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The Discovered Country: Wyoming's Primacy as a Trust Situs Jurisdiction

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THE DISCOVERED COUNTRY: WYOMING'S PRIMACY AS A TRUST SITUS JURISDICTION

*Amy M. Staeher**

For the West is where we all plan to go some day.

—Robert Penn Warren

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I. INTRODUCTION

The world is shrinking; it is becoming known. The global community, of which we are all a part, has embraced information sharing, transparency, and collaboration between jurisdictions.¹ Thanks to legislation and enforcement efforts both at home and abroad, governments are collecting long overdue taxes on unreported foreign gains,² continuing to close tax and reporting loopholes,³ and using multinational tools to combat money laundering.⁴ To be sure, these

¹ See *infra* notes 2–29 and accompanying text.

² See *Offshore Voluntary Disclosure Program*, INTERNAL REVENUE SERV. (Aug. 3, 2017), <https://www.irs.gov/individuals/international-taxpayers/offshore-voluntary-disclosure-program>; *Italian Government Reopens Voluntary Disclosure Program*, ERNST & YOUNG (Nov. 2016), <http://www.ey.com/gl/en/services/people-advisory-services/hc-alert—italian-government-reopens-voluntary-disclosure-program>; *Your Guide to Making a Disclosure*, HM REVENUE & CUSTOMS, <https://www.gov.uk/government/publications/hmrc-your-guide-to-making-a-disclosure/your-guide-to-making-a-disclosure> (last updated Nov. 17, 2017); ORG. FOR ECON. COOPERATION & DEV., UPDATE ON VOLUNTARY DISCLOSURE PROGRAMMES 5 (Aug. 2015), <https://www.oecd.org/ctp/exchange-of-tax-information/Voluntary-Disclosure-Programmes-2015.pdf>.

³ The Foreign Account Tax Compliance Act (FATCA) and associated regulations impose harsh withholding taxes on certain foreign financial institutions and non-financial foreign entities that do not agree to engage in due diligence to identify and report information about accounts held by U.S. persons to the IRS. I.R.C. §§ 1471(a), 1472(a) (2012); Treas. Reg. §§ 1.1471-2(a)(1), 1.1472-1(a) (2018). More than one hundred countries have entered into bilateral intergovernmental agreements with the U.S., providing for sharing of financial information. *Foreign Account Tax Compliance Act (FATCA)*, U.S. DEP'T OF TREASURY, <https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx> (last visited Feb. 11, 2018). OECD countries outside the U.S. have pursued similar information sharing through Common Reporting Standard (CRS) rules. *Communiqué at G20 Meeting on Global Economy in Moscow*, ORG. FOR ECON. COOPERATION & DEV. (July 20, 2013), http://www.g20.utoronto.ca/2013/2013_Final_Communique_FM_July_ENG.pdf; ORG. FOR ECON. COOPERATION & DEV., THE CRS IMPLEMENTATION HANDBOOK 5–6 (2015), <http://www.oecd.org/ctp/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf>; ORG. FOR ECON. COOPERATION & DEV., STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL INFORMATION IN TAX MATTERS 29 (2014), http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/standard-for-automatic-exchange-of-financial-account-information-for-tax-matters_9789264216525-en [hereinafter CRS].

⁴ 31 U.S.C. §§ 5313, 5324(a)(3), 5318(g)(1), 5340–5342 (2012); 31 C.F.R. § 1010.314 (2018); 12 U.S.C. § 1818(j) (2012); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended 18 U.S.C. § 1960 (2012)). See generally Laurel S. Terry, *An Introduction to the Financial Action Task Force and its 2008 Lawyer Guidance*, 2010 PROF. LAW. 3 (2010); Philip J. Ruce, *The Bank Secrecy Act: Considerations for Continuing Banking*

efforts have been going on for quite some time and their value is crucial to the viability of nations, to our general safety as citizens of the world, and in ensuring that enacted tax and financial laws are enforced against everyone.⁵ As these efforts progress, so do their corollary impacts.⁶ Aside from the benefits mentioned above, these efforts have resulted in increased reporting burdens for individuals, banks, money managers, and trust companies; a glut of shared financial information that some governments have little ability to sift through and make use of; and potentially increased peril for individuals living in certain parts of the world.⁷ As the intimate nature of our world increases, the laws within jurisdictions and governing interactions between them continue to evolve.⁸ As a result, families and the people who advise them are in the unique position of being able to consider a variety of jurisdictions—both new and established—and select the one with the right opportunities, sufficient flexibility, and appropriate safeguards in which to locate trusts to hold a portion or all of a family's wealth.⁹

In 2010, as part of the Hiring Incentives to Restore Employment (HIRE) Act,¹⁰ Congress passed the Foreign Account Tax Compliance Act (FATCA) in an effort to target non-compliance by U.S. taxpayers making use of foreign accounts,

Relationships After the Filing of a Suspicious Activity Report, 30 QUINNIPIAC L. REV. 43 (2011); FED. FIN. INST. EXAMINATION COUNCIL, BANK SECRECY ACT/ANTI-MONEY LAUNDERING EXAMINATION MANUAL (2014), https://www.ffiec.gov/bsa_aml_infobase/documents/bsa_aml_man_2014_v2.pdf.

⁵ See ORG. FOR ECON. COOPERATION & DEV., AUTOMATIC EXCHANGE OF INFORMATION: WHAT IT IS, HOW IT WORKS, BENEFITS, AND WHAT REMAINS TO BE DONE 15–16, 19–20 (2012), <http://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-of-information-report.pdf> (describing the worldwide efforts in favor and benefits of the automatic exchange of financial information).

⁶ See *infra* note 7 and accompanying text.

⁷ Sahel Ahyaié Assar, *FATCA: The End of 'Shadow Boxing' in the Offshore Trust Industry*, 44 TAX MGMT. INT'L J. 84 (2015) (discussing significant burdens placed on foreign financial institutions); Scott D. Michel & H. David Rosenbloom, *FATCA and Foreign Bank Accounts: Has the U.S. Overreached?*, TAX NOTES INT'L MAG., May 30, 2011, at 709, 710–12 (2011); Zac DeLap, *Too Much Collateral Damage FATCA: The Well-Intentioned, Yet Misguided and Unconstitutional*, *Tax Law*, 35 J. NAT'L ASS'N L. JUD. 213, 225–37 (2015); John S. Wisiackas, Comment, *Foreign Account Tax Compliance Act: What It Could Mean for the Future of Financial Privacy and International Law*, 31 EMORY INT'L L. REV. 585, 601–04 (2017); Brian A. Mottl, *More Than Just the Numbers: The Legal Dilemmas and Economic Repercussions of FATCA*, 7 NO. 2 U. PUERTO RICO BUS. L.J. 260, 265–67 (2016); Mark R. Van Heukelom, *The Foreign Account Tax Compliance Act and Foreign Insurance Companies: Better to Comply than to Opt Out*, 39 J. CORP. L. 155, 164–68 (2013).

⁸ See DAVID HELD ET AL., GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS, AND CULTURE 2 (1999) (discussing globalization as a process of evolving planetary interconnectedness of all aspects of social life); PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION 3–4, 35–38 (2005) (describing economic globalization and the evolution of legal responses).

⁹ 1 JEFFREY A. SCHOENBLUM, MULTISTATE AND INTERNATIONAL ESTATE PLANNING §§ 2.01–2.04 (2009) (discussing jurisdictional choice in international estate planning and relevant considerations).

¹⁰ Hiring Incentives to Restore Employment Act of 2010, Pub. L. No. 111-147, 124 Stat. 71 (2010).

including those utilized by offshore trusts.¹¹ As a result, U.S. jurisdictions gained popularity as trust situs locations.¹² Wyoming began to be recognized as a safe, stable, and friendly jurisdiction in which to locate a trust, offering accommodating and evolving trust legislation, a state-income-tax-free climate, and enhanced creditor protection.¹³ Christopher M. Reimer's comprehensive 2011 *Wyoming Law Review* article entitled *The Undiscovered Country: Wyoming's Emergence as a Leading Trust Situs Jurisdiction* details Wyoming trust law as compared to other leading jurisdictions at that time.¹⁴

Since the publication of that article, neither the scrutiny of offshore trust jurisdictions¹⁵ nor the corresponding interest in U.S. jurisdictions has subsided.¹⁶ The FATCA-generated financial information sharing between the U.S. and foreign governments spurred a global initiative, headed by the Organization for Economic Co-operation and Development (OECD), to implement similar

¹¹ JOINT. COMM. ON TAXATION, TECHNICAL EXPLANATION OF THE "FOREIGN ACCOUNT TAX COMPLIANCE ACT OF 2009" 50–59 (Oct. 27, 2009), <https://www.jct.gov/publications.html?func=startdown&id=3596>; Andrew Liazos & Todd Solomon, *What You Need to Know About Foreign Account Tax Compliance Act's (FATCA) Impact on Non-U.S. Retirement Plans*, NAT'L L. REV. (Mar. 22, 2013), <https://www.natlawreview.com/article/what-you-need-to-know-about-foreign-account-tax-compliance-act-s-fatca-impact-non-us>.

¹² See *infra* note 16 and accompanying text.

¹³ See Christopher M. Reimer, *The Undiscovered Country: Wyoming's Emergence as a Leading Trust Situs Jurisdiction*, 11 WYO. L. REV. 165, 166 (2011) [hereinafter Reimer, *Undiscovered Country*]; Scott St. Amand, *Should I Stay or Should I Go? The Erosion of the Offshore Asset Protection Trust and the Rise of Its Domestic Analogue*, 91 FLA. B. J., June 2017, at 18, 18 n.1; Alice Rokahr & Maggie Cockburn, *Foreign Trusts and U.S. Tax Implications*, 61 S.D. L. REV. 420, 426–27 (2016); Christopher M. Reimer, *International Trust Domestication: Migrating an Offshore Trust to a U.S. Jurisdiction*, 25 QUINNIPIAC PROB. L.J. 170, 175, 180–81, 184 (2012) [hereinafter Reimer, *Domestication*]; Allan V. Ytterberg & James P. Weller, *Managing Family Wealth through a Private Trust Company*, 36 ACTEC L.J. 623, 625, 628, 630 (2010).

¹⁴ See generally Reimer, *Undiscovered Country*, *supra* note 13 (describing the benefits of Wyoming as a trust situs).

¹⁵ For example, see the international uproar that accompanied a leak of a large number of financial documents from the Panama law firm of Mossack Fonseca, often called the "Panama Papers." Scott Higham, *For U.S. Tax Cheats, Panama Papers Reveal Perilous New World*, WASH. POST. (Apr. 10, 2016), https://www.washingtonpost.com/investigations/for-us-tax-cheats-panama-papers-reveals-a-perilous-new-world/2016/04/08/a3467e9a-fd9f-11e5-886f-a037dba38301_story.html?utm_term=.196f1c18b10f.

¹⁶ See Amand, *supra* note 13, at 18, 18; Michael Kosnitzky, *Why the U.S. May Become the Trust Jurisdiction of Choice for Non-Residents*, WORTH (June 3, 2016), <http://www.worth.com/why-the-us-may-become-the-trust-jurisdiction-of-choice-for-wealthy-non-residents/>; Peter A. Cotorceanu, *Hiding in Plain Sight: How Non-US Persons Can Legally Avoid Reporting under Both FATCA and GATCA*, 21 TR. & TR., 1050, 1050 (2015); Jesse Drucker, *The World's Favorite New Tax Haven Is the United States*, BLOOMBERG BUSINESSWEEK (Jan. 26, 2016), <https://www.bloomberg.com/news/articles/2016-01-27/the-world-s-favorite-new-tax-haven-is-the-united-states>.

information exchanges across the global community.¹⁷ In 2014, the OECD approved the Common Reporting Standard (CRS),¹⁸ under which at least ninety-five jurisdictions have agreed to the automatic exchange of financial information.¹⁹ The OECD based the provisions of CRS largely on FATCA, with the result that financial institutions around the world, including trusts and some business entities, share account ownership and other detailed financial information with participating governments.²⁰ Although the U.S. joined the 2014 Declaration on Automatic Exchange of Information in Tax Matters, which endorses the general principles of CRS,²¹ it has not signed onto the Multilateral Competent Authority Agreement.²² The FATCA regime already provides the U.S. government with the information it deems useful; further, joining requires legislative action.²³ Nevertheless, the U.S. has avoided being deemed non-cooperative according to OECD standards.²⁴

¹⁷ Hans Martin Schmid & Eike W. Grunert, *The OECD Common Reporting Standard (CRS): FATCA is Going Global*, BUS. L. MAG. 5–6 (June 11, 2015), <http://www.businesslaw-magazine.com/wp-content/uploads/sites/4/2015/06/The-OECD-common-reporting-standard.pdf>.

¹⁸ CRS “provides for an annual automatic exchange between governments of financial account information, including balances, interest, dividends, and sales proceeds from financial assets, reported to governments by financial institutions and covering accounts held by individuals and entities, including trusts and foundations.” *OECD Releases Full Version of Global Standard for Automatic Exchange of Information*, ORG. FOR ECON. COOPERATION & DEV. (July 21, 2014), <http://www.oecd.org/newsroom/oecd-releases-full-version-of-global-standard-for-automatic-exchange-of-information.htm>.

¹⁹ *Automatic Exchange of Information on Financial Accounts*, EUROPEAN BANKS, <https://thebanks.eu/articles/automatic-exchange-of-information-on-financial-accounts> (last updated Nov. 5, 2017).

²⁰ CRS has been implemented in stages since its adoption in 2014. See *Automatic Exchange Portal*, ORG. FOR ECON. COOPERATION & DEV., <http://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/crs-by-jurisdiction/> (last updated Jan. 24, 2017). OECD Secretary-General Angel Gurría stated that “[t]oday’s launch [of Common Reporting Standards] moves us closer to a world in which tax cheats have nowhere left to hide.” *OECD Releases Full Version of Global Standard for Automatic Exchange of Information*, *supra* note 18.

²¹ CRS, *supra* note 3, at Annex 6, 301–04.

²² *Is US Becoming World’s Leading Offshore Territory?*, SPUTNIK INT’L (Dec. 15, 2015), <http://sptnkne.ws/aqNX>.

²³ See Rick Mitchell, *U.S. Failure to Commit to Information Exchange ‘a Problem’*, INT’L TAX POL’Y F. (Sept. 28, 2016), https://www.itpf.org/itpf_blog?article_id=5728 (noting recognition that the U.S. is a special situation and exchanges information through the FATCA framework); John A. Koskinen, Comm’r, Internal Revenue Serv., Prepared Remarks Before the U.S. Council for International Business-OECD International Tax Conference 3 (June 7, 2016), <http://www.uscib.org/uscib-content/uploads/2016/06/OECD-Intl-Speech.pdf> (noting the need for Congress to pass legislation permitting the U.S. to sign onto CSR rules).

²⁴ *OECD’s ‘Non-Cooperative Jurisdiction’ Criteria Will Allow US to Escape Blacklisting*, SOC. OF TR. & EST. PRAC. (July 25, 2016), <http://www.step.org/news/oecd-non-cooperative-jurisdiction-criteria-will-allow-us-escape-blacklisting>.

While CRS is very similar to FATCA, the information collected and shared under CRS is marginally broader.²⁵ Furthermore, many individuals and their advisors are concerned that CRS may pave the way for the establishment of a public registry of beneficial owners—thereby eroding a family’s ability to keep their affairs private.²⁶ And there is the very real concern that some governments receiving financial information are not as secure as their residents and citizens would like, meaning the information may be obtainable by parties with potentially nefarious interests.²⁷ The rather ironic result of the FATCA/CRS mash-up is that trusts with a U.S. situs, particularly those containing only U.S. assets, continue to enjoy a modicum of privacy that the majority of non-U.S. jurisdictions can no longer provide.²⁸ As a result, both domestic and foreign interest in U.S. trust situs jurisdictions has seen a significant increase as CRS has been adopted and implemented globally.²⁹

Wyoming remains a dominant trust situs jurisdiction³⁰ known for having accommodating trust laws,³¹ a friendly business climate,³² a proactive Legislature,³³

²⁵ Robert E. Ward, *The Common Reporting Standard Comes to Canada*, 46 TAX MGMT. INT’L J. 538 (2017).

²⁶ See ANDRES KNOBEL & MARKUS MEINZER, “THE END OF BANK SECRECY”? BRIDGING THE GAP TO EFFECTIVE AUTOMATIC INFORMATION EXCHANGE 6–7 (Nov. 10, 2014), <http://docplayer.net/7265936-The-end-of-bank-secrecy-bridging-the-gap-to-effective-automatic-information-exchange.html>. Some jurisdictions have already taken independent steps to establish beneficial interest registries. Bruce Zaaris, *A Brave New World: Transparency Initiatives by Foreign Governments and International Organizations Place Increased Pressure on U.S. Tax Advisers, Other Gatekeepers*, 47 TAX MGMT. INT’L J. 10 (2018). In April of 2016, the U.K. began maintaining a publicly accessible database of self-reported data on the ultimate individual ownership and control of private U.K. companies. Jenik Radon & Mahhima Achuthan, *Beneficial Ownership Disclosure: The Cure for the Panama Papers Ills*, J. OF INT’L AFFAIRS, July 1, 2017, <https://jia.sipa.columbia.edu/beneficial-ownership-disclosure-%C2%A0cure%C2%A0panama-papers-ills%C2%A0>.

²⁷ Commentators frequently cite the use of such registries to aid kidnapping or blackmailing operations as potential concerns. Lucy Warwick-Ching, *Is My Family Vulnerable to Kidnapping?*, FIN. TIMES (Sept. 12, 2017), <https://www.ft.com/content/3c6047fc-92e9-11e7-bdfa-eda243196c2c>; DAVID DORGAN, TRANSPARENCY VS. PRIVACY 2–3 (Sept. 2016), [http://www.applebyglobal.com/publication-pdf/article/2016/transparency-vs-privacy-\(september-2016\)-ddorgan.pdf](http://www.applebyglobal.com/publication-pdf/article/2016/transparency-vs-privacy-(september-2016)-ddorgan.pdf).

²⁸ Cotorceanu, *supra* note 16, at 1052, 1054.

²⁹ *Id.* at 1056–58; Todd Ganos, *Forget the Panama Papers, Use the United States as a Tax Haven*, FORBES (Apr. 25, 2016), <http://www.forbes.com/sites/toddganos/2016/04/25/forget-the-panama-papers-use-the-united-states-as-a-tax-haven/>.

³⁰ See, e.g., Daniel G. Worthington & Mark Merric, *Which Situs is Best in 2016?*, TR. & EST. (Dec. 21, 2015), <http://www.wealthmanagement.com/asset-protection/which-situs-best-2016>.

³¹ See *id.*; AM. COLL. OF TR. & EST. COUNS., ELEVENTH ANNUAL ACTEC COMPARISON OF THE DOMESTIC ASSET PROTECTION TRUST STATUTES 34–48 (David Shaftel ed., 2017), <http://www.shaftellaw.com/docs/article-38.pdf>. [hereinafter ACTEC DAPT]; AM. COLL. OF TR. & EST. COUNS., VIRTUAL REPRESENTATION STATUTES CHART 26–27 (July 1, 2016), <http://www.actec.org/assets/1/6/Bart-Virtual-Representation-Statutes-Chart.pdf>; Steve Oshins, *5th Annual Dynasty Trust State Rankings Chart*, LAW OFFICES OF OSHINS & ASSOC. (Apr. 2016), <https://docs.wixstatic.com>.

an unlogged court system,³⁴ and a comparatively small cadre of trust service providers committed to high business, ethical, and service standards.³⁵ Reimer's *Undiscovered Country* discusses Wyoming's laws and evaluates several trust situs jurisdictions based on a number of factors, including modern trust statutes, low or non-existent state income taxes, the abolishment or expansion of the rule against perpetuities, the passage of asset protection statutes, and the availability of private trust companies.³⁶ This article is meant to be read as a companion to Reimer's *Undiscovered Country* and will focus on the updates and changes to Wyoming's trust legislation since 2011, all of which combine to confirm Wyoming's well-earned position as a top trust situs jurisdiction.³⁷

com/ugd/b211fb_15c05b51f611475b83e6aaa778c69191.pdf; Steve Oshins, *8th Annual Domestic Asset Protecting Trust State Rankings Chart*, LAW OFFICES OF OSHINS & ASSOC. (Apr. 2017), https://docs.wixstatic.com/ugd/b211fb_27c14ad60a414a2986e667d0fcd79049.pdf [hereinafter Oshins, DAPT]; Joseph F. McDonald, III, *Emerging Directed Trust Company Model*, TR. & EST. (Feb. 1 2012), <http://www.wealthmanagement.com/estate-planning/emerging-directed-trust-company-model>.

³² See Report: *Wyoming Has Business Friendly Taxes*, WYO. PUB. MEDIA (Jan. 26, 2012), <http://wyomingpublicmedia.org/post/report-wyoming-has-business-friendly-taxes#stream/0>; Douglas A. McIntyre, *Best and Worst Run States in America*, 24/7 WALL ST. (Nov. 28, 2011), <https://247wallst.com/special-report/2011/11/28/best-and-worst-run-states-in-america-an-analysis-of-all-50/print/>; PRAXIS STRATEGY GROUP, *ENTERPRISING STATES: POLICIES THAT PRODUCE 19* (June 13, 2012), <http://www.uschamber.com/sites/default/files/reports/Enterprising-States-2012-web.pdf>; Mark Wilcox, *Wyoming No. 4 Most Friendly State to Entrepreneurs*, WYO. BUS. REP. (Dec. 20, 2012), http://www.wyomingbusinessreport.com/industry_news/government_and_politics/wyoming-no-most-friendly-state-to-entrepreneurs/article_d38d79da-3c49-5083-b5ab-e236f59842ec.html.

³³ For example, see the Wyoming Legislature's constant activity in keeping abreast of developments in trust and business law since 2011, including the adoption of statutes expressly permitting both unregulated and lightly regulated private trust companies, reinforcing the creditor protection of limited liability companies, and other developments. See *infra* notes 63–277 and accompanying text. In the 2017 legislative session, Governor Matt Mead signed the ENDOW (Economically Needed Diversity Options for Wyoming) Initiative, which identified the “marketing and development of the international trust and fiduciary business and related sectors” as areas of study for diversifying the state's economy. S.F. 0132, 64th Leg., Gen. Sess. (Wyo. 2017) (codified as WYO. STAT. ANN. §§ 9-12-1401 to -1404 (2017)).

³⁴ Reimer, *Undiscovered Country*, *supra* note 13, at 200.

³⁵ See *Wyoming Trust Companies*, WYO. DIVISION OF BANKING, <http://wyomingbankingdivision.wyo.gov/regulated-financial-institutions/trust-companies> (last visited Feb. 11, 2018).

³⁶ Reimer, *Undiscovered Country*, *supra* note 13, at 172–99.

³⁷ *Id.* at 167; Caroline M. Watson, Note, *Why Oh Why Wyoming: Why Connecticut Should Amend Its Trust Situs Laws and Move Onward and Westward With Wyoming*, 29 QUINNIPIAC PROB. L.J. 469, 470 (2016).

II. FROM 2011 TO THE PRESENT—UPDATES, ADDITIONS, AND MODIFICATIONS TO WYOMING TRUST LEGISLATION

A. Background

Wyoming adopted the Uniform Trust Code (UTC) in 2003.³⁸ The ways in which Wyoming's code initially differed from the UTC as well as the ways in which the Legislature subsequently refined the state's laws helped solidify Wyoming's position as a prominent trust situs jurisdiction.³⁹ Since 2011 and the publication of Reimer's *Undiscovered Country*, further amendments to Wyoming's trust code, the adoption of the Wyoming Chartered Family Trust Company Act, the addition of asset protection trust options, and updates to the state's LLC laws have continued to ensure Wyoming remains at the forefront of jurisdictions to consider when migrating, domesticating, or settling a trust.⁴⁰

As an overview, this article begins with a review of Wyoming's tax-friendly stance even in the face of reduced state funding.⁴¹ The article goes on to discuss changes that enhance the level of privacy available to trusts both in court proceedings as well as in terms of the parties required to receive notice with respect to actions taken by a trustee.⁴² Next, this article will address recent changes to Wyoming's constantly-evolving modern trust laws, including (1) statutory trust decanting,⁴³ (2) clarification of a trustee's insurable interest,⁴⁴ (3) tenancy by the entirety protection for trust assets,⁴⁵ (4) clarification of the duration of noncharitable purpose trusts,⁴⁶ and (5) premortem trust contests.⁴⁷ It then focuses on Wyoming's codification of unregulated private family trust companies and

³⁸ H.B. 0077, 57th Leg., Gen. Sess. (Wyo. 2003) (codified as WYO. STAT. ANN. §§ 4-10-101 to -1103 (2017)).

³⁹ Many of the states which joined Wyoming at the top of the trust situs list in 2011—Alaska, South Dakota, and Nevada, for example—have been joined by other states, including Tennessee and Ohio. See, e.g., Oshins, DAPT, *supra* note 31. Note that individual ranking systems may not always accurately represent all aspects of Wyoming law. For example, Oshins's domestic asset protection trust ranking lists Wyoming as having “child support” under the column of exception creditors and states that an affidavit is required, which glosses over the specifics of Wyoming's statute. See *infra* notes 214–57 and accompanying text; ACTEC DAPT, *supra* note 31 (containing current and accurate information contributed by a Wyoming practitioner).

⁴⁰ See *infra* notes 63–278 and accompanying text.

⁴¹ See *infra* notes 52–62 and accompanying text.

⁴² See *infra* notes 63–113 and accompanying text.

⁴³ See *infra* notes 125–50 and accompanying text.

⁴⁴ See *infra* notes 151–62 and accompanying text.

⁴⁵ See *infra* notes 163–70 and accompanying text.

⁴⁶ See *infra* notes 171–80 and accompanying text.

⁴⁷ See *infra* notes 181–87 and accompanying text.

lightly-regulated private family trust companies.⁴⁸ Finally, this article reviews the changes to Wyoming's asset protection statutes, beginning with modifications to Wyoming Qualified Spendthrift Trusts,⁴⁹ moving on to the addition of Wyoming's exciting new asset protection trust option which is not subject to the exceptions and requirements of Wyoming Qualified Spendthrift Trusts,⁵⁰ and finishing with case-law related changes made to Wyoming's LLC statutes.⁵¹

B. *Ultra Tax Friendly*

Wyoming does not impose a state income tax of any kind.⁵² To be sure, the state's economic situation has undergone changes since 2011, largely as a result of declining world energy prices which have, in turn, affected the mineral extraction industries (particularly coal) upon which Wyoming has traditionally relied to support its state government.⁵³ While the downturn in the state's economic condition has resulted in governmental funding hurdles, it has not spurred the adoption of a state income tax.⁵⁴ Wyoming's Republican-dominated government has generally resisted suggestions that it use an income tax to reduce budget shortfalls.⁵⁵ Even if legislative will existed to adopt an income tax, its usefulness would be sharply limited by the Wyoming Constitution, which requires that any income tax be accompanied by a full credit against such liability for sales, use, and ad valorem taxes paid by a given taxpayer to any Wyoming taxing authority during the year.⁵⁶ As a further roadblock to the adoption of a state income tax, and unlike

⁴⁸ See *infra* notes 188–205 and accompanying text.

⁴⁹ See *infra* notes 214–38 and accompanying text.

⁵⁰ See *infra* notes 239–57 and accompanying text.

⁵¹ See *infra* notes 258–77 and accompanying text.

⁵² Brandon Marshall, *Increasing Wyoming's Prosperity*, WYO. BUS. COUNCIL, http://wyomingbusiness.org/DocumentLibrary/WBC/WBC_wyoming_profile_091415.pdf (last visited Feb. 11, 2018).

⁵³ Jack Healy, *In Wyoming, Hard Times Return as Energy Prices Slump*, N.Y. TIMES (Apr. 12, 2016), <https://www.nytimes.com/2016/04/13/us/in-wyoming-hard-times-return-as-energy-prices-slump.html>; Benjamin Storrow, *Does Wyoming Coal Have a Future?*, CASPER STAR TRIB. (Feb. 13, 2016), http://trib.com/business/energy/does-wyoming-coal-have-a-future/article_3347ce87-7689-5aaa-b9cb-0263fbb1c741.html.

⁵⁴ Laura Hancock, *In Cash-Strapped Wyoming, Tax Increases Remain Unlikely*, CASPER STAR TRIB. (June 22, 2016), http://trib.com/news/state-and-regional/govt-and-politics/in-cash-strapped-wyoming-tax-increases-remain-unlikely/article_eb8fb6a3-6d5a-5a0b-85f4-61e5b8e98bb5.html.

⁵⁵ *Id.*; Andrew Graham, *Senate President Bebout Opposes New Taxes*, WYOFILE (Jan. 24, 2017), <http://www.wyofile.com/senate-president-bebout-opposes-new-taxes/>.

⁵⁶ WYO. CONST. art. 15, § 18; see also Phil Roberts, *A History of the Wyoming Sales Tax and How Lawmakers Chose It from Among Severance Taxes, an Income Tax, Gambling, and a Lottery*, 4 WYO. L. REV. 157, 241 n. 702, 242 (2004) (describing the history of Wyoming taxation and the policy choice not to rely on income taxes).

some state constitutions, Wyoming's governmental charter is difficult to amend.⁵⁷ Constitutional amendment requires the affirmative vote of two-thirds of both the House and Senate, approval by the governor, and subsequent ratification by a majority of the voting public.⁵⁸ Finally, the value of the Permanent Wyoming Mineral Trust Fund (PWMTF), created in 1975, is over \$7 billion.⁵⁹ Funded by a portion of Wyoming's mineral severance tax revenues and the occasional legislative appropriation, the Wyoming Legislature created the PWMTF with an eye towards using the state's depletable minerals to provide for future generations.⁶⁰ Income from the PWMTF is added to the state's general fund on an annual basis.⁶¹ Given these realities, Wyoming is likely to remain a tax friendly locale for the foreseeable future.⁶²

C. *Enhanced Trust Privacy*

In the trusts and estates realm, families tend to place a premium on keeping their affairs out of the public eye both in terms of what they are leaving to whom and why, as well as the value of the family's assets themselves.⁶³ This section will address recent changes to Wyoming law that enhance a family's ability to keep trust-related information private, beginning with the automatic seal that is placed on court filings involving a trust,⁶⁴ and moving on to the revised definitions of "qualified beneficiaries"⁶⁵ and "interested persons,"⁶⁶ both of which serve to

⁵⁷ *Geringer v. Bebout*, 10 P.3d 514, 522 (Wyo. 2000) ("[I]t is almost universally true that the procedures instituted for the amendment of constitutions have purposely been made cumbersome, in order that the organic law may not readily be remolded to fit situations and sentiments that are relatively transitory and fleeting.").

⁵⁸ WYO. CONST., art. 20, § 1. The Wyoming Constitution can also be amended by a two-thirds vote of the House and Senate to authorize a constitutional convention, which must subsequently be approved by a majority of voting electors. *Id.* art. 20, §§ 3–4.

⁵⁹ *The Permanent Wyoming Mineral Trust Fund Facts & FAQs*, WYO. TAXPAYERS ASS'N (Apr. 2017), http://www.wyotax.org/_pdfs/2017/Apr/PWMTFCombined2016.pdf.

⁶⁰ *Id.*

⁶¹ *Id.* Only Alaska has a larger Permanent Mineral Trust Fund, valued at over \$60 billion. ALASKA PERMANENT FUND CORP., ANNUAL REPORT 2017 3 (2017), file:///Users/bobbiowen34/Downloads/2017-APFC-Annual-Report.pdf. Alaska, New Mexico, Alabama, North Dakota, Louisiana, Montana, and West Virginia have similar permanent funds primarily funded by oil, coal, or natural gas revenues. Grant Nülle, *Energy Resource Permanent Funds Vary by Purpose and State*, U.S. ENERGY INFO. ADMIN. (Apr. 30, 2015), <https://www.eia.gov/todayinenergy/detail.php?id=21032>.

⁶² See *supra* notes 52–61 and accompanying text.

⁶³ 1 SCHOENBLUM, *supra* note 9, at § 3.06[A].

⁶⁴ See *infra* notes 68–76 and accompanying text.

⁶⁵ See *infra* notes 77–98 and accompanying text.

⁶⁶ See *infra* notes 99–113 and accompanying text.

narrow the class of persons required to receive notice by a Wyoming trustee when undertaking certain trust-related actions.⁶⁷

1. *Court Privacy*

There is no requirement in Wyoming for a noncharitable trust to be registered with a local court or submitted to a registry of any kind—in fact, no such registry exists.⁶⁸ Further, trust records are now automatically sealed at the outset of any judicial proceeding.⁶⁹ This protection became part of the Wyoming Trust Code in 2017⁷⁰ and is unique among Uniform Trust Code states.⁷¹ The historical risk of publicity stemming from litigation involving a dispute between the trust's settlor, fiduciaries, beneficiaries, or creditors is now severely limited.⁷²

Upon the filing of any petition related to a trust in a Wyoming court, “the trust instrument, inventory, statement filed by any fiduciary, annual verified report of a fiduciary, final report of a fiduciary and any petition relevant to trust administration and any court order thereon” will automatically be sealed and not made a part of the public record of the proceeding.⁷³ Upon a showing of need and a subsequent order of the court, the sealed trust records will be made available, but only to “the court, the settlor, any fiduciary, any qualified beneficiary, their attorneys, and any other interested person” as determined by the court.⁷⁴

⁶⁷ See *infra* notes 68–113 and accompanying text.

⁶⁸ Trusts in U.S. jurisdictions generally need not register with a governmental entity of any kind to be valid. WARD L. THOMAS & LEONARD J. HENZKE, JR., TRUSTS: COMMON LAW AND IRC 501(c)(3) AND 4947 10 (2003), <https://www.irs.gov/pub/irs-tege/eotopica03.pdf>. However, unlike Wyoming, some states have adopted the former Article VII of the Uniform Probate Code, which requires registration of trusts with a court in their principal place of administration. *Id.* That article has subsequently been removed from the uniform version of the Act due to enactment of the Uniform Trust Code, which does not require registration. UNIF. PROBATE CODE § 3-703 cmt. (1969) (UNIF. LAW COMM'N, amended 2010). However, Alaska, Colorado, Hawaii, Idaho, Kentucky, and North Dakota continue to have statutes requiring trust registration. See ALASKA STAT. § 13.36.005 (2017); COLO. REV. STAT. § 15-16-101 (2017); HAW. REV. STAT. § 560:7-101 (2017); IDAHO CODE § 15-7-101 (2017); KY. REV. STAT. ANN. § 386B.2-050 (LexisNexis 2017). Registration appears to be optional in Michigan, Missouri, Nebraska, and South Dakota. MICH. COMP. LAWS ANN. § 700.7209 (2017); MO. REV. STAT. § 456.027 (2017); NEB. REV. STAT. § 30-3816 (2017); S.D. CODIFIED LAWS § 55-1-56 (2017).

⁶⁹ WYO. STAT. ANN. § 4-10-205 (2017). Trust litigants were formerly required to file a motion and affidavit to seal trust records under Rule 8 of the Wyoming Rules Governing Access to Court Records. In the author's experience, this was cumbersome and provided no guarantee the court would comply.

⁷⁰ H.B. 0125, 64th Leg., Gen. Sess. (Wyo. 2017) (codified as WYO. STAT. ANN. § 4-10-205).

⁷¹ Compare WYO. STAT. ANN. § 4-10-205, with UNIF. TRUST CODE (2010) (UNIF. LAW COMM'N, amended 2010).

⁷² Reimer, *Undiscovered Country*, *supra* note 13, at 178.

⁷³ WYO. STAT. ANN. § 4-10-205.

⁷⁴ *Id.*

The advantage of this type of legislation is clear: trust records are sealed in litigation proceedings as a matter of course, not by individual motion.⁷⁵ Wyoming joins South Dakota as one of the few states offering such expansive protection to those who have established a trust and seek the intervention of the court system.⁷⁶

2. *Narrower Definitions of Certain Interested Parties*

a. *“Qualified Beneficiary”*

Some commentators argue that the UTC requires excessive disclosure and notification to a trust’s beneficiaries.⁷⁷ Indeed, § 813 of the UTC requires a number of mandatory notices to a trust’s qualified beneficiaries,⁷⁸ notwithstanding a settlor’s desire for privacy, concern about asset protection or wealth management, or fear that such disclosures will discourage beneficiaries from developing their own careers and finances.⁷⁹ Realizing the need for enhanced trust privacy, Wyoming’s version of the UTC limits the Code’s default notification duties to qualified beneficiaries.⁸⁰ In addition, the original version of Wyoming’s statute narrowed the definition of “qualified beneficiary” to increase settlor control and limit the risk of unwanted disclosure.⁸¹ Over the years, Wyoming’s definition has been further modified, most recently in 2013.⁸² The definition currently reads:

(xv) “Qualified beneficiary” means:

- (A) A beneficiary who is currently entitled to mandatory distributions of income or principal from the trust or has a vested remainder interest in the residuary of the trust which is not subject to divestment;

⁷⁵ *See id.*

⁷⁶ Many of the states which joined Wyoming at the top of the trust situs list in 2011—Alaska, South Dakota, and Nevada, for example—have been joined by other states, including Tennessee and Ohio. *See, e.g.*, Oshins, DAPT, *supra* note 31; S.D. CODIFIED LAWS § 21-22-28 (2017). Alaska, Nevada, and Delaware continue to give the court discretion over whether to seal trust information. *See* ALASKA R. OF ADMIN. 37.6; NEV. SUP. CT. R. Pt. vii, R. 3; DEL. CH. CT. R. 5.1(b). Even if a Delaware court seals documents in a proceeding involving a trust, the seal is only protected for three years. DEL. CH. CT. R. 5.1(g).

⁷⁷ MARK MERRIC ET AL., THE UNIFORM TRUST CODE: IS ARIZONA’S NIGHTMARE ABOUT TO BECOME YOURS? 9 (2004), <http://www.internationalcounselor.com/Merric%20Law%20-%20Documents/UTC/utc20.pdf>.

⁷⁸ UNIF. TRUST CODE § 813 cmt. (2000) (UNIF. LAW COMM’N, amended 2010).

⁷⁹ MERRIC, *supra* note 77, at 9.

⁸⁰ *See* WYO. STAT. ANN. §§ 4-10-108(d), -418, -705(a)(1), -813(a)–(c).

⁸¹ *See* 2003 Wyo. Sess. Laws 124.

⁸² H.B. 0139, 62d Leg., Gen. Sess. (Wyo. 2013) (codified as amended at WYO. STAT. ANN. § 4-10-103(a)(xv) (2003)).

- (B) If a trust has no qualified beneficiary under subparagraph (A) of this paragraph, “qualified beneficiary” shall mean a beneficiary having a vested remainder interest in the residuary of the trust whose interest is subject to divestment only as a result of the beneficiary’s death;
- (C) If a trust has no qualified beneficiary under subparagraph (A) or (B) of this paragraph, “qualified beneficiary” shall mean a beneficiary currently eligible to receive discretionary distributions of income or principal from the trust, who has received one (1) or more distributions during the beneficiary’s lifetime;
- (D) If a trust has no qualified beneficiary under subparagraph (A), (B) or (C) of this paragraph, “qualified beneficiary” shall mean a beneficiary currently eligible to receive discretionary distributions of income or principal from the trust.⁸³

Wyoming’s cascading definition accounts for situations in which it is proper to require notice be given to a certain class of beneficiaries—those with mandatory interests, for example—without requiring a fiduciary to send notifications to beneficiaries with comparatively remote interests. This provision bolsters the settlor’s privacy and reduces the costs and administrative burdens associated with broader notification requirements.

Other prominent trust jurisdictions do not provide the same level of certainty regarding a trustee’s default duties to provide notice and information to beneficiaries.⁸⁴ The settlor of an Alaska trust may provide a written exemption of a trustee’s duty to keep certain beneficiaries informed.⁸⁵ This exemption, however, is limited to the shorter of the settlor’s lifetime or a judicial declaration of the settlor’s incapacity, and the default rule requires that all beneficiaries be informed of the trust and its administration.⁸⁶ While Delaware statutes are silent regarding a trustee’s default notification, the state’s courts have recognized such a duty.⁸⁷ Under Nevada’s default rules, a trustee must provide accountings to current

⁸³ WYO. STAT. ANN. § 4-10-103(a)(xv)(A)–(D). The statute also defines the Wyoming Department of Health as a qualified beneficiary where it has an interest as a vested remainder beneficiary of certain supplemental needs trusts. *Id.* § 4-10-103(a)(xv)(E).

⁸⁴ See *infra* notes 85–91 and accompanying text.

⁸⁵ ALASKA STAT. § 13.36.080(b) (2017).

⁸⁶ *Id.* § 13.36.080(a)–(b).

⁸⁷ See *McNeil v. McNeil*, 798 A.2d 503, 509–10 (Del. 2002). Additionally, as discussed below, Delaware law permits a trust instrument to modify a trustee’s notification duties. See DEL. CODE ANN. tit. 12 §§ 3303, 3534 (2017).

and remainder beneficiaries (but not to remote beneficiaries).⁸⁸ Nevada's statute provides some limitations to this broad default rule, including certain non-settlers of revocable trusts, non-power holders under trusts subject to broad powers of appointment, ex-beneficiaries, beneficiaries whose interests are not affected by the part of the trust at issue, and wholly discretionary beneficiaries.⁸⁹ South Dakota provides default notification to "qualified beneficiaries" of irrevocable trusts.⁹⁰ A "qualified beneficiary" under South Dakota law is an entity or individual who is at least twenty-one years old that:

- (1) Is a distributee or permissible distributee of trust income or principal;
- (2) Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees terminated on that date; or
- (3) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date. However, if the distributee is then unknown because a person holds a power to change the distributee, the trustee shall give notice only to the holder of the power.⁹¹

To illustrate the application of Wyoming's definition, consider a trust in which one person has a life interest (with or without mandatory income distributions) with the remainder going to different persons. In Wyoming, only the lifetime beneficiary, and not the remainder beneficiaries, is a qualified beneficiary entitled to receive reports from the trustee. South Dakota law would require the trustee to report to the current beneficiary as well as to all beneficiaries who would be distributees if the trust terminated—in the above example, this includes both the lifetime and the remainder beneficiaries. In Alaska, Delaware, and Nevada, the trustee would also be required, under the states' default rules, to report to both the lifetime beneficiary and the remaindermen.

⁸⁸ NEV. REV. STAT. § 165.1207(1)(a) (2017). A remainder beneficiary is one "who will become a current beneficiary upon the death of an existing current beneficiary or upon the occurrence of some other event that may occur during the beneficiary's lifetime, regardless of whether the beneficiary's share is subject to elimination, but has not been eliminated, under a power of appointment other than a broad power of appointment." *Id.* § 165.020.1(f). A remote beneficiary is "a natural person or an entity whose interest in the trust estate is preceded by the priority interest of one or more current beneficiaries and one or more remainder beneficiaries, all of whose interests must be extinguished by death or pursuant to the terms of the trust instrument before the remote beneficiary may become a current beneficiary." *Id.* § 165.020.1(g).

⁸⁹ *Id.* § 165.1207(1)(b)(1)–(5). Beneficiaries may waive the right to an accounting. *Id.* §§ 165.1207(1)(b)(6), 165.121.

⁹⁰ S.D. CODIFIED LAWS § 55-2-13 (2017).

⁹¹ *Id.*

To further illustrate the reasoning behind Wyoming's revised definition, at least one Wyoming District Court has concluded that a remainder beneficiary of a QTIP trust is not a qualified beneficiary of such a trust.⁹² In a well-reasoned opinion, the Court found that while a QTIP remainder beneficiary does in fact have a vested interest, such interest is subject to divestment because the remainder must survive the life interest holder. The Court stated:

If the remainder interest held by the [remainderman] is truly vested without qualification, it passes to the remainderman's estate to be disposed of by will or to the heirs of a remainderman who died intestate. McGovern and Kurtz, *Wills Trusts and Estates Including Taxation and Future Interests*, § 10.1 (West 2004). The language of the [Trust] states that, "the living descendants of any predeceased distributee to take the distributee's share." If the [remainderman] were to predecease [the life income beneficiary], this language would cause any distribution under the [Trust] to pass outside of the [remainderman's] estates. McGovern and Kurtz give an example of such. "If a will provides 'remainder to my children, but if any child dies before my spouse, his or her share shall go to his or her children,' the childrens' remainder is not contingent on survival, but vested subject to divestment for failure to survive." See McGovern and Kurtz, *Wills Trusts and Estates Including Taxation and Future Interests*, § 10.1 (West 2004). Thus, similarly to this example, the language . . . demonstrates a situation where death of the distributee prior to the time of taking causes them to lose their right and ability to direct the distribution of their interest. Therefore, it is clear that the language of [the Trust] is indicative of a remainder interest which is subject to divestment.⁹³

In addition, settlors of Wyoming trusts have the option of further restricting the availability of trust information to beneficiaries.⁹⁴ Wyoming rejected UTC §§ 105(b)(8) and (9), which make the UTC's notification provisions mandatory.⁹⁵ Instead, Wyoming law allows the settlor to create a truly

⁹² *Georges v. Georges*, No. 169-510 (Wyo. Dist. Ct. May 24, 2007) (order on file with the author).

⁹³ *Id.*

⁹⁴ See WYO. STAT. ANN. § 4-10-105 (2017) (providing default and mandatory rules).

⁹⁵ Compare H.B. No. 0077, 57th Leg., Gen. Sess. (Wyo. 2003) (codified as WYO. STAT. ANN. §§ 4-10-101 to -1103), with UNIF. TRUST CODE §105(b)(8)–(9) (2000) (UNIF. LAW COMM'N, amended 2010).

quiet, silent, or blind trust⁹⁶ by overriding the default notification provisions in the trust instrument.⁹⁷ While a quiet trust is not appropriate in every situation, handing this decision to the settlor of the trust allows Wyoming trusts to cater to a broader range of situations and interests than jurisdictions with more restrictive notice provisions.⁹⁸

b. “Interested Person”

Wyoming has also modified the statutory definition of “interested person.”⁹⁹ This term arises in two contexts in Wyoming trust law.¹⁰⁰ First, a court may not intervene in the administration of a trust until an “interested person” invokes that court’s jurisdiction, and continuing judicial supervision of a trust will not occur absent a court order.¹⁰¹ Second, “interested persons” can assent to nonjudicial settlement agreements which provide a cost-effective means of documenting and settling certain trust issues without the expense and time required by a court proceeding.¹⁰² As originally enacted, the statute did not include a definition of the first use of the term,¹⁰³ while the definition pertaining to the second use was

⁹⁶ See WYO. STAT. ANN. 4-10-813(b). Alaska, Delaware, New Hampshire, Ohio, South Dakota, and Tennessee, among others, join Wyoming in having quiet trust statutes. See ALASKA STAT. § 13.36.080 (2017); DEL. CODE ANN. tit. 12 §§ 3303, 3534 (2017); N.H. REV. STAT. ANN. § 564-B:1-105(b) (2017); OHIO REV. CODE ANN. § 5801.04 (LexisNexis 2017); S.D. CODIFIED LAWS § 55-2-13; TENN. CODE ANN. § 35-15-813 (2017). Delaware’s statute is arguably less protective because, although it permits a trust instrument to restrict or eliminate a beneficiary’s right to be informed of his or her interest in a trust, such restriction must be based on “a period of time,” including periods related to (1) the beneficiary’s age, (2) the lives of the settlor or settlor’s spouse, (3) a specific term of years or date, and (4) specific events. See DEL. CODE tit. 12, § 3303(a), (c).

A prudent advisor will counsel a settlor on his or her options when settling a quiet trust, including creating a trust that is quiet only for the life of the settlor or with respect to certain beneficiaries. See Adrienne Penta, *Quiet Trusts Need Not Be Silent: The Delayed Notification Option*, THINKADVISOR (July 6, 2016) (suggesting advisors review benefits, disadvantages, and alternatives to silent trusts with clients). A trust protector can be appointed to oversee a beneficiary’s interest in a quiet trust. For an in-depth discussion of quiet trusts and their implications, see, e.g., Kevin D. Millard, *The Trustee’s Duty to Inform and Report Under the Uniform Trust Code*, REAL PROP. PROB. & TR. J., Summer 2005, at 392, 392–96; Al W. King III, *Should You Keep a Trust Quiet (Silent) From Beneficiaries?*, TR. & EST. (Mar. 25, 2015), <http://www.wealthmanagement.com/estate-planning/should-you-keep-trust-quiet-silent-beneficiaries>; Steve R. Akers, *ACTEC 2014 Fall Meeting Musings*, THE AM. COLL. OF TR. & EST. COUNS., Nov. 2014, at 31–41, http://www.bessemerttrust.com/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/Advisor/Presentation/Print%20PDFs/ACTEC%202014%20Fall%20Meeting%20Musings_FINAL.pdf.

⁹⁷ WYO. STAT. ANN. § 4-10-105.

⁹⁸ See *supra* notes 100–13 and accompanying text.

⁹⁹ H.B. 0124, 64th Leg., Gen. Sess. (Wyo. 2017) (codified as WYO. STAT. ANN. § 4-10-816(b)).

¹⁰⁰ See *infra* notes 101–02 and accompanying text.

¹⁰¹ WYO. STAT. ANN. § 4-10-201(a)–(b).

¹⁰² *Id.* § 4-10-111.

¹⁰³ Commentary to the Uniform Trust Code noted a reluctance to precisely define the term. UNIF. TRUST CODE § 111 cmt. (2000) (UNIF. LAW COMM’N, amended 2010).

broad and included all “noncharitable beneficiaries eligible to receive current distributions from the trust.”¹⁰⁴

Wyoming now defines “interested person” in both contexts as “a qualified beneficiary, the settlor, if living, the trustee and trust protector, if any.”¹⁰⁵ For nonjudicial settlement agreement purposes, this clarification streamlines administrative tasks related to trusts and brings the definition more in line with Delaware¹⁰⁶ and New Hampshire¹⁰⁷ (Alaska, Nevada, and South Dakota have not adopted nonjudicial settlement agreement statutes).¹⁰⁸ For jurisdiction purposes, the amendment clarifies the narrower class of persons entitled to invoke the jurisdiction of the court and intervene in judicial proceedings.¹⁰⁹ By way of contrast, Alaska permits “interested parties” to invoke the court’s jurisdiction and requires notice to “all interested persons.”¹¹⁰ “Interested parties” is undefined, but “interested persons” is defined broadly as including “heirs, devisees, children, spouses, creditors, beneficiaries, and other persons having property rights in or claims against a trust estate or the estate of a decedent, ward, or protected person.”¹¹¹ Alaska’s definition of “beneficiaries,” in turn, includes any person “who has a present or future interested, vested or contingent” in a trust.¹¹² Alaska’s definition is significantly broader than the modified definition in Wyoming’s statute.¹¹³

¹⁰⁴ See 2007 Wyo. Sess. Laws 155.

¹⁰⁵ WYO. STAT. ANN. §§ 4-10-111(a), -201(d).

¹⁰⁶ See DEL. CODE ANN. tit. 12, § 3338(a) (2017) (defining “interested persons” as “trustees and other fiduciaries,” beneficiaries with a present interest or whose interest would vest if the trust terminated on the date of the agreement, the settlor, and “all other persons having an interest in the trust according to the express terms of the governing instrument.”).

¹⁰⁷ See N.H. REV. STAT. ANN. § 564-B:1-111 (2017) (defining “interested person” as “a trustee; a person who, under the terms of the trust, has the power to enforce the trust; if the trust is a charitable trust, the director of charitable trusts; and any other person, other than the settlor, whose consent would be required in order to achieve a binding settlement were the settlement to be approved by a court.”).

¹⁰⁸ Todd A. Flubacher & Kenneth F. Hunt, *The Non-Judicial Settlement Agreement Wrapper*, TR. & EST., (Dec. 3, 2013), <http://www.wealthmanagement.com/asset-protection/non-judicial-settlement-agreement-wrapper>.

¹⁰⁹ See WYO. STAT. ANN. §§ 4-10-111(a), 4-10-201(d).

¹¹⁰ See ALASKA STAT. §§ 13.36.035(a), 13.36.055(a), 13.36.060 (2017).

¹¹¹ *Id.* § 13.06.050(26).

¹¹² *Id.* § 13.06.050(3); accord *Barber v. Barber*, 837 P.2d 714, 717 (Alaska 1992) (holding a contingent beneficiary was an “interested person” and therefore entitled to receive notice before the court approved a settlement terminating the trust).

¹¹³ See ALASKA STAT. § 13.06.050(3).

D. Modern Trust Laws

The most significant changes to Wyoming's substantive trust laws have been in the following areas: (1) statutory trust decanting,¹¹⁴ (2) clarification of a trustee's insurable interest,¹¹⁵ (3) tenancy by the entireties protection for trust assets,¹¹⁶ (4) clarification of the duration of noncharitable purpose trusts,¹¹⁷ and (5) premortem trust contests.¹¹⁸ Statutes related to directed trusts,¹¹⁹ trust protectors,¹²⁰ special purpose entities,¹²¹ change of situs procedures,¹²² trust modification and reformation,¹²³ and virtual representation¹²⁴ have remained largely unchanged since 2011.

1. Statutory Trust Decanting

Decanting, the process of which is akin to an exercise of a limited power of appointment, albeit in a fiduciary capacity, has come into style in recent years as a flexible means of fixing problematic trusts, changing jurisdictions, or responding to unanticipated changes in a family situation or the law.¹²⁵ In practice, a trustee decants by distributing some or all of the trust principal to a new trust rather than directly to a beneficiary.¹²⁶ The provisions of the new trust may be largely the same as the prior trust but include critical differences designed to overcome issues with the original trust.¹²⁷ Whether and the extent to which the provisions of the new

¹¹⁴ See *infra* notes 125–50 and accompanying text.

¹¹⁵ See *infra* notes 151–62 and accompanying text.

¹¹⁶ See *infra* notes 163–70 and accompanying text.

¹¹⁷ See *infra* notes 171–80 and accompanying text.

¹¹⁸ See *infra* notes 181–87 and accompanying text.

¹¹⁹ WYO. STAT. ANN. § 4-10-718 (2017).

¹²⁰ *Id.* §§ 4-10-710 to -711, -714 to -717.

¹²¹ No specific Wyoming statute addresses the use of special purpose entities, which consist of unregulated entities established to act as trust advisors or protectors for Wyoming trusts. Wyoming Statute § 4-10-710 discusses trust protectors. See *id.* § 4-10-710.

¹²² *Id.* § 4-10-108.

¹²³ *Id.* §§ 4-10-411 to -418.

¹²⁴ *Id.* §§ 4-10-301 to -305.

¹²⁵ Mary Akkerman, *Decanting: A Practical Roadmap for Modernizing Trusts in South Dakota*, 61 S.D. L. REV. 413, 417–418 (2016); Beth A. Wood, *Making Misfit Trusts Work When Planning Goes Awry*, PROB. & PROP., Apr. 30, 2016, at 55, 55–57; William R. Culp, Jr. & Briani Bennett Mellen, *Trust Decanting: An Overview and Introduction to Creative Planning Opportunities*, 45 REAL PROP. TR. & EST. L.J. 1, 13–16 (2010); David Restrepo, *New York's Decanting Statute: Helping Old Vintage Come to Life or Spoiling the Settlor's Fine Wine*, 34 PACE L. REV. 479, 498–500 (2014).

¹²⁶ Jonathan G. Blattmachr et al., *An Analysis of the Tax Effects of Decanting*, 47 REAL PROP. TR. & EST. L.J. 141, 142 (2012).

¹²⁷ See *supra* note 125 and accompanying text.

trust may differ from the original depend upon state law,¹²⁸ the common law,¹²⁹ and the terms of the original trust itself.

Wyoming expressly grants trustees of discretionary or mandatory trusts the authority to decant, eliminating any need to rely on the common law for authority.¹³⁰ While many modern trust instruments now expressly authorize decanting, such power is somewhat uncommon in older instruments, and it is very often these older instruments and their beneficiaries that could benefit, for tax reasons or otherwise, from decanting.¹³¹ Additionally, while a number of states have adopted statutes expressly permitting the practice, the authority under these statutes varies widely, meaning not every state will have legislation to address a given situation.¹³² In states that have not enacted a statute, it is necessary to rely on common law to support a trustee's decanting authority.¹³³ Even if a trustee administers a trust in a state with a decanting statute, such statutory power may not be applicable to a trust originally settled in a state that offered no such authority.¹³⁴

Wyoming's express decanting provision expands a trustee's default powers to include the following:

¹²⁸ See, e.g., ALASKA STAT. § 13.36.157 (2017); ARIZ. REV. STAT. ANN. § 14-10819 (2017); DEL. CODE ANN. tit. 12, § 3528 (2017); FLA. STAT. § 736.04117 (2017); NEV. STAT. § 163.556 (2017); N.H. REV. STAT. ANN. § 564-B:4-418 (2017); N.C. GEN. STAT. § 36C-8B-11 (2017); OHIO REV. CODE ANN. § 5808.18 (LexisNexis 2017); S.D. CODIFIED LAWS § 55-2-15 (2017); TENN. CODE ANN. § 35-15-816(b)(27) (2017); WYO. STAT. ANN. § 4-10-816(a)(xxviii).

¹²⁹ See, e.g., *In re Estate of Mayer*, 672 N.Y.S.2d 998, 1000 (N.Y. Surr. Ct. 1998) (analyzing the legal premise underlying the state's decanting statute); *Phipps v. Palm Beach Tr. Co.*, 196 So. 299, 301 (Fla. 1940); *Wiedenmayer v. Johnson*, 254 A.2d 534, 535–36 (N.J. Super. Ct. App. Div. 1969); *In re Estate of Spencer*, 232 N.W.2d 491, 496–98 (Iowa 1975); *Morse v. Kraft*, 992 N.E.2d 1021, 1024–27 (Mass. 2013); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS §§ 11.1 cmts. a, d, 19.3 cmt. a, illus. 2, 19.4 (AM. LAW INST. 1986); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 19.1 cmts. e, f (AM. LAW INST. 2011).

¹³⁰ WYO. STAT. ANN. § 4-10-816(a)(xxviii).

¹³¹ See *supra* note 125 and accompanying text.

¹³² Compare N.H. REV. STAT. § 564-B:4-418(b) (not requiring that the beneficiaries in the new trust be identical to the beneficiaries in the old trust), with TENN. CODE ANN. § 35-15-816(b)(27) (limiting the beneficiaries of the new trust to those of the old trust).

¹³³ See, e.g., Restrepo, *supra* note 125, at 481. Scholars have discussed arguments in favor of common law decanting. See Blattmachr, *supra* note 126, at 143–47; Culp & Mellen, *supra* note 125, at 4–12.

¹³⁴ At common law, the law governing the validity of a trustee's decanting power is determined by the law governing the original trust's validity. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. a (AM. LAW INST. 1971). For example, for a decanting power to fall under the federal safe harbor rules to preserve a pre-1985 trust's grandfathered exemption from generation skipping transfer taxes, it had to be permissible under the state law that was applicable when the trust became irrevocable. See Treas. Reg. § 26.2601-1(b)(4)(i)(A)(1)(ii) (2018) (requiring that state law authorized the distribution without beneficiary or court approval when the trust became irrevocable).

[A trustee may] [d]istribute all or any portion of trust income or principal in further trust for the benefit of the trust beneficiaries pursuant to authority granted in the trust instrument to make discretionary or mandatory distributions of trust income or principle to the trust beneficiaries, whether or not the discretionary or mandatory distributions are pursuant to an ascertainable standard.¹³⁵

This succinct provision effectively codifies the common law power of a trustee with discretion to distribute income or principal to a beneficiary to distribute that income or principal to a trust for the beneficiary's benefit.¹³⁶ Importantly, Wyoming's statutory power goes one step further by being applicable to trustees only able to make mandatory distributions, which is not a common inclusion.¹³⁷ In fact, of the states with decanting statutes, Wyoming is one of the few whose statute is broad enough to include trustees with only a mandatory distribution power.¹³⁸ Additionally, Wyoming's statute includes no notice provision—yet another aspect that differentiates it from other states as many jurisdictions require notice of a decanting to be given to beneficiaries.¹³⁹

Wyoming's statute also includes a provision designed to prevent a trustee's exercise of the decanting power from triggering unintended transfer tax results:

(b) The [decanting] power . . . shall not be exercised in any manner that would prevent qualification for a federal estate or gift tax marital deduction, federal estate or gift tax charitable deduction, or other federal income, estate, gift or generation-skipping transfer tax benefit claimed for the trust from which the distribution in further trust is made. If the trustee making a distribution in further trust under paragraph (a)(xxviii) of this

¹³⁵ WYO. STAT. ANN. § 4-10-816(a)(xxviii).

¹³⁶ See *supra* note 133 and accompanying text.

¹³⁷ WYO. STAT. ANN. § 4-10-816(a)(xxviii). *Cf.*, e.g., S.D. CODIFIED LAWS § 55-2-15 (2017).

¹³⁸ New Hampshire and Tennessee do not expressly say mandatory but may permit decanting in such a case. See N.H. REV. STAT. § 564-B:4-418(l)(4), (5) (2017); TENN. CODE ANN. § 35-15-816(b)(27) (2017). Under Alaska law, a trustee without unlimited discretion may decant, but the terms of the new trust are limited to having the same current beneficiaries as the old trust and the same standard of distribution as the old trust. ALASKA STAT. § 13.36.157(d), (e) (2017). Other noted jurisdictions' statutes appear to be limited to trustees holding the power to make discretionary distributions. See S.D. CODIFIED LAWS § 55-2-15 (stating that decanting authority applies "if a trustee has discretion under the terms of a governing instrument to make a distribution of income or principal to or for the benefit of one or more beneficiaries"); NEV. REV. STAT. § 163.556(1) (2017) (stating that decanting authority applies to "a trustee with discretion or authority to distribute trust income or principal to or for a beneficiary").

¹³⁹ See ALASKA STAT. § 13.36.159(b), (d); OHIO REV. CODE ANN. § 5808.18(F) (LexisNexis 2017); 760 ILL. COMP. STAT. 5/16.4(e) (2017); IND. CODE § 30-4-3-36(d) (2017).

section is a beneficiary of the trust from which the distribution in further trust is made, the distribution in further trust may not change the trustee's interest as a beneficiary in the trust. A trustee shall not be liable for exercising the power permitted under paragraph (a)(xxviii) of this section if the power is exercised in good faith.¹⁴⁰

Similar savings provisions exist in many states' decanting laws.¹⁴¹

From the inception of Wyoming's decanting statute in 2013, the state has chosen a minimalist approach. Even with the addition of the 2015 and 2017 amendments, the Wyoming decanting statute is arguably one of the most concise; as a result, it provides a trustee with very broad statutory backing to decant a mandatory or discretionary trust without concern about what is disallowed.¹⁴²

For example, consider the scope of changes to a trust permissible under Wyoming's decanting statute.¹⁴³ While many decanting statutes provide express rules regarding what is permissible and what is not, Wyoming's original statute was completely silent.¹⁴⁴ The 2015 amendment restricted decanting in a manner that would interfere with certain tax deductions and benefits.¹⁴⁵ The 2017 amendment added a prohibition disallowing interested trustees from decanting trust assets to a trust that would change that interested trustee's own beneficial interest.¹⁴⁶ According to the standard rules of statutory interpretation, one is to presume the legislature does not intend futile things.¹⁴⁷ A statutory amendment, therefore, presumably indicates a change in the substantive law.¹⁴⁸ If Wyoming's statute did not already permit the broadest use of decanting to modify a trust's term, no such change would have been necessary.¹⁴⁹ The 2015 and 2017 amendments, while

¹⁴⁰ WYO. STAT. ANN. § 4-10-816(b).

¹⁴¹ See ALASKA STAT. § 13.36.158(i)(5)(A); S.D. CODIFIED LAWS § 55-2-15(6)(a), (b); NEV. REV. STAT. § 163.556(3)(a)(1), (2).

¹⁴² See WYO. STAT. ANN. § 4-10-816(a)(xxviii), (b).

¹⁴³ See *id.*

¹⁴⁴ Compare H.B. 0139, 62d Leg., Gen. Sess. (Wyo. 2013) (codified as WYO. STAT. ANN. § 4-10-816(a)(xxviii)), with N.H. REV. STAT. ANN. § 564-B:4-418, and NEV. REV. STAT. § 163.556.

¹⁴⁵ H.B. 0146, 63d Leg., Gen. Sess. (Wyo. 2015) (amending WYO. STAT. ANN. § 4-10-816(b)).

¹⁴⁶ H.B. 0124, 64th Leg., Gen. Sess. (Wyo. 2017) (amending WYO. STAT. ANN. § 4-10-816(b)).

¹⁴⁷ *E.g.*, State Farm Mut. Auto. Ins. Co. v. Kunz, 2008 WY 71, ¶ 12, 186 P.3d 378, 381 (Wyo. 2008).

¹⁴⁸ *E.g.*, Bd. of Cty. Comm'rs *ex rel.* Teton Cty. Sheriff's Dep't v. Bassett, 8 P.3d 1079, 1083–84 (Wyo. 2000).

¹⁴⁹ See *supra* notes 143–48 and accompanying text.

restricting a trustee's decanting authority for tax reasons, serve to demonstrate the unparalleled breadth of decanting powers available to a Wyoming trustee.¹⁵⁰

2. Trustee's Insurable Interest

In 2013, the Wyoming Legislature adopted § 113 of the UTC, which provides that a trustee of a trust may have an “insurable interest” in the life of an individual insured under a life insurance policy held in trust.¹⁵¹ As in many states,¹⁵² Wyoming requires the purchaser of a life insurance policy to have an insurable interest in the insured's life.¹⁵³ If a person who procures a policy (e.g., the trustee of an irrevocable life insurance trust) lacks an insurable interest, the insured's personal representative may maintain an action to recover the death benefit.¹⁵⁴ However, this can result in the inclusion of the life insurance contract's death benefit in the insured's gross estate—an undesirable result to be sure.¹⁵⁵ Moreover, the proceeds may be treated as gross income for failure to qualify as “amounts received under a life insurance contract . . . paid by reason of the death of the insured.”¹⁵⁶ This issue gained notoriety in the estate planning community after the insurance fraud case of *Chawla v. Transamerica Occidental Life Insurance Company*.¹⁵⁷ In *Chawla*, the U.S. District Court for the Eastern District of Virginia not only determined that an insurance policy was invalid due to a material misrepresentation on an application, it also arrived at the remarkable conclusion that the policy was void because the trust had no insurable interest in the decedent's life.¹⁵⁸ While the U.S. Court of Appeals affirmed based on the misrepresentation holding and vacated the insurable interest holding, the decision alarmed many estate planners and led to legislative proposals to address the issue, including an optional amendment to

¹⁵⁰ See SUSAN T. BART, AM. COLL. OF TR. & EST. COUNS., SUMMARIES OF STATE DECANTING STATUTES 2–3 (Aug. 22, 2014), <http://www.actec.org/assets/1/6/Bart-State-Decanting-Statutes.pdf> (including a list of changes permitted by various decanting statutes).

¹⁵¹ H.B. 0139, 62d Leg., Gen. Sess. (Wyo. 2013) (codified as WYO. STAT. ANN. § 4-10-112(a)); see also UNIF. TRUST CODE § 113(b) (2000) (UNIF. LAW COMM'N, amended 2010)).

¹⁵² The “insurable interest” principle originated in England and is now “firmly rooted in the common law of every state in the Union.” *PHL Variable Ins. Co. v. Price Dawe 2006 Ins. Tr. ex rel. Christiana Bank & Tr. Co.*, 28 A.3d 1059, 1069 (Del. 2011).

¹⁵³ WYO. STAT. ANN. § 26-15-102(a).

¹⁵⁴ See *id.*

¹⁵⁵ See I.R.C. § 2042 (2012).

¹⁵⁶ See I.R.C. § 101(a); accord *Harrison v. Comm'r*, 59 T.C. 578, 585 (1973) (citing *Atlantic Oil Co. v. Patterson*, 331 F.2d 516, 516 (5th Cir. 1964)) (noting that a death benefit payable under an invalid insurance policy would not be excluded from the taxpayer's income); Mary Ann Mancini & Caitlin L. Murphy, *The Elusive Insurable Interest Requirement: Are You Sure the Insured is Insured?*, 46 REAL PROP. TR. & EST. L.J. 409, 412, 419 (2012).

¹⁵⁷ See *Chawla v. Transamerica Occidental Life Ins. Co.*, No. CIV.A. 03-CF-1215, 2005 WL 405405, at *6–7 (E.D. Va. Feb. 3, 2005), *aff'd in part, vacated in part*, 440 F.3d 639 (4th Cir. 2006).

¹⁵⁸ *Id.* at *5–6.

the Uniform Trust Code.¹⁵⁹ The Wyoming Legislature adopted this amendment in 2013, thereby preventing a future *Chawla*-like decision under Wyoming law.¹⁶⁰ This amendment brings Wyoming's statute in line with many comparable trust jurisdictions¹⁶¹ and puts it on better footing than Nevada, which continues to provide that a trust has an insurable interest in the insured's life only if all of its noncharitable beneficiaries have an insurable interest in that life.¹⁶²

3. *Tenancy by the Entirety Protection*

The 2013 Wyoming UTC amendments extended tenancy by the entirety protection to trust property.¹⁶³ Wyoming permits married persons to own both real and personal property as tenants by the entireties,¹⁶⁴ a protective form of ownership in which the creditors of only one spouse cannot attach property owned by both spouses as tenants by the entireties.¹⁶⁵ Before the amendment, there was no way for married couples to hold property in trust (for probate avoidance or other reasons) while retaining the asset protection benefits of tenancy by the entirety ownership.¹⁶⁶ The 2013 amendment eliminated the problem by expressly providing a method by which property initially owned by a married couple can be transferred to a trust or trusts, revocable or irrevocable, and retain tenancy by the entirety status.¹⁶⁷

In contrast, many other states, including South Dakota, Nevada, and New Hampshire, do not even offer tenancy by the entirety as a method of holding property.¹⁶⁸ Since 2014, Delaware has provided protection for entireties property held in trust by limiting creditors to the remedy of "an order directing the trustee

¹⁵⁹ UNIF. TRUST CODE § 113 cmt. (2000) (UNIF. LAW COMM'N, amended 2010).

¹⁶⁰ See WYO. STAT. ANN. § 4-10-112(a) (2017).

¹⁶¹ See ALASKA STAT. § 21.42.020(d) (2017); DEL. CODE ANN. tit. 18, § 2704(c)(5) (2017); S.D. CODIFIED LAWS § 58-10-4(6) (2017).

¹⁶² See NEV. REV. STAT. § 687B.040(2)(a) (2017).

¹⁶³ H.B. 0139, 62d Leg., Gen. Sess. (Wyo. 2013) (codified as WYO. STAT. ANN. § 4-10-402(c), (d)).

¹⁶⁴ WYO. STAT. ANN. § 34-1-140. For a discussion of the requirements to create a tenancy by the entireties, see *Wambeke v. Hopkins*, 372 P.2d 470, 475 (Wyo. 1962) (citing *Peters v. Dona*, 54 P.2d 817, 820 (Wyo. 1936); 41 C.J.S. *Husband and Wife* § 31 (1962); 14 AM. JUR. *Cotenancy* § 7 (1962)).

¹⁶⁵ *Baker v. Speaks*, 2013 WY 24, ¶ 48, 295 P.3d 847, 858 (Wyo. 2013).

¹⁶⁶ See *supra* notes 163–65 and accompanying text.

¹⁶⁷ WYO. STAT. ANN. § 4-10-402(c)–(e).

¹⁶⁸ See *Schimke v. Karlstad*, 208 N.W.2d 710, 714 (S.D. 1973) (holding South Dakota has never recognized estates by the entireties); *Stilphen v. Stilphen*, 23 A. 79, 79 (N.H. 1889) (recognizing an 1860 statute's abolition of tenancy by the entirety).

to transfer the property to both spouses as tenants by the entireties.”¹⁶⁹ Alaska recognizes tenancies by the entirety, but does not appear to have addressed the issue of whether entireties property may be held in trust.¹⁷⁰

4. *Perpetual Noncharitable Purpose Trusts*

According to the common law of trusts, one requirement for the creation of a valid trust is the existence of one or more ascertainable beneficiaries.¹⁷¹ A noncharitable purpose trust, however, is a type of trust created for a specific purpose with no ascertainable beneficiaries.¹⁷² It therefore falls outside the definition of a “trust” in many jurisdictions, either because there is no beneficiary to enforce the trust¹⁷³ or because it violates the rule against perpetuities.¹⁷⁴ Since Wyoming adopted the UTC, it has expressly permitted the creation of such noncharitable purpose trusts,¹⁷⁵ although some uncertainty has been expressed as to whether purpose trusts could fall under Wyoming’s addition to the standard 21-year rule against perpetuities (RAP), allowing trusts to last 1,000 years.¹⁷⁶ Some

¹⁶⁹ DEL. CODE ANN. tit. 12, §§ 3334, 3574(f) (2017). Between 2011 and 2013, Delaware’s statute was similar to Wyoming’s and simply provided that such property retained its entireties character. *See id.* tit. 12, §§ 3334, 3574(f) (2011) (amended 2013).

¹⁷⁰ ALASKA STAT. § 34.15.140 (2017).

¹⁷¹ *See* RESTATEMENT (SECOND) OF TRUSTS § 124 (AM. LAW INST. 1959) (“Where the owner of property transfers it in trust for a specific non-charitable purpose, and there is no definite or definitely ascertainable beneficiary designated, no enforceable trust is created, but the transferee has the power to apply the property to the designated purpose, unless . . . the purpose is capricious.”).

¹⁷² Al W. King, III, *Trusts Without Beneficiaries—What’s the Purpose?*, TR. & EST. (Feb. 2, 2015), <http://www.wealthmanagement.com/estate-planning/trusts-without-beneficiaries-what-s-purpose>.

¹⁷³ *See In re Estate of Boyer*, 868 P.2d 1299, 1303 (N.M. Ct. App. 1994) (holding that a will purporting to create a trust for the benefit of “the objects of [the decedent’s] generosity” failed to create a trust); *In re Renner’s Estate*, 57 A.2d 836, 838 (Pa. 1948) (holding that a trust for the care of a dog and a parrot failed to create a trust due to the lack of a beneficiary and was an outright gift); *Barton v. Parrot*, 495 N.E.2d 973, 974–75 (Ohio Prob. Ct. 1984) (holding that a trust to establish a horse racing event was not charitable and failed for lack of a beneficiary).

¹⁷⁴ At common law, a noncharitable trust is invalid if it fails to comply with the rule against perpetuities. *See Morristown Tr. Co. v. Mayor & Bd. of Aldermen*, 91 A. 736, 737 (N.J. Ch. 1924) (holding a testamentary trust to build a flagstaff base in a park was not charitable and therefore violated the rule against perpetuities).

¹⁷⁵ WYO. STAT. ANN. § 4-10-410(a) (2017).

¹⁷⁶ Wyoming has codified the common law rule against perpetuities (RAP), which provides that no interest is valid unless it must vest within twenty-one years of a life in being at the interest’s creation (plus a reasonable period for gestation). WYO. STAT. ANN. § 34-1-139(a). The Uniform Statutory Rule Against Perpetuities (USRAP) limits control to the RAP or 90 years, whichever is greater. UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1 (1987) (UNIF. LAW COMM’N, amended 1990). In the trust setting, the RAP requires that the trust principal must vest outright in one or more persons at the end of that period. JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* 191 (4th ed. 1942). However, Wyoming allows trusts directly holding non-real property to exist for 1,000 years from the date of their creation. WYO. STAT. ANN. § 34-1-139(b)(ii). While real property

scholars have argued that an independent common law principle exists requiring noncharitable purpose trusts to vest within the time required by the common law RAP as a matter of public policy.¹⁷⁷ This principle creates the possibility that even if noncharitable purpose trusts are not subject to the common law RAP, they may still be subject to a separate common law rule requiring termination (rather than merely vesting) within a period similar to the RAP.¹⁷⁸ While the existence of such a separate rule in Wyoming had been contested,¹⁷⁹ the Wyoming Legislature removed all uncertainty in 2013 when it adopted a statute clarifying that “[n]o common law rule limiting the duration of noncharitable purpose trusts is in force in this state.”¹⁸⁰ Therefore, if a settlor creates a noncharitable purpose trust in Wyoming, it shall remain in existence subject to Wyoming’s 1,000 year perpetuities period.

5. *Premortem Trust Contests*

An inherent risk in any estate plan is that heirs and beneficiaries will challenge a document’s validity after the testator or settlor’s death. Such challenges often assert undue influence¹⁸¹ or take issue with a settlor’s capacity to execute a trust instrument, amendment, or revocation.¹⁸² Under Wyoming law, the capacity of a settlor to create, revoke, or amend a revocable trust is based on the same general standard of soundness of mind applicable to the maker of a will.¹⁸³

A common method of deterring trust disputes is the use of no-contest or *in terrorem* clauses, which are enforceable under Wyoming law.¹⁸⁴ In addition, the Wyoming UTC now permits a trustee of a revocable trust to provide notice of a trust instrument to a person, allowing the recipient 120 days to file an action

held directly by the trust is subject to the 21-year RAP, because the definition of real property does not include a mineral interest or an interest in a corporation, LLC, partnership, business trust, or other entity, a trust can indirectly hold real property for up to 1,000 years. *Id.* § 34-1-139(c), (d).

¹⁷⁷ See Adam J. Hirsch, *Delaware Unifies the Law of Charitable and Noncharitable Purpose Trusts*, 36 EST. PLAN. 13, 19 (2009); 3 JOHN A. BORRON, JR. ET. AL., THE LAW OF FUTURE INTERESTS § 1394 (3d ed. 2011).

¹⁷⁸ Adam J. Hirsch, *Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws*, 26 FLA. ST. U. L. REV. 913, 932, 932 n.94 (1999).

¹⁷⁹ Reimer, *Domestication*, *supra* note 13, at 204–07.

¹⁸⁰ WYO. STAT. ANN. § 4-10-410(a)(iv).

¹⁸¹ Meyer v. Miller, 2014 WY 91, ¶ 21, 330 P.3d 263, 269 (Wyo. 2014) (stating the elements of undue influence).

¹⁸² Kibbee v. First Interstate Bank, 2010 WY 143, ¶ 31, 242 P.3d 973, 982–83 (Wyo. 2010) (stating the standard of capacity required to execute a valid living trust).

¹⁸³ WYO. STAT. ANN. § 4-10-601; see also UNIF. TRUST CODE § 601 cmt. (2000) (UNIF. LAW COMM’N, amended 2010) (noting that revocable trusts are primarily used as will substitutes and should therefore be governed by the same capacity standard).

¹⁸⁴ See Briggs v. Wyo. Nat’l Bank of Casper, 836 P.2d 263, 266 (Wyo. 1992).

to contest the trust's validity.¹⁸⁵ After that period expires, the recipient is forever barred from challenging the instrument's validity.¹⁸⁶ As a result, a Wyoming trustee has the option to force potentially dissatisfied heirs or beneficiaries to commence a trust contest while the trust's settlor is still alive. Because so many fights among heirs arise only when the settlor is gone or incapacitated, the ability to bring the issue to light while the settlor is able to address it will forestall many otherwise baseless estate challenges.¹⁸⁷

E. Private Family Trust Companies

Private family trust companies provide an increasingly popular tool for administering trusts holding wealthy families' assets.¹⁸⁸ A private family trust company is a limited liability company or corporation formed to act as a fiduciary for trusts created to benefit members of a single family¹⁸⁹ and which does not provide trust services to the general public.¹⁹⁰ Benefits of such companies include establishing adequate nexus to take advantage of a particular jurisdiction's favorable trust laws, increased privacy, a smoother trustee succession process, and the efficient management of wealth based on a particular family's needs and values. Of particular interest to many families is the ability to gradually introduce members of a younger generation to the family's approach to wealth management and related values through participation on the private family trust company's board of directors; for example, a younger family member can be appointed as non-voting manager, director, or committee member and be given increased responsibility as that family member gains interest and experience.¹⁹¹ Private family trust companies are often thought of as an estate planning tool for the ultra-wealthy; however, the administrative ease and relative cost efficiency have made private family trust companies an affordable alternative for those of more modest means.¹⁹²

¹⁸⁵ WYO. STAT. ANN. § 4-10-604(a)(ii).

¹⁸⁶ *Id.* § 4-10-604(d).

¹⁸⁷ *See supra* notes 181–86 and accompanying text.

¹⁸⁸ Christopher C. Weeg, *The Private Trust Company: A DIY for the Über Wealthy*, 52 REAL PROP. TR. & EST. L.J. 121, 123–30 (2017); John P.C. Duncan, *The Private Family Trust Company*, TR. & EST. (Mar. 2017), <http://www.wealthmanagement.com/estate-planning/private-family-trust-company>; Ytterberg & Weller, *supra* note 13, at 624–36.

¹⁸⁹ Christopher M. Reimer, *Private Trustees Beware: A Review of the Sweeping New SEC Registration Requirements under the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 12 J. BUS. & SEC. L. 337, 338–39 (2012); Richard M. Lipton & Marnin J. Michaels, *Getting Ready for FATCA—A Practical Approach*, 114 J. OF TAX'N 89, 99 (2011).

¹⁹⁰ Reimer, *Undiscovered Country*, *supra* note 13, at 188.

¹⁹¹ *Id.* at 186–87; Todd Ganos, *Wealthy Families Create Private Trust Companies for Privacy, Protection, Tax Savings, And Control*, FORBES (Oct. 28, 2015), <http://onforbes.es/1kaWjWp>.

¹⁹² Reimer, *Undiscovered Country*, *supra* note 13, at 186.

While for many years Wyoming had no statute expressly authorizing the use of private family trust companies, the Wyoming Banking Commissioner long recognized that private family trust companies that do not provide trust services to the general public or hold themselves forth as such are not subject to mandatory trust company registration with the Division of Banking.¹⁹³ Because these companies do not engage in the statutory definition of “trust business,” they are therefore beyond the Commissioner’s jurisdiction.¹⁹⁴ As a matter of policy, the Commissioner’s position is intuitively sensible because such companies’ activities are confined to a single family and do not pose the same risk of insolvency to the public and the economy at large.¹⁹⁵

Wyoming continues to be one of the few U.S. states permitting truly unregulated private family trust companies.¹⁹⁶ The Wyoming Legislature codified the availability of such private family trust companies with the 2015 adoption of the Wyoming Chartered Family Trust Company Act (the Act),¹⁹⁷ which allows a “family trust company” to act as a trustee and provide a number of additional fiduciary services to members of a single family.¹⁹⁸ A company qualifies as a “family trust company” if it is a limited liability company or corporation that:

- (A) Acts or proposes to act as a fiduciary;
- (B) Is organized or qualified to do business in this state to serve family members;
- (C) Does not transact trust company business with, propose to act as a fiduciary for or solicit trust company business with the general public; and
- (D) Whose officers execute and deliver a signed waiver to the commissioner acknowledging that the family trust company is

¹⁹³ Letter from Joseph B. Meyer, Wyo. Att’y Gen., State of Wyo., to Sue Mecca, State Banking Comm’r, Wyo. Banking Comm’n (Mar. 1, 1993) (on file with author).

¹⁹⁴ *Id.*

¹⁹⁵ *Cf.* Family Offices, 75 Fed. Reg. 63,753, 63,754 (Oct. 18, 2010) (describing the Security and Exchange Commission’s rationale for not requiring family offices, which provide fiduciary services to members of a single family, to register under the Investment Advisers Act).

¹⁹⁶ Nevada allows unregulated private family trust companies by statute. NEV. REV. STAT. §§ 669A.010 to -.135 (2017). Some states, including New Hampshire, Delaware, and South Dakota, permit lightly regulated private or limited purpose trust companies. *See* N.H. REV. STAT. ANN. §§ 383-D:1-101 to -D:13-1305 (2017); DEL. CODE ANN. tit. 5, §§ 773–779 (2017); § S.D. CODIFIED LAWS § 51A-6A-1(12A) (2017).

¹⁹⁷ H.B. 0061, 63d Leg., Gen. Sess. (Wyo. 2015) (codified as WYO. STAT. ANN. §§ 13-5-201 to -219 (2017)).

¹⁹⁸ WYO. STAT. ANN. § 13-5-210(a).

not regulated under this act and its members are not afforded any of the protections or privileges of this act.¹⁹⁹

The definition of “family member” includes a designated ancestor, persons within the tenth degree of lineal kinship or ninth degree of collateral kinship, and certain spouses, former spouses, family affiliates, and trusts.²⁰⁰ A qualifying family trust company can submit a short, sworn statement and modest fee to the Commissioner and receive a letter of assurance stating that it has complied with the requirements of a family trust company and will therefore not be regulated as a public trust company.²⁰¹

Family trust companies that wish to be subject to a light form of regulation, whether to take advantage of state oversight or in lieu of more stringent Securities and Exchange Commission (SEC) regulation, have the option of voluntarily seeking a charter from the Commissioner.²⁰² A chartered family trust company must include a statement of its intention to be structured in such a fashion in its organizational instrument.²⁰³ It must also have a physical office and bank account in the state.²⁰⁴ The Act imposes additional rules on chartered family trust companies, including minimum capital of \$500,000, an application process, fees, reporting, and oversight.²⁰⁵ While a majority of families forming private family trust companies in Wyoming will likely opt for the unregulated version, Wyoming’s new lightly regulated trust company alternative allows families a broader range of options.

F. Asset Protection

Wyoming continues to be one of a minority of states, albeit a growing minority, that authorizes the creation of self-settled spendthrift trusts, also known as domestic asset protection trusts.²⁰⁶ As long as the trust is irrevocable, is not funded via a fraudulent transfer, follows statutory requirements, and is not subject to other exceptions, its assets are generally protected from attachment by

¹⁹⁹ *Id.* § 13-5-204(a)(vii).

²⁰⁰ *Id.* § 13-5-204(a)(vi)(A)–(G).

²⁰¹ *Id.* § 13-5-213(a)(iv).

²⁰² *See id.* § 13-5-202(a)(i).

²⁰³ *Id.* § 13-5-205.

²⁰⁴ *Id.* § 13-5-206.

²⁰⁵ *See id.* §§ 13-5-208, -209, -213 to -216. The minimum initial capital requirement is \$500,000 and the company must maintain the “minimum level of capital required by the commissioner to operate in a safe and sound manner,” though such minimum level shall never be less than \$500,000. *Id.* § 13-5-208.

²⁰⁶ Cherish D. Van Mullem, *Shield Assets Kept Nearby with Asset Protection Trusts*, 45 EST. PLAN. 32, 33 (2018).

a beneficiary's creditor.²⁰⁷ While such trusts have traditionally been valid for third party beneficiaries only,²⁰⁸ a settlor may create such a trust for him or herself if it is authorized by local statute. Initially, the Wyoming Legislature created an asset protection trust known as a Wyoming Qualified Spendthrift Trust (WQST).²⁰⁹ Since 2015, amendments to the Wyoming Trust Code have authorized a second type of asset protection trust with no exception creditors and a streamlined formation and funding process, referred to herein as a Discretionary Asset Protection Trust or Discretionary APT.²¹⁰

This section begins with an overview of WQSTs, including the changes made to the powers a settlor may hold, the codification of a higher standard of proof for claims against a WQST, and additional limitations on the scope of exception creditors.²¹¹ Next, this section will take a close look at the provisions of Wyoming's new Discretionary APT.²¹² Finally, as LLCs are a powerful tool in Wyoming's cadre of entities providing creditor protection, Part 3 will review the changes made to Wyoming's LLC law.²¹³

1. Wyoming Qualified Spendthrift Trusts

The creation of a WQST requires that the irrevocable trust (1) have a "qualified trustee,"²¹⁴ (2) hold "qualified trust property,"²¹⁵ (3) state that the trust is a qualified spendthrift trust under Wyoming Statute § 4-10-510,²¹⁶ (4) expressly incorporate the law of the state of Wyoming to govern the validity, construction,

²⁰⁷ E.g., Alexander B. Shiffman, Note, *The Domestic Asset Protection Trust and its Federalism Implications*, 13 CARDOZO PUB. L. POL'Y & ETHICS J. 853, 859–60 (2015) (citing ALASKA STAT. § 34.40.110 (2015); DEL. CODE ANN. tit. 12, § 3572(A) (2015); Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1045 (2000)).

²⁰⁸ E.g., *Rush Univ. Med. Ctr. v. Sessions*, 2012 IL 112906, ¶ 20 (Ill. 2012) (citing HELENE S. SHAPO ET AL., BOGERT'S TRUSTS & TRUSTEES § 223 (3d ed. 2007); RESTATEMENT (SECOND) OF TRUSTS § 156 cmt. a (AM. LAW. INST. 1959); Erwin N. Griswold, *Spendthrift Trusts Created in Whole or in Part for the Benefit of the Settlor*, 44 HARV. L. REV. 203, 204 (1930)).

²⁰⁹ WYO. STAT. ANN. § 4-10-510(a).

²¹⁰ H.B. 0146, 64th Leg., Gen. Sess. (Wyo. 2015) (codified as WYO. STAT. ANN. §§ 4-10-506).

²¹¹ See *infra* notes 214–38 and accompanying text.

²¹² See *infra* notes 239–57 and accompanying text.

²¹³ See *infra* notes 258–77 and accompanying text.

²¹⁴ WYO. STAT. ANN. § 4-10-510(a). A qualified trustee is a natural person who is a resident of Wyoming or a Wyoming private trust company, regulated trust company, or financial institution that "maintains or arranges for custody" in Wyoming of some or all of the trust property, maintains trust records, prepares or arranges for the income tax return for the trust, or "otherwise materially participates in the administration" of the trust. *Id.* § 4-10-103(a)(xxxv).

²¹⁵ *Id.* § 4-10-510(a).

²¹⁶ *Id.* § 4-10-510(a)(i).

and administration of the trust,²¹⁷ and (5) include a spendthrift clause.²¹⁸ For property transferred to a WQST to be considered “qualified trust property,” it must be the subject of a qualified transfer from the settlor to the trustee of the WQST, and accompanied by an affidavit.²¹⁹ Among other things, the affidavit requires the settlor to have personal liability insurance of at least one million dollars.²²⁰

Wyoming’s UTC allows settlors to retain significant interests in the principal and income of WQSTs including: (1) income from the trust;²²¹ (2) distributions from a charitable remainder annuity trust or unitrust;²²² (3) annual distributions of principal at the trustee’s sole discretion or based on an ascertainable standard;²²³ and (4) the use of real property held in a qualified personal residence trust.²²⁴ Additionally, the settlor of a WQST may retain the following broad powers without eroding the trust’s protective nature: (1) the power to veto distributions; (2) an inter vivos or testamentary general or limited power of appointment; (3) the right to add, remove, or replace a trustee, a trust advisor, or a trust protector with a person other than the settlor; and (4) the right to act as an investment advisor of the trust.²²⁵

Since 2011, the Wyoming Legislature has expanded the interests a settlor may retain without causing a WQST to lose its protective status. The interests now also include the settlor’s receipt of payments to pay income taxes attributable to the trust, and the qualified trustee’s ability to pay the settlor’s outstanding debts after death, estate administration expenses, and estate or inheritance taxes.²²⁶

Additionally, Wyoming law now includes a heightened standard of proof: if a creditor wishes to attach property of a settlor held in a WQST, the creditor must show by clear and convincing evidence that the transfer of property to the trust

²¹⁷ *Id.* § 4-10-510(a)(ii).

²¹⁸ *Id.* § 4-10-510(a)(iii).

²¹⁹ *Id.* § 4-10-512.

²²⁰ *Id.* § 4-10-523(a)(ix). This type of insurance policy is optional coverage available as an add-on to a U.S. homeowners or auto policy; such a policy is relatively inexpensive and generally easy to obtain.

²²¹ *Id.* §§ 4-10-506(b), -510(a)(iv)(C).

²²² *Id.* §§ 4-10-506(b), -510(a)(iv)(D).

²²³ *Id.* §§ 4-10-506(b), -510(a)(iv)(E).

²²⁴ *Id.* §§ 4-10-506(b), -510(a)(iv)(H).

²²⁵ *Id.* § 4-10-510(a)(iv)(A), (B), (G), (K).

²²⁶ *Id.* § 4-10-510(a)(iv)(O), (P). These provisions were added by the Wyoming Legislature in 2013. *Id.* The potential or actual receipt of income or principal must be pursuant to a provision in the trust instrument that expressly provides for the payment of taxes, and if the potential or actual receipt of income would be the result of the qualified trustee’s acting in the qualified trustee’s discretion or pursuant to a mandatory direction in the trust instrument or at the direction of a trust advisor other than the settlor who is acting in the advisor’s discretion. *Id.* § 4-10-510(a)(iv)(O).

was fraudulent pursuant to the Uniform Fraudulent Transfers Act.²²⁷ A creditor, assignee, or agent does not have a claim or cause of action against a fiduciary or “any person involved in the counseling, drafting, administration, preparation, execution, or funding of the [qualified spendthrift] trust.”²²⁸ Furthermore, if one creditor, assignee, or agent is successful in meeting the required burden of proof, their success does not invalidate any other qualified transfer of property, nor does it constitute proof as to any other claim to property within the trust.²²⁹

Finally, the Wyoming Legislature has made changes to the few limitations pertaining to the protections offered to property in WQSTs.²³⁰ First, property in a WQST will not be protected in the event of an agreement or court order requiring the settlor to pay child support, if the settlor is in default by thirty or more days.²³¹ Second, financial institutions may be able to limit qualified trust property where the financial institution has relied on the property in extending credit to the settlor other than for the benefit of the qualified spendthrift trust.²³² This exception now applies only in relation to the specific institution from which the credit was sought.²³³ The WQST statutes do not provide an exception for tort claims, as does Delaware.²³⁴ Like Wyoming, South Dakota and Ohio include child support as an exception creditor.²³⁵ Unlike Wyoming, however, South Dakota includes a divorcing spouse and a spouse owed alimony as exception creditors.²³⁶

If a qualified transfer to a spendthrift trust is voided, the qualified trustee who acted in good faith has a “first and paramount” lien against the property that is the subject of the qualified transfer in an amount equal to the entire cost

²²⁷ *Id.* §§ 4-10-517, -521(b). Prior to the amendments enacted in 2013, with respect to a self-settled qualified spendthrift trust, a creditor had to prove by a preponderance of the evidence that a settlor or beneficiary acted in bad faith. H.B. 0069, 59th Leg., Gen. Sess. (Wyo. 2007). Wyoming adopted the Uniform Fraudulent Transfers Act (UFTA) in 2006. WYO. STAT. ANN. §§ 34-14-201. In 2014, the Uniform Law Commission renamed their UFTA the Uniform Voidable Transactions Act; Wyoming has not done the same. *See* UNIF. VOIDABLE TRANSACTIONS ACT (1984) (UNIF. LAW COMM'N, amended 2014). Most states with DAPT laws except fraudulent transfers from asset protection coverage. *See, e.g.*, NEV. REV. STAT. § 166.170(3) (2017); S.D. CODIFIED LAWS § 55-16-9 (2017). Other prominent trust situs jurisdictions have also adopted a clear and convincing evidence standard. *See, e.g.*, S.D. CODIFIED LAWS § 55-16-10(3) (2017).

²²⁸ WYO. STAT. ANN. § 4-10-517.

²²⁹ *Id.*

²³⁰ H.B. 0139, 62d Leg., Gen. Sess. (Wyo. 2013) (codified as WYO. STAT. ANN. §§ 4-10-520, 521).

²³¹ WYO. STAT. ANN. § 4-10-520(a)(i).

²³² *Id.* § 4-10-520(a)(ii).

²³³ *Id.*

²³⁴ DEL. CODE ANN. tit. 12, § 3572 (2017).

²³⁵ S.D. CODIFIED LAWS § 55-16-15(1) (2017); OHIO REV. CODE ANN. § 5816.03(C) (LexisNexis 2017).

²³⁶ S.D. CODIFIED LAWS § 55-16-15(1).

of defending the action or proceedings to avoid the qualified transfer.²³⁷ If the creditor argues that the qualified trustee acted in bad faith and thus the trustee's "first and paramount" lien should not be upheld, the creditor will have to do so by clear and convincing evidence, regardless of whether or not the qualified spendthrift trust is self-settled and the settlor or beneficiary acted in bad faith.²³⁸

2. *Discretionary Asset Protection Trusts*

In 2015, the Wyoming Legislature added an additional provision to the Wyoming Trust Code creating a second form of asset protection trust, referred to herein as the Discretionary APT.²³⁹ The provision reads as follows:

With respect to irrevocable trusts providing that the trustee may only make discretionary distributions to the settlor, a creditor or assignee of the right of a settlor are limited by W.S. 4-10-504(b) if:

- (i) The transfer of property to the trust by the settlor was not in violation of the Uniform Fraudulent Transfers Act by applying the same standard of proof as provided in W.S. 4-10-517;
- (ii) At least one (1) trustee of the irrevocable trust is a qualified trustee; and
- (iii) The trustee with authority to make distributions to the settlor is not a trust beneficiary, related to the settlor or subordinate to the settlor under Internal Revenue Code section 672(c).²⁴⁰

As a result, a creditor or assignee of a settlor of an irrevocable discretionary trust created for the benefit of the settlor, with or without a spendthrift clause, may not attach the trust property or compel the trustee to make a distribution.²⁴¹ This is true even if the trustee: (1) has the discretion to make distributions based on a standard, (2) has abused his or her discretion, or (3) elects to make a distribution directly to a third-party for the benefit of the beneficiary.²⁴² Wyoming law further

²³⁷ WYO. STAT. ANN. § 4-10-521(a)(1)(A). Expenses covered include "attorney's fees, court costs, penalties, fines, and other amounts paid or payable, or which were properly incurred by the qualified trustee in defense of the action or proceedings . . ." *Id.*

²³⁸ *Id.* Prior to the amendments enacted in 2013, with respect to a self-settled qualified spendthrift trust, a creditor had to prove by a preponderance of the evidence that a settlor or beneficiary acted in bad faith. H.B. 0155, 59th Leg., Gen. Sess. (Wyo. 2007) (codified as WYO. STAT. ANN. § 4-10-521).

²³⁹ H.B. 0146, 64th Leg., Gen. Sess. (Wyo. 2015) (codified as WYO. STAT. ANN. §§ 4-10-504, -506).

²⁴⁰ WYO. STAT. ANN. § 4-10-506(c).

²⁴¹ *Id.* § 4-10-506(c), -504(b).

²⁴² *Id.*

states that no property interest is created in a beneficiary of a discretionary trust, regardless of whether distributions are made pursuant to a standard of distribution—reinforcing the creditor protection of Discretionary APTs as well as any other discretionary Wyoming trust.²⁴³

The creation of a Discretionary APT requires at least one qualified trustee²⁴⁴ and a trust instrument governed by Wyoming law that provides for discretionary distributions of income or principal to the settlor.²⁴⁵ Unlike a WQST, neither an affidavit nor personal liability insurance is required to transfer property to a Discretionary APT.²⁴⁶ Other than fraudulent transfers proven by clear and convincing evidence, which are excepted from protection under most state statutes,²⁴⁷ a Wyoming Discretionary APT has no exception creditors.²⁴⁸ While a settlor of a WQST can retain considerable interests in the trust's principal and income, a Discretionary APT limits a settlor's retained interest to the ability to receive discretionary distributions.²⁴⁹ The settlor of a Discretionary APT may retain the same powers as a settlor of a WQST including (1) “[a]n inter vivos or testamentary general or limited power of appointment;” (2) the right to add, remove, or replace a trustee, a trust advisor, or a trust protector with a person other than the settlor; and (3) the “right to act as an investment advisor of the trust.”²⁵⁰ Unlike with a WQST, however, the settlor of a Discretionary APT may not retain the power to veto distributions.²⁵¹

Many other provisions of Wyoming law applicable to WQSTs are also relevant to Discretionary APTs. If a creditor wishes to attach property held in a Discretionary APT, the creditor must show by clear and convincing evidence that the transfer of property to the trust was fraudulent pursuant to the Uniform Fraudulent Transfers Act.²⁵² As with the WQST, a creditor, assignee, or agent does not have a claim or cause of action against a fiduciary or any other person participating in tasks related to the preparation, administration, or funding of a Discretionary APT.²⁵³ If one creditor prevails, other transfers of property to a

²⁴³ *Id.* § 4-10-504(g).

²⁴⁴ *Id.* § 4-10-506(c)(ii).

²⁴⁵ *Id.* § 4-10-506(c). The distribution power of the trustee can be wholly discretionary or pursuant to a standard. *Id.* § 4-10-504(b).

²⁴⁶ *See id.* § 4-10-506(c).

²⁴⁷ *See, e.g.*, NEV. REV. STAT. § 166.170(3) (2017); S.D. CODIFIED LAWS § 55-16-9 (2017).

²⁴⁸ *See* WYO. STAT. ANN. §§ 4-10-506(c), -504(b), -517.

²⁴⁹ *See id.*

²⁵⁰ *Id.* § 4-10-510(a)(iv)(B), (G), (K).

²⁵¹ *See id.* § 4-10-506(c). The discretionary distribution requirement of a Discretionary APT precludes allowing the settlor veto power. *Id.*

²⁵² *Id.* §§ 4-10-517, -521(b).

²⁵³ *Id.* § 4-10-517.

Discretionary APT are not invalidated, nor does the creditor's success constitute proof as to any other claim.²⁵⁴ Should a transfer to a Discretionary APT be invalidated, the qualified trustee who acted in good faith has a lien against the property subject to the invalidated transfer in an amount equal to the cost and fees incurred to defend the trust.²⁵⁵ If a creditor argues that the qualified trustee acted in bad faith and thus the trustee's lien should not be upheld, the creditor will have to establish as much by clear and convincing evidence.²⁵⁶

The ease of creation and lack of exception creditors (absent a fraudulent transfer) make Wyoming's Discretionary APT a powerful tool. All in all, the inclusion of the Discretionary APT in Wyoming's trust law provides an additional avenue to asset protection that only serves to expand the jurisdiction's appeal to individuals and advisors seeking a broad range of options.²⁵⁷

3. *Wyoming Limited Liability Companies*

Wyoming, as the first state to enact limited liability companies (LLCs), has remained proactive in ensuring its LLC statutes remain both protective and flexible.²⁵⁸ This section will review the continued level of privacy available to managers and members of Wyoming LLCs as well as the Legislature's swift action to shore up the creditor protection available to Wyoming LLCs in light of a court case that purported to erode the same.

a. *Privacy*

While the global impetus towards transparency includes an effort to tackle the problem of shell companies used to hide money, the U.S. has not wholly embraced these efforts. While any federal push towards unifying the states' varied approaches towards confidentiality in business structures is unlikely, the states themselves appear equally reluctant to make these sort of changes, with the result that the U.S. is the country where some confidentiality can still be obtained.²⁵⁹ Wyoming's LLC laws continue to require only the entity's registered agent to appear publicly on the Secretary of State's informational website.²⁶⁰ The members

²⁵⁴ *Id.*

²⁵⁵ *Id.* § 4-10-521(a)(1)(A).

²⁵⁶ *Id.* § 4-10-521(b).

²⁵⁷ Only Nevada offers an asset protection trust with no exception creditors (absent a fraudulent transfer) and no affidavit requirement. *See* NEV. REV. STAT. §§ 166.010 to -.170 (2017).

²⁵⁸ *See* Dale W. Cottam et al., *The 2010 Wyoming Limited Liability Company Act: A Uniform Recipe with Wyoming "Home Cooking"*, 11 WYO. L. REV. 49, 51–53 (2011).

²⁵⁹ *The Biggest Loophole of All*, ECONOMIST (Feb. 20, 2016), <https://www.economist.com/news/international/21693219-having-launched-and-led-battle-against-offshore-tax-evasion-america-now-part>.

²⁶⁰ WYO. STAT. ANN. § 17-29-201.

and managers, while not publicly available, are certainly not without oversight or U.S. reporting obligations as the entity, so long as it is tax compliant, will provide this information to the IRS.²⁶¹ Additionally, with the recent change to federal law imposing reporting requirements on 100% foreign-owned LLCs, some curtailing of the U.S. as the “secrecy” jurisdiction is underway.²⁶² Whether the choice of U.S. jurisdictions like Wyoming to maintain some modicum of confidentiality for their patrons is right or wrong, the reality is that there are any number of legitimate reasons a fully tax compliant person might want to maintain some level of confidentiality.

b. Veil Piercing

Limited liability companies are advantageous because they are entities distinct from their members.²⁶³ While LLCs are generally very protective structures, there are instances in which the corporate veil can be pierced. In veil piercing, a court disregards an entity's limited liability and allows an individual manager to be held personally liable for the company's debts.²⁶⁴ In the LLC context, the more relevant issue consists of reverse veil piercing, which occurs when a creditor of an LLC member attempts to satisfy the member's liability by attaching the member's interest in the LLC.²⁶⁵

Wyoming refreshed its thirty-year-old LLC statute in 2010 to allow “significant freedom and flexibility” in the management structure and operation of a company.²⁶⁶ In addition, the Wyoming Supreme Court has stated that an LLC's corporate veil will be pierced only under certain extraordinary circumstances.²⁶⁷

²⁶¹ An LLC, as a business entity not falling under the definition of a “per se corporation,” represents an “eligible entity,” which may elect classification under the I.R.S.'s “check-the-box” regulations. *See* Treas. Reg. § 301.7701-2 (2018). Depending on whether the LLC has multiple members or makes an affirmative election, the I.R.S. will classify it as a disregarded entity (treated as a pass-through conduit that has its income reported on its member's tax returns), partnership, or corporation, and the LLC or its owners will file accordingly. *See id.*

²⁶² *Id.* §§ 1.6038A-1(c)(1), 301.7701-2(c)(2)(vi)(A) (treating disregarded domestic entities wholly owned, directly or indirectly, by a foreign person or persons, as corporations under I.R.C. § 6038A, thereby requiring such entities to maintain records and file reports regarding transactions with related parties).

²⁶³ WYO. STAT. ANN. § 17-29-104(a).

²⁶⁴ *See* *FILo America, Inc. v. Olhoss Trading Co., LLC*, 321 F. Supp.2d 1266, 1269 (M.D. Ala. 2004) (listing cases in which an LLC's corporate veil has been pierced).

²⁶⁵ *E.g.*, *Curci Inv., LLC v. Baldwin*, 221 Cal. Rptr. 3d 847, 851 (Cal. Ct. App. 2017).

²⁶⁶ *GreenHunter Energy, Inc. v. W. Ecosystems Tech., Inc.*, 2014 WY 144, ¶ 25, 337 P.3d 454, 462 (Wyo. 2014).

²⁶⁷ *Id.* ¶ 26, 337 P.3d at 462.

Fraud, inadequate capitalization, and the degree to which the business and finances of the company are intermingled with the member are the three most common factors a court will consider before allowing the veil of a Wyoming LLC to be pierced.²⁶⁸ The only dispositive factor is fraud; all other factors must be relied upon by a court in combination, and “injustice or unfairness must always be proven.”²⁶⁹

The Wyoming Supreme Court’s decision in *GreenHunter Energy, Inc. v. Western Ecosystems Technology, Inc.* caused some concern regarding the effectiveness of Wyoming LLCs as asset protection vehicles.²⁷⁰ Although *GreenHunter* presented an anomalous situation in which the LLC was completely uncapped, the court’s analysis suggested that courts would apply features intrinsic to single-member LLCs, including the failure to be treated as a separate taxpayer for federal income tax purposes, in determining whether to pierce the veil of limited liability.²⁷¹ The Wyoming Legislature reacted to the *GreenHunter* decision by amending the LLC statute in 2016.²⁷² First, the amendment repealed Wyoming Statute § 17-29-304(b), which had provided that the failure of an LLC to observe formalities in the exercise of its powers and management of its activities was not grounds for imposing the LLC’s liabilities on its members or managers.²⁷³ In its place, the Legislature adopted two new subparagraphs:

- (c) For purposes of imposing liability on any member or manager of a limited liability company for the debts, obligations or other liabilities of the company, a court shall consider only the following factors no one (1) of which, except fraud, is sufficient to impose liability:
 - (i) Fraud;
 - (ii) Inadequate capitalization;
 - (iii) Failure to observe company formalities as required by law; and

²⁶⁸ *Id.* ¶¶ 30–33, 337 P.3d at 463–64.

²⁶⁹ *Id.* ¶ 34, 337 P.3d at 464.

²⁷⁰ See Allen Sparkman, *Will Your Veil be Pierced? How Strong Is Your Entity’s Liability Shield?—Piercing the Veil, Alter Ego, and Other Bases for Holding an Owner Liable for Debts of an Entity*, 12 HASTINGS BUS. L.J. 349, 397–99 (2016).

²⁷¹ *Wyoming Supreme Court Makes Piercing Single Member LLC Veil More Difficult*, INCNOW, (Mar. 31, 2016), <https://www.incnw.com/blog/2016/03/31/wyoming-supreme-court-gets-it-wrong-and-pierces-single-member-llc-veil-convert-wyoming-llcs-to-delaware-llcs-now/>.

²⁷² S.F. 0036, 63d Leg., Budg. Sess. (Wyo. 2016) (codified as WYO. STAT. ANN. § 17-29-304 (2017)).

²⁷³ WYO. STAT. ANN. § 17-29-304(b) (repealed 2016).

- (iv) Intermingling of assets, business operations and finances of the company and the members to such an extent that there is no distinction between them.
- (d) In any analysis conducted under subsection (c) of this section, a court shall not consider factors intrinsic to the character and operation of a limited liability company, whether a single or multiple member limited liability company. Factors intrinsic to the character and operation of a limited liability company include but are not limited to:
 - (i) The ability to elect treatment as a disregarded or pass-through entity for tax purposes;
 - (ii) Flexible operation or organization including the failure to observe any particular formality relating to the exercise of the company's powers or management of its activities;
 - (iii) The exercise of ownership, influence and governance by a member or manager;
 - (iv) The protection of members' and managers' personal assets from the obligations and acts of the limited liability company.²⁷⁴

These provisions clearly state under which circumstances a court may pierce the LLC veil, while also limiting the authority to pierce based on an LLC's tax status as a disregarded or pass-through entity.²⁷⁵ While a court may consider an LLC's "[f]ailure to observe company formalities *as required by law*,"²⁷⁶ non-legal formalities, including standards inappropriately borrowed from the world of corporations, may not be considered.²⁷⁷

III. CONCLUSION

As the world changes, Wyoming's laws have changed as well. This is particularly true in the estate planning world, where the state Legislature has worked hard to make the state's laws competitive with other top-tier trust situs jurisdictions. While Wyoming is in a more difficult economic position than it

²⁷⁴ *Id.* § 17-29-304(c), (d).

²⁷⁵ *See id.*

²⁷⁶ *Id.* § 17-29-304(c)(iii) (emphasis added).

²⁷⁷ *Id.* § 17-29-304(d).

was during the coal boom years when Reimer published his 2011 article, this western state remains on more than sound footing as a situs for family wealth. It continues to impose no tax of any kind on trust income and offers some of the most flexible and powerful trust and asset protection tools available in the United States.²⁷⁸ If anything, the state's economic woes have spurred an even greater focus on fiduciary services to both domestic and international clients as a potential means of diversifying the state's economy and tax base.

²⁷⁸ See *supra* notes 52–277 and accompanying text.