, 32 VAND. J. TRANSNAT'L L. 739, 740 (1999).

11. Advertisements for offshore asset protection trusts may be found in financial magazines and on the internet being marketed to physicians and other professionals as a means to protect their assets from malpractice claims, divorce awards, and other judgments. *Id.*; Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1036 (2000). Although the fees for establishing and maintaining such trusts are often steep, their use is no longer limited to the ultra-wealthy. Henzy, *supra* note 10, at 740. While such devices may serve legitimate estate planning or tax planning purposes, offshore trusts also may be employed to hinder creditors or attempt to avoid the burdens of alimony and child support payments. *See* Breitenstine v. Breitenstine, 62 P.3d 587, 593 & n.1 (Wyo. 2003).

12. Debtors also may employ fraudulent transfer devices to hinder state collection efforts. For example, as a condition of eligibility for state aid and benefits, recipients must assign all of their rights to spousal support, child support, and medical support to the state. *See, e.g.*, WYO. STAT. ANN. § 20-6-106(a) (LexisNexis 2003). Thereafter, the state may enforce claims for such support obligations to reimburse it for any public assistance received. *See, e.g., id.* § 20-6-106(h). Thus, debtors may use fraudulent conveyance schemes to thwart the state's recovery of support payments, thereby shifting the cost of assistance to taxpayers which results in increasing the burden on the public.

lent conveyance laws promulgated over 85 years ago.<sup>13</sup> This raises the question, are Wyoming's current statutes adequate to reach the new, novel, and often imaginative fraudulent transfer schemes employed today? After 85 years, are improvements or modifications required to protect Wyoming's citizens from unscrupulous debtors?

Considering the number of legal and commercial developments since enactment, the proliferation of increasingly sophisticated fraudulent transfer schemes, and the zealous promotion of asset protection devices, a critical examination of Wyoming's fraudulent conveyance laws appears warranted. In the hopes of stimulating discussion, this Article examines whether Wyoming should update its fraudulent conveyance laws. Part II of this Article traces the origins of Wyoming's fraudulent conveyance laws. Part III questions why Wyoming has not updated its laws. Part IV offers a critique of Wyoming's current statutory approach. Part V discusses alternative statutory approaches. And Part VI examines the cost and benefits of legislative reform in this area.

This Article maintains that improvement and modernization of Wyoming's fraudulent conveyance laws are long overdue. Given that a well-received, widely-adopted, and updated uniform act already exists, the cost associated with revising Wyoming's fraudulent transfer statutes would be far from prohibitive, while the social and economic benefits may well be many.<sup>14</sup>

## II. WYOMING'S FRAUDULENT CONVEYANCE LAWS

### *A. Origin of Wyoming's Fraudulent Conveyance Laws*

While still a territory, Wyoming adopted the common law of England, including its prohibitions against fraudulent transfers.<sup>15</sup> The origins of Wyoming's fraudulent conveyance laws, therefore, date back to the Statute of 13 Elizabeth enacted by England's Parliament in 1570.<sup>16</sup> Similarly, most American jurisdictions adopted some form of the Statute of 13 Elizabeth,

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13. As of this writing, Wyoming, Maryland, and New York are the only three states that continue to retain the UFCA which was promulgated in 1918. See UNIF. FRAUDULENT CONVEYANCE ACT, 7A pt. 2 U.L.A. 1 (Supp. 2004).

14. See *infra* Part VI.

15. See *Ware v. Wanless*, 2 Wyo. 144, 154-57 (Wyo. 1879) (noting Wyoming, while a territory, adopted the common law of England, as modified by judicial decisions, including the Statute of 13 Elizabeth which prohibited transfers that delay, hinder, or defrauds creditors); see also COMPILED LAWS OF WYOMING, ch. 26 (1876) (setting forth text of 1869 Wyoming act adopting the common law of England).

16. JAMES J. WHITE, BANKRUPTCY AND CREDITORS' RIGHTS, CASES AND MATERIALS 711 (1985); see also *Bay Plastics, Inc. v. BT Commercial Corp.*, 187 B.R. 315, 322 & n.8 (Bankr. C.D. Cal. 1995).

either statutorily or by incorporating it as part of their common law tradition.<sup>17</sup>

The Statute of 13 Elizabeth made it unlawful to convey property with the intent to “delay, hinder or defraud creditors.”<sup>18</sup> Unfortunately, the intent to delay, hinder, or defraud creditors is rarely subject to direct proof,<sup>19</sup> since debtors seldom are dim-witted enough to admit their devious intent. In an effort to achieve just results, courts began to recognize certain so-called “badges of fraud,”<sup>20</sup> meaning suspicious circumstances from which a court could infer the requisite intent.<sup>21</sup> These badges of fraud included transfers to friends or relatives, transfers where the debtor retained possession and use of the property, transfers for no consideration, transfers made in secret, and transfers made when creditors commenced collection activity.<sup>22</sup> Over the years, the list grew until too numerous to catalog.<sup>23</sup>

Moreover, as courts confronting differing fact patterns attempted to reach equitable outcomes, fraudulent conveyance law began to vary.<sup>24</sup> Not only did the circumstances that constituted a “badge of fraud” vary, but the weight given to a particular badge of fraud could vary as well.<sup>25</sup> These differing results led to confusion, inconsistencies, and uncertainty in the law.<sup>26</sup>

17. Peter M. Alces & Luther M. Dorr, *A Critical Analysis of the New Uniform Fraudulent Transfer Act*, 1985 U. ILL. L. REV. 527, 530 (1985).

18. See 13 Eliz., ch. 5 (1570) (Eng.) (providing text of statute).

19. See *Breitenstine v. Breitenstine*, 62 P.3d 587, 592 (Wyo. 2003); see also UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 268, prefatory note (1999).

20. In *Twyne's Case*, 76 Eng. Rep. 809 (Star Chamber 1601), the seminal English case on fraudulent conveyance law and a staple in most debtors' and creditors' rights textbooks, the court noted certain “signs and marks of fraud,” such as when there occurs (i) a transfer of all the debtor's property, including necessities; (ii) while the debtor retains possession and use of the property; (iii) where the transfer is clandestinely made; and (iv) while a creditor's collection action is pending. *Id.* at 812-13.

21. *Breitenstine*, 62 P.3d at 592-93; see also UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 268, prefatory note (1999).

22. *Breitenstine*, 62 P.3d at 593 (listing some of the more common badges of fraud).

23. *Id.*

24. See UNIF. FRAUDULENT CONVEYANCE ACT, 7A pt. 2 U.L.A. 2-3, prefatory note (1999); UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 268, prefatory note (1999). See, e.g., *Platte County State Bank v. Frantz*, 239 P. 531, 534-35 (1925) (describing split in jurisdictions on the issue of whether a creditor must obtain a judgment before bringing an action to set aside a transfer as fraudulent).

25. For example, jurisdictions varied as to whether the “badge” was treated as “conclusive of fraud, prima facie evidence of fraud, or merely admissible evidence of fraud.” DAVID G. EPSTEIN & STEVE H. NICKLES, *DEBT, BANKRUPTCY, ARTICLE 9 AND RELATED LAWS, MODERN CASES AND MATERIALS* 48 (1994). Over time, the law became so “muddled and confused” that in some states the case law offered three different, contradictory methods of handling the same situation. Frank Reich, *Uniform Fraudulent Conveyance Act in Pennsylvania*, 5 U. PITT. L. REV. 161, 165 (1939). See also UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 268, prefatory note (1999).

26. See UNIF. FRAUDULENT CONVEYANCE ACT, 7A pt. 2 U.L.A. 2-3, prefatory note (1999).

For example, transactions treated as fraudulent conveyances in one state were not considered fraudulent transfers in neighboring states.<sup>27</sup> Even within states, the law was often muddled, confused, and inconsistent.<sup>28</sup>

### *B. Wyoming's Adoption of the Uniform Fraudulent Conveyance Act*

In 1918, the National Conference of Commissioners on Uniform State Laws (NCCUSL or Commissioners) promulgated the Uniform Fraudulent Conveyance Act (UFCA) to promote uniformity and reduce the confusion in fraudulent conveyance laws existing at the time.<sup>29</sup> Commentators applauded the UFCA and urged its adoption.<sup>30</sup> Twenty-six states, including Wyoming, subsequently enacted the UFCA.<sup>31</sup>

The UFCA proved successful in promoting uniformity. Many states enacted the UFCA substantially without change, while other states used the UFCA as a template in drafting their own legislation.<sup>32</sup> Furthermore, in those states that did not adopt the UFCA, state courts often developed common law rules that mirrored UFCA provisions.<sup>33</sup> Even more importantly, its provisions were incorporated into the Bankruptcy Act of 1938.<sup>34</sup>

The UFCA also proved successful in reducing confusion, inconsistencies, and uncertainty in the law. The UFCA not only codified established common law principles,<sup>35</sup> but clarified substantive issues and simplified pro-

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27. See UNIF. FRAUDULENT CONVEYANCE ACT, 7A pt. 2 U.L.A. 2, prefatory note (1999). Peter M. Alces and Luther M. Dorr provide an excellent historical overview of the confusion created by differing state law precedent in their article, *A Critical Analysis of the New Uniform Fraudulent Transfer Act*, *supra* 17, at 530-32, including citations to illustrative cases.

28. See Reich, *supra* note 25, at 165.

29. UNIF. FRAUDULENT CONVEYANCE ACT, 7A pt. 2 U.L.A. 2-3, historical notes & prefatory note (1999).

30. Alces & Dorr, *supra* note 17, at 533 & n.44 (citing numerous law review articles published from 1920 through 1972 that praised the UFCA and recommended its adoption).

31. Uniform Law Commissioners, NCCUSL, Summary, Uniform Fraudulent Transfer, at [http://www.nccusl.org/nccusl/uniformact\\_summaries/uniformacts-s-ufca.asp](http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-ufca.asp) (last visited Oct. 26, 2004) [hereinafter NCCUSL, Summary]. See UNIF. FRAUDULENT CONVEYANCE ACT, 7A pt. 2 U.L.A. 1 (Supp. 2004) (noting Wyoming's adoption).

32. ELIZABETH WARREN & JAY L. WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS, TEXT, CASES, AND PROBLEMS* 130 (4th ed. 2001).

33. 5 ALAN N. RESNICK & HENRY J. SOMMER, *COLLIER ON BANKRUPTCY* ¶ 548.01[2] (Lawrence P. King ed., 15th ed. rev. 2004).

34. UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 268, prefatory note (1999). See, e.g., Analysis of H.R. 12889, 74th Cong., 2d Sess. 214 (May 28, 1936) ("We have condensed the provisions of the Uniform Fraudulent Conveyance Act, retaining its substance and, as far as possible, its language.") [hereinafter Analysis of H.R. 12889].

35. The UFCA codified the Statute of 13 Elizabeth with respect to transfers by debtors made with actual intent to defraud. See UNIF. FRAUDULENT CONVEYANCE ACT § 7, 7A pt. 2 U.L.A. 113 (1999) ("Every conveyance made and every obligation incurred with actual intent . . . to hinder, delay, or defraud either present or future creditors, is fraudulent . . ."). In doing so, the drafters also sought to codify the "better" decisions applying the Statute of 13 Elizabeth. See Analysis of H.R. 12889, *supra* note 34, at 213.

cedures. For example, the drafters sought to eliminate, or at least minimize, diversity by providing a more objective test for determining fraudulent intent.<sup>36</sup> Under the UFCA, certain types of transfers were deemed constructively fraudulent, such as when the conveyance was not supported by fair consideration and the transferor's financial position was inadequate to repay his creditors at the time or as a result of the transfer.<sup>37</sup> In addition, the UFCA conferred rights to creditors prior to judgment or execution<sup>38</sup> and also extended protection to future creditors.<sup>39</sup>

Recognizing the social and economic benefits that flow from uniformity, certainty, and consistency, the Wyoming legislature enacted the UFCA in 1929.<sup>40</sup> With the exception of a few insignificant, nonsubstantive changes,<sup>41</sup> Wyoming's fraudulent conveyance statutes embody the UFCA as it left the hands of the drafters in 1918.<sup>42</sup>

*C. Wyoming's Fraudulent Conveyance Statutes Remain Unchanged Despite Promulgation of a Revised Uniform Act and Numerous Legal and Commercial Developments*

Notwithstanding the wide-spread acceptance of the UFCA, NCCUSL was persuaded to rewrite and revise the UFCA to respond to the legal and commercial developments that occurred in the years since its promulgation.<sup>43</sup> While the UFCA served its initial purposes admirably, by the 1980s even the drafters of the UFCA conceded that over time the act's language had become archaic and some of its provisions outdated.<sup>44</sup> In addition, NCCUSL determined that modernization, technical changes, and improvements were needed to provide greater clarity and to react to changes in

36. See UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 268, prefatory note (1999).

37. See UNIF. FRAUDULENT CONVEYANCE ACT §§ 4-6, 7A pt. 2 U.L.A. 67, 105, 110 (1999).

38. UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 268, prefatory note (1999) ("An important reform effected by the Uniform Act was the elimination of any requirement that a creditor have obtained a judgment or execution returned unsatisfied before bringing action to avoid a transfer as fraudulent.").

39. See UNIF. FRAUDULENT CONVEYANCE ACT §§ 6-7, 7A pt. 2 U.L.A. 110, 113 (1999).

40. See UNIF. FRAUDULENT CONVEYANCE ACT, 7A pt. 2 U.L.A. 1 (Supp. 2004) (providing citation to Wyoming's adoption and effective date of the legislation).

41. The alterations are minor and do not affect the substance of the legislation. The variations are limited to stylistic changes in numbering, capitalization, and punctuation and the insertion of statutory cross-references. The modifications represent amendments required to conform to Wyoming's statutory drafting and style rules, and therefore such changes are essentially cosmetic in nature. Compare UNIF. FRAUDULENT CONVEYANCE ACT §§ 1 to 14, 7A pt. 2 U.L.A. 6-264 (1999), with WYO. STAT. ANN. §§ 34-14-101 to -113 (LexisNexis 2003). A copy of the UFCA marked to show all Wyoming departures from the official text is available from the author upon request.

42. Compare UNIF. FRAUDULENT CONVEYANCE ACT §§ 1 to 14, 7A pt. 2 U.L.A. 6-264 (1999), with WYO. STAT. ANN. §§ 34-14-101 to -113 (LexisNexis 2003).

43. UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 268-71, prefatory note (1999).

44. See NCCUSL, Summary, *supra* note 31.



the law and the commercial marketplace that had taken place since the Commissioners promulgated the UFCA in 1918.<sup>45</sup>

For example, NCCUSL concluded that new laws, such as revisions to the federal bankruptcy statutes relating to fraudulent transfers, the widespread adoption of the Model Corporation Act, added prohibitions in the Model Rules of Professional Conduct, and the universal enactment of Article 9 of the Uniform Commercial Code, dictated the need for conforming amendments.<sup>46</sup> As an illustration, over the years, Congress had made significant changes to the federal bankruptcy laws.<sup>47</sup> These revisions to the bankruptcy code created conflicts between the UFCA and federal fraudulent transfer laws.<sup>48</sup> Differing terminology, tests, and defenses produced differing outcomes when a case was decided under the UFCA versus the federal bankruptcy statutes,<sup>49</sup> thus proving problematic.<sup>50</sup> Conflicts with other state and federal statutes produced similar difficulties. Numerous examples of such conflicts existed.<sup>51</sup> NCCUSL therefore decided revisions to the UFCA were needed to bring the statute into conformity with various federal and state laws that had been enacted since 1918.<sup>52</sup>

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45. See NCCUSL, Summary, *supra* note 31; Uniform Law Commissioners, NCCUSL, Why States Should Adopt, Uniform Fraudulent Transfer, at [http://www.nccusl.org/Update/uniformact\\_why/uniformacts-why-ufta.asp](http://www.nccusl.org/Update/uniformact_why/uniformacts-why-ufta.asp) (last visited Oct. 26, 2004) [hereinafter NCCUSL, Why States Should Adopt].

46. See UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 268-71, prefatory note (1999).

47. The Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978), as amended from time to time, governed from 1898 until 1978. Congress made extensive revisions to the bankruptcy laws in the late 1970s with the passage of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (current version at 11 U.S.C. §§ 101-1330). Since then, Congress has amended the bankruptcy code several times. For a detailed description of the history of the bankruptcy code and its amendments, see WARREN & WESTBROOK, *supra* note 32, at 161-67.

48. See UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 268, prefatory note (1999).

49. See, e.g., Paul P. Daley & Mitchell Appelbaum, *The Modernization of Massachusetts Fraudulent Conveyance Law: The Adoption of the Uniform Fraudulent Transfer Act*, 82 MASS. L. REV. 337, 338-39 (1998); see also 7A pt. 2 U.L.A. 269-71, prefatory note (1999) (discussing how the drafters revised various provisions in the uniform law to reflect bankruptcy code provisions and why such changes were desirable).

50. See *infra* Part IV discussing the impact on commerce, on lawyers advising clients, on forum shopping, and on a host of other considerations when there is a lack of uniformity.

51. For example, provisions in the Uniform Commercial Code, the Model Corporation Act, and the Model Rules of Professional Conduct either conflicted with the UFCA or created confusion in the courts. See UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 268-69, prefatory note (1999) (listing legal developments that were inconsistent with the UFCA and created confusion); see also Alces & Dorr, *supra* note 17, at 537 (noting conflicting legal developments, such as provisions regarding perfection of security interests in the Uniform Commercial Code and the Model Corporation Act's treatment of dividend distributions).

52. See NCCUSL, Why States Should Adopt, *supra* note 45.

To remedy the situation, NCCUSL promulgated the Uniform Fraudulent Transfer Act (UFTA) to replace the UFCA.<sup>53</sup> As of this writing, forty-two states and the District of Columbia have adopted the UFTA.<sup>54</sup> Over the years, all but three of the twenty-six states that adopted the UFCA have replaced it with the UFTA.<sup>55</sup>

Not only is Wyoming one of less than a handful of states that continues to retain the UFCA,<sup>56</sup> but since its enactment in 1929<sup>57</sup> the Wyoming legislature has made no substantive changes to the state's fraudulent conveyance statutes.<sup>58</sup> This begs the question, why hasn't Wyoming adopted the revised uniform act or even updated its fraudulent transfer statutes?

### III. WHY HASN'T WYOMING'S LAW BEEN UPDATED?

As Professor Douglas Michael astutely observed in his article concerning Kentucky's fraudulent transfer laws, "Sometimes an antique is an honored, well-worn standard that has endured because of its superior quality and workmanship."<sup>59</sup> On the other hand, sometimes an antique "is simply junk that no one has bothered to throw out or replace because it hasn't been in the way very much."<sup>60</sup> While Wyoming's fraudulent conveyance statutes are far from "junk," it is more than likely that Wyoming's failure to update its fraudulent transfer laws is simply an oversight. Clearly, Wyoming's legislators have had more pressing matters to attend to over the years. In addition, given the relatively low volume of reported cases dealing with these

53. See UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 268-69, prefatory note (1999). NCCUSL withdrew its recommendation and endorsement of UFCA enactment in 1984 due to the act being superseded by the UFTA. See UNIF. FRAUDULENT CONVEYANCE ACT, 7A pt. 2 U.L.A. 1 (Supp. 2004).

54. The UFTA has been enacted in Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, and Wisconsin. For a list of states adopting the UFTA, statutory citations, and effective dates, see tables in UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 26-27 (Supp. 2004).

55. See NCCUSL, Summary, *supra* note 31 (stating twenty-six states adopted the UFCA). Wyoming, Maryland, New York, and the Virgin Islands are the only jurisdictions that continue to retain the UFCA. Therefore, only three states continue to retain the UFCA. See UNIF. FRAUDULENT CONVEYANCE ACT, 7A pt. 2 U.L.A. 1 (Supp. 2004).

56. See *supra* note 55.

57. 1929 Wyo. Sess. Laws ch. 8 (approved Feb. 2, 1929).

58. Compare UNIF. FRAUDULENT CONVEYANCE ACT §§ 1 to 14, 7A pt. 2 U.L.A. 6-264 (1999), with WYO. STAT. ANN. §§ 34-14-101 to -113 (LexisNexis 2003).

59. Douglas C. Michael, *The Past and Future of Kentucky's Fraudulent Transfer and Preference Laws*, 86 Ky. L.J. 937, 968 (1997-98).

60. *Id.*

issues,<sup>61</sup> it is certainly understandable that outdated fraudulent conveyance laws have not garnered much legislative attention. Like an old piece of furniture gathering dust in the corner, these laws just haven't "been in the way very much."

Informal conversations with Wyoming legislators and former members of Wyoming's Uniform Laws Commission confirm that amending Wyoming's fraudulent conveyance laws just has not been a priority. Instead, Wyoming's legislators and Commission members have used their limited time, resources, and political capital to address topics of more pressing importance to the citizens of Wyoming, and rightly so.

In fact, there is no evidence that the Wyoming legislature or any of its legislative committees have ever considered any changes to Wyoming's fraudulent conveyance statutes. It appears that no revisions have been proposed, let alone studied, considered, or rejected. Thus, any failure to update Wyoming's fraudulent conveyance laws is a sin of omission, rather than a deliberate, conscious, and studied choice to retain the current law as superior to other alternatives. Consequently, it may now be time for the Wyoming legislature to take a critical look at the state's fraudulent transfer laws.

#### IV. SHOULD WYOMING UPDATE ITS FRAUDULENT CONVEYANCE LAWS?

The purpose of fraudulent transfer laws is to protect creditors from unfair transactions that hinder efforts to collect legitimate debts.<sup>62</sup> The intent is to make it more difficult for the devious to prevail and much safer for the honest and decent among us.<sup>63</sup> Does Wyoming's UFCA<sup>64</sup> accomplish its purpose efficiently and effectively?

Wyoming's current fraudulent conveyance statutes embody the UFCA as it left the hands of the drafters in 1918, without any substantive changes.<sup>65</sup> As a result, Wyoming's current statutory approach is subject to the same criticisms and concerns that prompted NCCUSL to withdraw its

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61. See WYO. STAT. ANN. §§ 34-14-1 to -113 (LexisNexis 2003) (based on case citations in the statutory annotations, Wyoming's UFCA has been cited in only 12 reported cases).

62. CHARLES J. TABB, *THE LAW OF BANKRUPTCY* 412 (1997).

63. In an analogous context, Karl Llewellyn, Chief Reporter of the Uniform Commercial Code, wrote that by addressing flaws in the existing law the Uniform Commercial Code "made it a little more difficult to be dirty and very much safer to be honest and decent in the handling of one's business." Karl Llewellyn, *Why a Commercial Code?*, 22 TENN. L. REV. 779, 781 (1953).

64. WYO. STAT. ANN. § 34-14-101 (LexisNexis 2003) ("This act . . . may be cited as the Uniform Fraudulent Conveyance Act."). Wyoming's fraudulent conveyance statutes, hereafter, are often referred to as "Wyoming's UFCA" in the text and footnotes.

65. Compare UNIF. FRAUDULENT CONVEYANCE ACT §§ 1 to 14, 7A pt. 2 U.L.A. 6-264 (1999) (promulgated in 1918), with WYO. STAT. ANN. §§ 34-14-101 to -113 (LexisNexis 2003).

endorsement<sup>66</sup> and promulgate a revised uniform act.<sup>67</sup> Among the criticisms lodged at the UFCA is that the language of the act is archaic, the terminology is outdated, amendments are needed to reduce conflicts with other laws, and revisions are required to correct statutory flaws, address omissions, respond to case law, and react to commercial developments. Additionally, it may be argued that Wyoming's failure to adopt the most recent uniform fraudulent transfer statutes imposes unnecessary costs and burdens on Wyoming residents. The section that follows describes these concerns, and thus serves as a critique of Wyoming's current statutory approach.

*Archaic Language and Outdated Terminology.* The purpose of legislation is to establish standards and communicate rules of conduct.<sup>68</sup> To effectively accomplish its purpose, a statute should be written in a language familiar to its readers, so that it can be easily read and comprehended.<sup>69</sup>

Since the UFCA was drafted over 85 years ago,<sup>70</sup> it contains language and terminology from an earlier time. As previously discussed, even the drafters of the UFCA concede that its language is antiquated and its terminology outdated.<sup>71</sup> When read today, the language seems stilted and jargon-ridden.<sup>72</sup> Some of the key terms used are no longer words that lawyers, judges, or others would regard as familiar. Furthermore, much of the legal terminology employed has fallen into disuse, replaced with more modern terms and tests designed to respond to recent commercial and legal developments.<sup>73</sup>

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66. See UNIF. FRAUDULENT CONVEYANCE ACT, 7A pt. 2 U.L.A. 1 (Supp. 2004) (stating "[t]he Uniform Fraudulent Conveyance Act (1918) was withdrawn from recommendation for enactment by the National Conference of Commissioners on Uniform State Laws in 1984 . . .").

67. See *supra* part II.C.

68. See U.S. Fidelity & Guaranty Co. v. Guenther, 281 U.S. 34, 37 (1930) (stating that the term "law" when used "in its generic sense" means "rules of action or conduct duly prescribed by controlling authority, and having binding legal force"); LAWRENCE E. FILSON, THE LEGISLATIVE DRAFTER'S DESK REFERENCE 72 (1992) (stating that "any law is intended to communicate a message to its readers").

69. FILSON, *supra* note 68, at 7, 72, 86 (stating that laws "ought to be written in language familiar to . . . readers," and in "language that can easily be read and comprehended.").

70. The UFCA was promulgated by NCCUSL in 1918. UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 268, prefatory note (1999).

71. NCCUSL, Summary, *supra* note 31, and text accompanying *supra* notes 44-45.

72. See UNIF. FRAUDULENT CONVEYANCE ACT §§ 1 to 14, 7A pt. 2 U.L.A. 6-264 (1999); see also WYO. STAT. ANN. §§ 34-14-101 to -113 (LexisNexis 2003).

73. For example, Wyoming's UFCA contains terms of art, such as the term "fair consideration." WYO. STAT. ANN. §§ 34-14-104 to -107 (LexisNexis 2003). The term "fair consideration" is no longer used in the federal bankruptcy code or any other statutes that governs fraudulent transactions. Instead, the federal bankruptcy code uses the term "reasonably equivalent value," which represents a different test than that used in the UFCA. See UNIF. FRAUDULENT TRANSFER ACT § 4 cmts. (2) & (3), 7A pt. 2 U.L.A. 302 (1999).

For example, the title of the act itself, the "Uniform Fraudulent Conveyance Act," is dated.<sup>74</sup> Today, the word "conveyance" is rarely used, except when referring to certain types of real estate transactions.<sup>75</sup> In commercial transactions, parties now use the word "transfer" when referring to a change in possession or control of property, rather than the more legalistic and antiquated term "conveyance."<sup>76</sup> In addition, over the years, courts have recognized that the public is not only concerned with prohibiting fraudulent conveyances of real property, but given the growing importance and value of personal property such laws should restrict fraudulent transfers of personal property as well.<sup>77</sup>

If the intent of legislation is to communicate clearly, accurately, and effectively, then the Wyoming legislature may wish to consider updating Wyoming's UFCA to modernize the language and adopt terminology and tests that are more frequently used in analogous areas of the law.

*Conflicts with Other State and Federal Laws.* Probably the most compelling reason why Wyoming should consider updating and revising its fraudulent conveyance laws is that Wyoming's current fraudulent conveyance statutes differ in important respects with other state and federal laws. As previously discussed, NCCUSL concluded that conforming amendments were needed to reduce or minimize conflicts between the UFCA and other laws.<sup>78</sup> The drafters determined that portions of the UFCA were inconsistent with provisions in the federal Bankruptcy Reform Act of 1978 and state laws based on the Model Corporation Act, the Uniform Commercial Code, and the Model Rules of Professional Conduct. Such dissonance led NCCUSL to promulgate a revised uniform act<sup>79</sup> and withdraw its endorsement of the UFCA.<sup>80</sup>

*Results in Unnecessary Costs and Burdens.* The UFCA does not purport to cover all law relating to fraudulent transfers.<sup>81</sup> Other bodies of

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74. UNIF. FRAUDULENT CONVEYANCE ACT § 13, 7A pt. 2 U.L.A. 264 (1999); see also WYO. STAT. ANN. § 34-14-101 (LexisNexis 2003).

75. See Frank R. Kennedy, *The Uniform Fraudulent Transfer Act*, 18 UCC L.J. 195, 199 (1986) (noting that the word "conveyance" has "a connotation suggestive only of a transfer of real property"); see also *Report of the Debtor-Creditor Committee of the Indiana State Bar Association Reporting on and Recommending Adoption of the Indiana Uniform Fraudulent Transfer Act*, 28 IND. L. REV. 1197, 1203 (1995) [hereinafter *Indiana Report*].

76. See NCCUSL, *A Short Comparison of the Uniform Fraudulent Transfer Act with the Uniform Fraudulent Conveyance Act 1* (memorandum) (on file with the author) (stating "transfer" "is the more accepted modern term") [hereinafter *NCCUSL, A Short Comparison*].

77. See Kennedy, *supra* note 75, at 199-200.

78. See *supra* notes 46-52 and text accompanying notes.

79. See UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 268-71, prefatory note (1999).

80. See *supra* note 66.

81. UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 269, prefatory note (1999).

law, such as the federal bankruptcy code<sup>82</sup> and state corporate law, address fraudulent transfers as well.<sup>83</sup> The linguistic differences between Wyoming's UFCA and other laws, therefore, create unnecessary burdens for Wyoming lawyers and increase legal costs for Wyoming residents.<sup>84</sup> For instance, when reviewing corporate transactions, conducting estate planning, or handling domestic relations matters, Wyoming counsel must analyze all property transfers under both Wyoming's UFCA and the federal bankruptcy code. Consequently, when structuring a property division in a divorce case or advising a client with respect to asset transfers, a Wyoming lawyer must evaluate his client's solvency under two different sets of definitions and two different tests.<sup>85</sup> The lawyer also must determine whether his client is receiving "fair consideration" under Wyoming's UFCA,<sup>86</sup> and then evaluate whether his client is receiving "reasonably equivalent value" under the federal bankruptcy code.<sup>87</sup> The differences in language, key definitions, and legal tests between Wyoming's UFCA and other laws require duplicative analysis and thus may lead to differing determinations, judicial outcomes, and risk. If the legislature revised Wyoming's fraudulent conveyance laws to correspond more closely with the federal bankruptcy code and other analogous laws, the burden on Wyoming lawyers and the cost to Wyoming residents would be reduced.

*Statutory Flaws and Omissions Create Uncertainty.* Wyoming's UFCA is not a perfect statute. Over the years, the drafters of the UFTA, commentators, and courts interpreting the UFCA have identified drafting errors and areas where the statutory language of the UFCA could be improved. For instance, the UFCA provision that deals with conveyances of partnership property<sup>88</sup> is redundant and also susceptible to inequitable appli-

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82. The federal bankruptcy code section dealing with fraudulent transfers is codified at 11 U.S.C. § 548 (2000).

83. See TABB, *supra* 62, at 414 (providing state corporate law and commercial law examples). Moreover, courts generally have adopted the view that the UFCA does not preempt all fraudulent transfer law in jurisdictions that have adopted the act. 2 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 1291 n.8 (1965).

84. The arguments and examples set forth in this paragraph are drawn from an article by Paul Daley and Mitchel Appelbaum in which they argued that the differences between the Massachusetts UFCA and the federal bankruptcy code created unnecessary burdens for Massachusetts lawyers. Daley & Appelbaum, *supra* note 49, at 339.

85. Compare WYO. STAT. ANN. § 34-14-103 (LexisNexis 2003) (providing definition of "insolvency"), with 11 U.S.C. § 101(32) (2000) (providing definition of "insolvent"). In addition to linguistic differences, each set of statutes is subject to a different set of judicial decisions that interpret the statutory language.

86. WYO. STAT. ANN. § 34-14-104 (LexisNexis 2003) (setting forth test for "fair consideration").

87. 11 U.S.C. § 548(a)(1)(B)(i) (2000) (requiring debtor receive "reasonably equivalent value").

88. UNIF. FRAUDULENT CONVEYANCE ACT § 8, 7A pt. 2 U.L.A. 197 (1999); see also WYO. STAT. ANN. § 34-14-109 (LexisNexis 2003).

cation.<sup>89</sup> In addition, there are gaps and omissions in the statute. One example is the lack of statutory guidance for determining the time when a transfer is made.<sup>90</sup> In addition, the UFCA does not establish a statute of limitations for fraudulent conveyance claims.<sup>91</sup> Nor does the UFCA provide any transferee defenses or contain any provisions to protect the interests of transferees.<sup>92</sup>

Furthermore, creditor-debtor relationships and commercial transactions have changed dramatically over the years.<sup>93</sup> The drafters of the UFCA never envisioned the types of complex commercial transactions that are considered common today, such as leveraged buyouts, intercorporate guarantees, intricate asset protection devices, and other sophisticated commercial transfer mechanisms that have developed over time. As a result, the UFCA was not designed, nor is it adequate, to address such transactions.<sup>94</sup> When important and emerging areas of the law are not addressed in the statutes, the outcome is unclear, the lawyer's work increases, and the client's risk multiplies.<sup>95</sup>

Uncertainty is expensive. When an issue is uncertain, lawyers must review case law, and given the paucity of Wyoming cases often research the case law in other states, then determine the possible statutory interpretations, consider various outcomes, assess the risk, and advise the client accord-

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89. See UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 269, prefatory note (1999). The various criticisms of the UFCA provision dealing with conveyances of partnership property are well-documented in several articles written by Professor Frank Kennedy. See Kennedy, *supra* note 75, at 204; Frank R. Kennedy, *Partnerships and Partners' Estates under the Bankruptcy Code*, 1983 ARIZ. ST. L.J. 219, 241-45 (1983); Frank R. Kennedy, *A New Deal for Partnership Bankruptcy*, 60 COLUM. L. REV. 610, 622-24 (1960).

90. See UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 271, prefatory note (1999) (noting that the revised uniform act, the UFTA, contains a "new section" that specifies when a transfer is made, thus indicating that the UFCA did not contain an analogous provision). Other fraudulent transfer statutes, such as the UFTA and the federal bankruptcy code, contain specific provisions that specify when a transfer is deemed made, thereby eliminating any uncertainty. See 11 U.S.C. § 548 (d) (2000); UNIF. FRAUDULENT TRANSFER ACT § 6, 7A pt. 2 U.L.A. 336-37 (1999).

91. See NCCUSL, *A Short Comparison*, *supra* note 76, at 3 (stating that the statute of limitations provision in the UFTA is new, thus indicating that the UFCA did not contain an analogous provision).

92. See *id.* (stating that the UFCA does not provide any defenses for transferees or any provisions that protect the interests of the transferee).

93. See NCCUSL, *Summary*, *supra* note 31.

94. BRIAN A. BLUM, *BANKRUPTCY AND DEBTOR/CREDITOR EXAMPLES AND EXPLANATIONS* 73 (2d ed. 1999) (stating that "[b]y the late 1970s, . . . the [UFCA] had become out-of-date and wanting for revision to accommodate judicial decisions and recent developments in commercial law. . .").

95. Edward A. Weiss, *Connecticut Fraudulent Conveyance Law*, 11 BRIDGEPORT L. REV. 489, 579-80 (1991) (noting that the role of lawyers and the decisions of their clients become more difficult when the law is confusing or an important issue has not been addressed).

ingly.<sup>96</sup> Thus, any uncertainty represents an unnecessary tax on Wyoming residents, particularly when the Wyoming legislature could eliminate such uncertainty by simply updating and revising the statute to address such issues.

*Lack of Uniformity Imposes Added Costs on Wyoming Residents.* Now that Wyoming is one of only a handful of states that retain the UFCA,<sup>97</sup> its fraudulent transfer laws vary significantly from that of the forty-two states that have adopted the revised uniform act.<sup>98</sup> This lack of uniformity creates practical problems for lawyers and adds to the costs borne by Wyoming residents and those doing business in Wyoming.

Lack of uniformity is costly. Having a different set of legal rules than other states undermines economic development. When commercial laws differ from state to state, it complicates business transactions and adds another layer of legal costs that foreign entities may be unwilling to assume simply to do business with Wyoming entities and individuals. Moreover, it complicates the legal life of Wyoming individuals and firms that wish to do business in other states. Wyoming residents must not only learn the laws that govern in Wyoming, but must learn the laws that govern in other states as well. Uniformity would make it easier and less costly for Wyoming residents and Wyoming firms to transact business in other states.

Since the promulgation of the UFTA, the UFCA has been abandoned by NCCUSL and no longer receives institutional support. Now that forty-two states have updated their fraudulent transfer laws by adopting the revised uniform act, the vast majority of new case law in the area is being developed under the UFTA, rather than the UFCA. Legal treatises are now focusing solely on the UFTA. Commentators and scholars are directing their efforts toward improving the UFTA, not the UFCA. Law review articles are no longer written about the UFCA. As a result, the UFCA has been left to languish. With little new case law and no new commentary, Wyoming attorneys lack guidance on how to apply Wyoming's UFCA to new types of commercial transactions or innovative asset protection schemes. As the years go by, Wyoming will be left with scattered, disassociated, and outdated case law and few legal resources to provide guidance. If Wyoming does not update its statutes, the state's limited judicial resources will be devoted unnecessarily to answering questions under the UFCA which could be answered immediately with the adoption of the revised uniform act.<sup>99</sup>

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96. BLUM, *supra* note 94, at 73 (stating that "Over the years, judicial embellishment of the [UFCA] had made it muddy, cumbersome, and nonuniform.").

97. *Supra* note 55.

98. *Supra* note 54.

99. See Weiss, *supra* note 95, at 580.



Given the criticisms and concerns detailed in this section, it is unlikely that anyone will rise to the defense of Wyoming's existing fraudulent conveyance statutes. Improvement and modernization of Wyoming's law in this area seem long overdue. From the standpoint of Wyoming's businesses, legal community, and citizens in general, better fraudulent transfer laws appear needed. So what are Wyoming's options?

#### V. WYOMING'S OPTIONS: ALTERNATIVE STATUTORY APPROACHES

If modernization of Wyoming's fraudulent conveyance statutes appears desirable, what are Wyoming's legislative options? State fraudulent transfer statutes follow one of three models.<sup>100</sup> Several states continue to employ some version of the Statute of 13 Elizabeth,<sup>101</sup> which was first enacted in 1570.<sup>102</sup> Only three states, including Wyoming, continue to retain the UFCA.<sup>103</sup> By far, the most common model is the UFTA, which has been enacted in forty-two states.<sup>104</sup>

Adopting the Statute of 13 Elizabeth would represent a step backward for the State of Wyoming. In 1929, the Wyoming legislature abandoned the state's common law approach to fraudulent transfer law which was based on the vaguely worded Statute of 13 Elizabeth.<sup>105</sup> Recognizing the benefits that flow from a more comprehensive statutory approach, the Wyoming legislature enacted the UFCA.<sup>106</sup> To return to a statutory approach based on the Statute of 13 Elizabeth would constitute a retreat to a time when the Wyoming law of fraudulent conveyance was uncertain and confused.<sup>107</sup>

Part IV of this Article summarizes the criticisms directed at the UFCA and describes many of the concerns voiced about it.<sup>108</sup> While updating and revising the UFCA to address such issues is theoretically possible, the expense in terms of time, manpower, and expertise would be prohibitive for a small state with limited resources such as Wyoming. Moreover, given that the UFTA reflects NCCUSL's attempt to rewrite and revise the UFCA to improve the statute and address concerns,<sup>109</sup> any attempt to revise the UFCA would merely duplicate NCCUSL's efforts when it drafted the UFTA.

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100. TABB, *supra* note 62, at 413-14.

101. *Id.* at 414. See *supra* Part II.A. for a discussion of the Statute of 13 Elizabeth.

102. *Supra* note 16.

103. See *supra* note 55.

104. See *supra* note 54.

105. See *supra* Part II.A. and Part II.B.

106. See *supra* Part II.B.

107. See *supra* Part II.A.

108. See *supra* Part IV.

109. See *supra* Part II.C.

Unless the Wyoming legislature wishes to spend its limited time and legislative resources drafting a new set of fraudulent transfer statutes from whole cloth, adoption of the UFTA or some modified form of the UFTA appears to be the most cost-effective solution, if the legislature deems reform desirable. Consequently, if the benefits that would flow from adopting the UFTA or some variation of the UFTA outweigh the costs, the Wyoming legislature may wish to consider enactment.

## VI. BENEFITS AND COSTS OF REFORM

How would Wyoming's fraudulent conveyance law change if the Wyoming legislature adopted the UFTA? Is the UFTA an improvement over the UFCA? If so, how? How would Wyoming benefit if it enacted the UFTA? The section that follows attempts to answer these questions.

First, the goal of all fraudulent transfer laws is the same. The Statute of 13 Elizabeth, the UFCA, the UFTA, and the variations of each all strive to make it unlawful to convey property with the intent to hinder, delay, or defraud creditors.<sup>110</sup> Each new iteration of the fraudulent transfer laws represents an attempt to improve the law so as to better deter and catch the devious among us. For example, the UFCA sought to codify the "better decisions" applying the Statute of 13 Elizabeth,<sup>111</sup> clarify certain issues that had arisen, and simplify procedures.<sup>112</sup> Similarly, the drafters of the UFTA sought to update the UFCA to respond to legal and commercial developments.<sup>113</sup> Years of experience applying the UFCA indicated areas where modernization, technical changes, and improvements would be desirable.<sup>114</sup>

Second, adoption of the UFTA would not result in a radical change in Wyoming's fraudulent conveyance law. The goal of the UFTA drafters was to fine tune, enhance, and build upon the UFCA to better thwart attempts to hinder, delay, and defraud creditors. Thus, the UFTA preserves the same basic structure and approach as the UFCA, but with a number of important improvements.<sup>115</sup> Even critics of the UFTA recognize that the

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110. See UNIF. FRAUDULENT TRANSFER ACT § 4(a), 7A pt. 2 U.L.A. 301 (1999) ("A transfer made or obligation incurred by a debtor is fraudulent . . . if the debtor made the transfer . . . with actual intent to hinder, delay, or defraud any creditor . . ."); UNIF. FRAUDULENT CONVEYANCE ACT § 7, 7A pt. 2 U.L.A. 113 (1999) ("Every conveyance made and every obligation incurred with actual intent . . . to hinder, delay, or defraud either present or future creditors, is fraudulent . . ."); 13 Eliz., ch. 5 (1570) (Eng.) (unlawful to convey property with the intent to "delay, hinder or defraud creditors").

111. See Analysis of H.R. 12889, *supra* note 34, at 213.

112. See *supra* notes 35-39 and accompanying text.

113. See *supra* notes 43-53 and accompanying text.

114. See *supra* notes 43-53 and accompanying text.

115. See UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 269-71, prefatory note (1999).

UFTA represents an improvement over its predecessors and constitutes the best available codification of fraudulent conveyance law.<sup>116</sup>

### A. Benefits

The UFTA is more accessible and more understandable than the UFCA. The obscure terminology and dated language of the UFCA creates confusion.<sup>117</sup> In contrast, the UFTA contains updated statutory language<sup>118</sup> and incorporates terms used in analogous fraudulent transfer laws.<sup>119</sup> Simplification and modernization of the statutory language results in a more accessible and more understandable code that is much more user friendly than Wyoming's UFCA.

The UFTA corrects statutory flaws that were discovered in the UFCA. For example, the UFTA omits UFCA provisions that were deemed redundant or susceptible to inequitable application.<sup>120</sup> The UFTA also eliminates the unneeded distinction between creditors holding matured claims versus those holding unmatured claims.<sup>121</sup> Under the UFTA, remedies are available to all creditors whether they have matured claims or unmatured claims.<sup>122</sup>

The UFTA fills gaps and addresses perceived omissions in the UFCA. The drafters of the UFTA added a number of new code sections. For instance, the UFTA includes a provision that establishes a statute of

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116. See, e.g., Paul M. Shupack, *Confusion in Policy and Language in the Uniform Fraudulent Transfer Act*, 9 CARDOZO L. REV. 811, 841 (1987) ("Therefore, while the Uniform Fraudulent Transfer Act may well be an improvement on its predecessor, the Uniform Fraudulent Conveyance Act, the choice of its drafters to fail to make one last edit of its language is regrettable.").

117. See *supra* notes 70-77 and accompanying text.

118. The UFTA employs more modern terminology. For example, the UFTA replaces the word "conveyance" with the more modern and commonly used term "transfer." NCUSSL, A Short Comparison, *supra* note 76, at 1. Similarly, the UFTA replaces the UFCA term "fair consideration" with the term "reasonably equivalent value," which is derived from the more modern terminology used in the federal bankruptcy code. See *id.*; UNIF. FRAUDULENT TRANSFER ACT § 3 cmts. (2) & (3), 7A pt. 2 U.L.A. 295-96 (1999).

119. See *infra* notes 132-134 and accompanying text.

120. The drafters of the UFTA omitted section 8 of the UFCA which addressed conveyances of partnership property. In the UFTA prefatory note, NCCUSL observed that section 8 of the UFCA is "redundant in part and in part susceptible of inequitable application." UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 269-70, prefatory note (1999). For a discussion of the various criticisms directed at section 8 of the UFCA, see the articles cited *supra* note 89.

121. UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 270, prefatory note (1999).

122. See UNIF. FRAUDULENT TRANSFER ACT §§ 1(3)-(4), 7, 7A pt. 2 U.L.A. 275, 339-40 (1999).

limitations for fraudulent transfer actions.<sup>123</sup> Another completely new provision answers questions that have arisen under the UFCA regarding when a transfer is made or an obligation is incurred.<sup>124</sup> Additionally, the UFTA includes a brand new provision intended to protect the interests of transferees by providing certain defenses.<sup>125</sup>

The UFTA also offers additional guidance in areas where the UFCA was lacking. As an example, the UFTA, unlike the UFCA, provides a list of factors that courts may consider in determining whether the debtor had fraudulent intent.<sup>126</sup> By providing such illustrations, this list of nonexclusive factors promotes uniformity in application and provides guidance to both practitioners and the judiciary.

The UFTA provides greater certainty, a characteristic that is advantageous in all commercial law. For example, the UFTA adds a number of newly defined terms that result in greater clarity.<sup>127</sup> In addition, the drafters renamed the act to emphasize its applicability to transfers of personal property as well as conveyances of real property.<sup>128</sup>

The UFTA codifies certain decisional rules that developed under the UFCA.<sup>129</sup> The UFTA, therefore, clarifies areas where statutory interpretation of the UFCA was an issue or the law was confused. Moreover, interpretative case law often is difficult to locate and not always easy to read or understand when you do find it.<sup>130</sup> As a result, such codification reduces uncer-

123. UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 271, prefatory note (1999); UNIF. FRAUDULENT TRANSFER ACT § 9 & cmts., 7A pt. 2 U.L.A. 359 (1999) (setting forth a four year statute of limitations).

124. The UFTA contains a new section that defines when a transfer is made or an obligation is incurred for purposes of the act. UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 271, prefatory note (1999); UNIF. FRAUDULENT TRANSFER ACT § 6 & cmts., 7A pt. 2 U.L.A. 336-37 (1999). Timing of transfers is relevant for many purposes, including determining when the statute of limitations begins to run.

125. See UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 270-71, prefatory note (1999); UNIF. FRAUDULENT TRANSFER ACT § 8 & cmts., 7A pt. 2 U.L.A. 351-52 (1999).

126. See UNIF. FRAUDULENT TRANSFER ACT § 4(b) & cmt. (5), 7A pt. 2 U.L.A. 302-03 (1999).

127. The UFTA contains many more defined terms than the UFCA. Compare UNIF. FRAUDULENT CONVEYANCE ACT § 1, 7A pt. 2 U.L.A. 6 (1999) (defining only four terms, "assets," "conveyance," "creditor," and "debt"), with UNIF. FRAUDULENT TRANSFER ACT § 1, 7A pt. 2 U.L.A. 274-76 (1999) (containing definitions for thirteen terms used in the act).

128. See UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 269, prefatory note (1999).

129. EPSTEIN & NICKLES, *supra* note 25, at 49. See, e.g., UNIF. FRAUDULENT TRANSFER ACT § 4 cmts. (5)-(6), 7A pt. 2 U.L.A. 303-05 (1999) (discussing the origins of section 4(b) as representing a codification of prior case law).

130. In an analogous context, Karl Llewellyn, Chief Reporter of the Uniform Commercial Code, wrote that prior to the codification of the Uniform Commercial Code a "large body of the law on sales of goods . . . exist[ed] as dissociated case law, difficult to find and not too easy to read when you do find it." Llewellyn, *supra* note 63, at 779.

tainty and decreases legal costs by reducing the amount of legal research required.

As previously discussed, the UFCA differs in important respects with other state and federal laws that deal with fraudulent transfers.<sup>131</sup> The UFTA, on the other hand, incorporates many of the definitions and tests found in analogous fraudulent transfer laws<sup>132</sup> and therefore is compatible with other such laws. For instance, many of the UFTA's definitions are derived from language found in the federal bankruptcy code.<sup>133</sup> Other UFTA provisions incorporate federal bankruptcy code concepts.<sup>134</sup> As a result, the UFTA tracks the federal bankruptcy code much more closely than the UFCA.<sup>135</sup> Both debtors and creditors benefit when such laws are compatible and harmonious.

The UFTA includes accompanying comments.<sup>136</sup> The comments, among other things, explain the purpose of various statutory provisions, describe the origin and background of certain code sections, express the drafters' intent, provide cross-references to other related sections of the statute, and outline the differences between the UFTA and the UFCA.<sup>137</sup> The benefit of these comments to lawyers and judges working with the statute is immeasurable.<sup>138</sup> For a Wyoming lawyer in a rural area who is unfamiliar with

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131. See *supra* notes 46-52 and accompanying text.

132. For example, the definition of "person" used in the UFTA is adapted from terminology used in the Uniform Commercial Code. UNIF. FRAUDULENT TRANSFER ACT § 1 cmt. (9), 7A pt. 2 U.L.A. 278 (1999). The definition of "property" used in the UFTA is derived from the Uniform Probate Code. *Id.* § 1 cmt. (10), at 278.

133. The following defined terms used in the UFTA are derived from the federal bankruptcy code: "affiliate," "claim," "debt," "insider," "lien," "relative," "transfer," and "insolvency." See *id.* § 1 cmts. (1), (3), (5), (7), (8), (11), (12), at 276-78; *id.* § 2 cmt. (1), at 289. For a reference table that lists terms used in the UFTA and the corresponding federal bankruptcy code provisions, see Michael L. Cook & Richard E. Mendales, *The Uniform Fraudulent Transfer Act: An Introductory Critique*, 62 AM. BANKR. L.J. 87, 96 (1988).

134. For example, the UFTA's concepts of "value," "reasonably equivalent value," and "present value" are derived from language in the federal bankruptcy code and hence reflect the bankruptcy code's concepts of valuation. See UNIF. FRAUDULENT TRANSFER ACT § 3 cmts. (2), (3), (6), 7A pt. 2 U.L.A. 295-97 (1999). The timing provisions in the UFTA that establish when a transfer is made or an obligation is incurred are based on provisions in the bankruptcy code. See *id.* § 6 cmt. (1), at 336. Provisions of the UFCA dealing with the defenses provided to, the liability of, and the protections afforded to transferees are drawn from similar provisions in the bankruptcy code. See *id.* § 8 cmts. (2), (4), (6), at 352-54.

135. While the UFTA tracks the federal bankruptcy code more closely than the UFCA, the UFTA and the federal bankruptcy code still differ in a number of respects. As a result, commentators have questioned the effectiveness of the UFTA's conforming amendments. See, e.g., Cook & Mendales, *supra* note 133.

136. See UNIF. FRAUDULENT TRANSFER ACT §§ 1-10 cmts., 7A pt. 2 U.L.A. 274-364 (1999).

137. See *id.*

138. In an analogous context, Karl Llewellyn, Chief Reporter of the Uniform Commercial Code, discusses the benefits of statutory comments to lawyers and the judiciary. Llewellyn, *supra* note 63, at 782.

fraudulent transfer laws and has no access to law review articles or legal treatises, the comments will allow the attorney to get up to speed quickly and easily. Furthermore, by describing the drafters' intent, such comments are of tremendous assistance to courts seeking to interpret and apply the statutes.

Moreover, Wyoming courts and practitioners will benefit from the judicial decisions that courts in other jurisdictions have rendered over the years.<sup>139</sup> Such opinions provide guidance to both the bar and the judiciary regarding interpretation and application of the UFTA.<sup>140</sup>

In addition, NCCUSL, commentators, and scholars have written hundreds of pages about the UFTA, including law review articles and treatise sections that explain its various provisions<sup>141</sup> and how such provisions relate to other areas of the law.<sup>142</sup> The availability of these many and varied resources should quell any concerns that Wyoming practitioners might voice about having to master a new set of statutes. In addition, for those practitioners already familiar with the UFCA, there are many excellent sources that compare the UFTA and the UFCA provision-by-provision.<sup>143</sup> As a result, the legal community should not find transitioning from the UFCA to the UFTA either painful or over burdening.

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139. *Uniform Laws Annotated* provides case digests and references to the judicial decisions that interpret and apply the UFTA. Hundreds of cases are cited. See, e.g., UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 30-84 (Supp. 2004).

140. See *id.*

141. For excellent overviews and descriptions of the various UFTA provisions see BLUM, *supra* note 94, at 74-83, and TABB, *supra* note 62, at 412-57. See also Nathaniel Hansford, *Fraudulent Conveyances: Alabama Common Law vs. the Uniform Fraudulent Transfers Act—An Opening Discussion*, 16 CUMB. L. REV. 1, 16-20 (1985). The large three-ring binder and numerous drop files in my office that contain copies of law review and bar journal articles on the UFTA evidence the number of pages written on the subject. Either prior to or concurrent with enactment of the UFTA in a state, the state's bar journal, the state school's law review, or some other analogous publication often publishes an article that describes the provisions of the UFTA. Given that forty-two states have adopted the UFTA, more than a few pages have been written on the topic. See, e.g., Daley & Appelbaum, *supra* note 49, at 337 (providing an example of a state law review article); Kenneth C. Kettering, *The Pennsylvania Uniform Fraudulent Transfer Act*, PA. B. ASS'N Q., Apr. 1994, at 68 (providing an example of a state bar publication article).

142. A number of excellent sources compare provisions of the UFTA with provisions in the federal bankruptcy code. See, e.g., TABB, *supra* note 62, at 412-57; Cook & Mendales, *supra* note 133.

143. For example, both the UFTA's section-by-section comments and the UFTA's detailed prefatory note compare the UFTA with its predecessor, the UFCA. See UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 268-71, prefatory note (1999); UNIF. FRAUDULENT TRANSFER ACT §§ 1-10 cmts., 7A pt. 2 U.L.A. 274-364 (1999). The two most succinct and helpful provision-by-provision analysis sources that I have found are short two to three page outlines that I obtained from NCCUSL. See Fred H. Miller, *The Uniform Fraudulent Transfer Act Section by Section Analysis of the Act* (memorandum on file with the author); NCCUSL, *A Short Comparison*, *supra* note 76. A number of law review articles also offer provision-by-provision analysis. See, e.g., Alces & Dorr, *supra* note 17, at 537-47; Cook & Mendales, *supra* note 133, at 88-95.

The most important benefit of adopting the UFTA is that Wyoming's fraudulent transfer law would be uniform with the law of most other states.<sup>144</sup> Businesses today often disregard state lines. Uniform commercial laws make it easier and less costly for both firms and individuals to transact business in multiple states. Uniformity reduces the need for individuals and businesses to learn and to deal with a myriad of other laws as they do business in different states. The adoption of uniform laws facilitates economic development by providing foreign entities, both international and domestic, a clear, consistent, and familiar legal framework for doing business. Moreover, fraudulent conveyances, by their nature, frequently involve the transfer of property across state lines.<sup>145</sup> Uniformity in state rules and procedures allows creditors to more easily recover property that has been transferred outside the state.<sup>146</sup> By adopting the UFTA, Wyoming will move back into the mainstream of commercial debtor-creditor law.

### B. Costs

Even if the benefits are overwhelming, before embarking on any reform initiative, the legislature must consider costs. Legal reform generally requires significant legislative time, energy, and resources. Too often the cost associated with legislative action thwarts reform.

In this case, however, a well-received uniform act drafted by experts in the field already exists. Forty-two states have enacted the UFTA, many after careful study and scrutiny.<sup>147</sup> State legislative studies and findings are readily available.<sup>148</sup> Such studies provide an overview of the statutes, critiques of the provisions, and extensive analysis of the policy issues raised. In addition, both academics and practitioners have written a significant number of thoughtful articles on the UFTA.<sup>149</sup>

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144. For discussions regarding the benefits and advantages of uniform laws see UNIF. FRAUDULENT CONVEYANCE ACT, 7A pt. 2 U.L.A. 2, prefatory note (1999); Larry E. Ribstein & Bruce Kobayahi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 137-40, 150 (1996); NCCUSL, *Why States Should Adopt*, *supra* note 45.

145. Hansford, *supra* note 141, at 21.

146. *Id.*

147. A number of law review articles and other publications report the findings, conclusions, and recommendations of state bar committees that reviewed the UFTA prior to enactment. See, e.g., *Indiana Report*, *supra* note 75 (reporting on Indiana's study); Michael, *supra* note 59, at 957 n.130 (referencing commentary provided by North Carolina's bar association); Kettering, *supra* note 141 (reporting on Pennsylvania's study).

148. See *supra* note 147.

149. See, e.g., Alces & Dorr, *supra* note 17; Hansford, *supra* note 141; Kennedy, *supra* note 75; Shupack, *supra* note 116.

Even more importantly, states have “road tested” the UFTA.<sup>150</sup> Numerous jurisdictions have enacted the UFTA, tested it for years, and subjected it to judicial review and interpretation. Wyoming can draw from and benefit from the experiences of these other jurisdictions, including the neighboring states of Colorado, Idaho, Montana, Nebraska, South Dakota, and Utah.<sup>151</sup> Compared to most legislative proposals, there would be little, if any, groundbreaking work to do.<sup>152</sup> The costs associated with this reform proposal, therefore, would be far from prohibitive.

## VII. CONCLUSION

In discussing the state of commercial law before the enactment of the Uniform Commercial Code, Professor Karl Llewellyn observed that “the law as it now stands . . . stands only because nobody has ever got around to thinking and doing anything about it . . . .”<sup>153</sup> The same may be said about Wyoming’s current fraudulent conveyance statutes.<sup>154</sup> Despite the need for effective laws to curb fraudulent transfers,<sup>155</sup> Wyoming is one of only three states that continue to retain a fraudulent conveyance law promulgated over 85 years ago.<sup>156</sup> Considering the number of legal and commercial development since enactment, the proliferation of increasingly sophisticated fraudulent transfer schemes, and the zealous promotion of asset protection devices, improvement and modernization of Wyoming’s fraudulent conveyance laws appear long overdue.<sup>157</sup> Given that a well-received, widely-adopted, and updated uniform act already exists, the cost associated with revising Wyoming’s fraudulent transfer statutes would be far from prohibitive, while the social and economic benefits may well be many.<sup>158</sup> Adoption of the UFTA, therefore, merits the Wyoming legislature’s serious consideration.

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150. Twenty-two states enacted the UFTA in the late 1980s, and thus have well over a decade of experience. Sixteen states enacted the UFTA in the 1990s. See UNIF. FRAUDULENT TRANSFER ACT, 7A pt. 2 U.L.A. 26-27 (Supp. 2004).

151. See *id.*

152. Most states have adopted the UFTA without substantial modifications. *Indiana Report*, *supra* note 75, at 1203. Several states have modified the UFTA prior to adoption by either departing from the uniform language or by deleting or amending certain provisions. See *id.* at 1203, 1205-07 (describing certain statutory modifications adopted and proposed in various states). For an analysis of notable departures from the language of the uniform act see Frank R. Kennedy, *Reception of the Uniform Fraudulent Transfer Act*, 43 S.C. L. REV. 655 (1992); see also *Indiana Report*, *supra* note 75, at 1205-07; Kettering, *supra* note 141, at 70, 77-78; Michael, *supra* note 59, at 961-62.

153. Llewellyn, *supra* note 63, at 781.

154. See *supra* Part III.

155. See *supra* notes 1-12 and accompanying text.

156. See *supra* note 13.

157. See *supra* Part II.C. and Part IV.

158. See *supra* Part VI.



