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## ESTATE LAW—Balancing the Competing Interests of Efficiency, Finality, and Freedom of Disposition in Ancillary Administration Proceedings: *Lon V. Smith Foundation v. Devon Energy Corp.*, 2017 WY 121, 403 P.3d 997 (Wyo. 2017)

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CASE NOTE

**ESTATE LAW—Balancing the Competing Interests of Efficiency, Finality, and Freedom of Disposition in Ancillary Administration Proceedings: *Lon V. Smith Foundation v. Devon Energy Corp.*, 2017 WY 121, 403 P.3d 997 (Wyo. 2017).**

*Kaylee Harmon\**

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I. INTRODUCTION

Although you cannot take it with you when you go, American succession laws permit the next best thing—the power to decide who will receive your possessions when you are gone.<sup>1</sup> This notion of fulfilling donative intent permeates American probate laws, and its breadth is nearly unparalleled by any other modern legal system.<sup>2</sup> Policymakers have gone to great lengths to ensure that probate procedures accommodate the freedom of disposition, only permitting outright restraints in certain limited circumstances.<sup>3</sup> So, testators can rest easy knowing their property will be dispersed according to their wishes, right? Unfortunately, there may still be cause for concern. Over time, states have unwittingly undermined donative intent by attempting to balance the freedom of

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<sup>1</sup> JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 2 (10th ed. 2017).

<sup>2</sup> *Id.* at 4.

<sup>3</sup> *Id.* (“[F]reedom of disposition at death is curbed only by wealth transfer taxation[,] . . . the forced share for a surviving spouse[,] . . . rules protecting creditors[,] . . . [and] public policy constraints such as the Rule Against Perpetuities, the rule against trusts for capricious purposes, and the rule against restraints on alienation.”).

disposition with other interests.<sup>4</sup> This has called into question the legitimacy of the American premise that “freedom of disposition is paramount and the courts have no power to deviate from a person’s will.”<sup>5</sup>

The Wyoming Supreme Court recently grappled with this dilemma in the context of ancillary probate administration.<sup>6</sup> In *Lon V. Smith Foundation v. Devon Energy Corp.*, the Wyoming Supreme Court settled a controversy between named beneficiaries as to the rightful ownership of certain Wyoming real property listed within a testator’s will.<sup>7</sup> The dispute resolution focused primarily on a determination of which instrument—the testator’s will or a conflicting foreign decree adopted during ancillary probate administration proceedings—governed the disposition of the estate’s assets.<sup>8</sup> This case presented an opportunity for the Wyoming Supreme Court to examine the interplay between Wyoming’s interest in upholding the freedom of disposition and the efficient operation of ancillary probate proceedings under Wyoming Statute § 2-11-201.<sup>9</sup> The court ultimately concluded that the foreign probate decree adopted by the Natrona County District Court pursuant to Wyoming Statute § 2-11-201 controlled the distribution of Wyoming real property, notwithstanding the decree’s failure to distribute the real property in accordance with the testator’s will.<sup>10</sup>

This case note examines concerns stemming from the operation of Wyoming ancillary probate statutes as seen through the Wyoming Supreme Court’s holding. It first provides a brief description of the history behind Wyoming probate laws, followed by a discussion of the ancillary administration proceedings available in Wyoming.<sup>11</sup> Next, it gives a summary of the facts, holding, and analysis in *Lon V. Smith Foundation v. Devon Energy Corp.*<sup>12</sup> It argues the court’s holding in *Lon V. Smith Foundation* was correct based upon the present language of Wyoming Statute § 2-11-201 and general probate principles.<sup>13</sup> However, this case note further argues that Wyoming Statute § 2-11-201, as

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<sup>4</sup> THOMPSON ON REAL PROPERTY § 88.13(d)(3)(i) (David A. Thomas ed., 3d ed. 2017). Efficiency is often the primary competing interest, in light of the growing consensus that probate is “costly and time-consuming.” *Id.*

<sup>5</sup> RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 6–7 (2010).

<sup>6</sup> See *DUKEMINIER & SITKOFF*, *supra* note 1, at 142–210. This issue also frequently arises in connection with will formalities. See *id.*

<sup>7</sup> *Lon V. Smith Found. v. Devon Energy Corp.*, 2017 WY 121, 403 P.3d 997 (Wyo. 2017).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* ¶ 39, 403 P.3d at 1009.

<sup>11</sup> See *infra* notes 16–87 and accompanying text.

<sup>12</sup> See *infra* notes 88–148 and accompanying text.

<sup>13</sup> See *infra* notes 149–87 and accompanying text.

applied, incorrectly favors efficiency at the expense of accurately fulfilling the testator's intent.<sup>14</sup> Finally, this case note examines the legislative response to the principal case's application of Wyoming Statute § 2-11-201 and proposes an amendment to the statute.<sup>15</sup>

## II. BACKGROUND

### A. *History of Wyoming Probate Law*

The term “probate” refers to the actions of validating a will and administering a decedent's estate in a probate court.<sup>16</sup> The concept of monitoring succession of property upon death in this fashion has origins in English law, first used by ecclesiastical courts after the Norman Conquest in 1066 A.D.<sup>17</sup> The colonies later adopted these concepts during the sixteenth century, and they have carried on into modern American jurisprudence.<sup>18</sup> Today, the practice of examining a will and administering an estate is firmly established and follows a similar process in every state.<sup>19</sup> However, the mechanics of probate proceedings are controlled by each state's statutes and court rules, which vary greatly.<sup>20</sup> Careful consideration of applicable state probate law is therefore imperative to both prospective estate planning and retroactive estate distribution.<sup>21</sup>

Wyoming probate law has evolved sporadically. President Andrew Johnson first recognized Wyoming as a U.S. territory in 1868.<sup>22</sup> Shortly thereafter, the first legislative assembly enacted intestacy provisions.<sup>23</sup> However, it was not until after induction as a state—twenty-two years later—that the first state legislature of Wyoming passed the Wyoming Probate Procedure Act.<sup>24</sup> The substantive basis

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<sup>14</sup> See *infra* notes 188–223 and accompanying text.

<sup>15</sup> See *infra* notes 224–43 and accompanying text.

<sup>16</sup> *Probate*, BLACK'S LAW DICTIONARY (5th Pocket ed. 2016).

<sup>17</sup> Eugene A. Haertle, *The History of the Probate Court*, 45 MARQ. L. REV. 546, 546 (1962) (providing a more in-depth analysis of the origins of probate).

<sup>18</sup> See *id.* at 548, 551.

<sup>19</sup> DUKEMINIER & SITKOFF, *supra* note 1, at 44.

<sup>20</sup> *Id.* Wyoming's probate procedures are presently governed under Title 2 of the Wyoming Statutes, entitled *Wills, Decedent's Estates and Probate Code*. WYO. STAT. ANN. tit. 2 (2017). This Title contains eighteen Chapters, each of which addresses various technical components of estate distribution and interpretation. *Id.*

<sup>21</sup> DUKEMINIER & SITKOFF, *supra* note 1, at 44.

<sup>22</sup> Debora A. Person, *Wyoming Pre-Statehood Legal Materials: An Annotated Bibliography—Part II*, 7 WYO. L. REV. 333, 375 (2007).

<sup>23</sup> Lawrence H. Averill, Jr., *Wyoming's Law of Decedents' Estates, Guardianship and Trusts: A Comparison with the Uniform Probate Code—Part I*, IX LAND & WATER L. REV. 172 (1974) [hereinafter *Wyoming's Law—Part I*].

<sup>24</sup> *Id.* at 172–73.

for this Act was derived primarily from portions of the California Code of Civil Procedure of 1872.<sup>25</sup> Consequently, a large body of Wyoming case law has given deference to California court interpretations of the language underlying this Act.<sup>26</sup> The probate procedures set forth in the Act remained substantially unchallenged until 1969, when the National Conference of Commissioners on Uniform State Laws approved the Uniform Probate Code (UPC).<sup>27</sup> The UPC is a culmination of extensive research and discussion in the area of decedents' estates, guardianships, and trusts by leading experts, who drafted their findings into a model code over a period of six years.<sup>28</sup> Once approved, several states sought to replace their current probate statutes through adoption of this model code, including Wyoming.<sup>29</sup>

Following the national trend, in 1975, the 43rd Wyoming Legislature proposed and passed the UPC as a replacement to the Wyoming Probate Procedure Act.<sup>30</sup> However, Governor Ed Herschler quickly vetoed this modification that same year.<sup>31</sup> Governor Herschler cited various reasons for his veto, including uniformity concerns, an absence of input by the trust profession, and burdensome impacts on courts.<sup>32</sup> Additionally, he expressed his confidence in the operation of Wyoming's system at that time.<sup>33</sup> The 44th Wyoming Legislature made a second attempt to pass the UPC in 1977, but, again, Governor Herschler vetoed it.<sup>34</sup> In the wake of these failed revision attempts, the Wyoming Probate Procedure Act governed administration of Wyoming estates until 1979, at which time the 45th Wyoming State Legislature enacted the Wyoming Probate Code of

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<sup>25</sup> *Id.* at 173 n.20. The probate portions of the California Code of Civil Procedure of 1872 were an updated version of the California Probate Act of 1851, which likely originated out of Texas. *Id.*

<sup>26</sup> See, e.g., *Merrill v. Dist. Court of Fifth Judicial Dist.*, 272 P.2d 597, 598 (Wyo. 1954); *In re Estate of Kimball*, 583 P.2d 1274, 1279 (Wyo. 1978).

<sup>27</sup> Ann Bradford Stevens, *Uniform Probate Code Procedures: Time for Wyoming to Reconsider*, 2 WYO. L. REV. 293, 294 (2002).

<sup>28</sup> Averill, *Wyoming's Law—Part I*, *supra* note 23, at 174–75.

<sup>29</sup> Stevens, *supra* note 27, at 294 n.11, 297 n.23. (listing those states which have presently adopted the UPC in substantially unaltered form as: Alaska, Arizona, Colorado, Idaho, Montana, Nebraska, New Mexico, North Dakota, and Utah); Steven D. Lerner, *The Need for Reform in Multistate Estate Administration*, 55 TEX. L. REV. 303, 304 n.7 (1977).

<sup>30</sup> Stevens, *supra* note 27, at 294.

<sup>31</sup> *Id.* 294–95.

<sup>32</sup> *Id.* The justifications for Governor Herschler's veto appear to be unfounded. See *id.* UPC drafters, including members of the trust profession, designed the Code to operate as a uniform approach to streamlining probate procedures. *Id.* Wyoming's failure to adopt the UPC ultimately set it apart from neighboring western states—by 1975, the UPC had already been adopted by Colorado, Idaho, Montana, Nebraska, North Dakota, and Utah. *Id.* at 293, 294 n.11.

<sup>33</sup> *Id.* at 294–95.

<sup>34</sup> *Id.* at 295 n.13.

1979.<sup>35</sup> Alterations to the Probate Code of 1979 were modeled after provisions of the Uniform Probate Code and the Iowa Probate Code.<sup>36</sup>

Complaints about the new probate code arose soon after its enactment.<sup>37</sup> Opponents argued it suffered from both “technical and substantive problems.”<sup>38</sup> In response, the 45th Wyoming State Legislature passed an amended version of the 1979 Code during their second legislative session.<sup>39</sup> On April 1, 1980, this amended probate code, now known as the Probate Code of 1980, went into effect.<sup>40</sup> The 1980 Code amended, repealed, and renumbered the previous provisions of the 1979 Code.<sup>41</sup> Although the Probate Code of 1980 reorganized and enacted changes to previous estate administration procedures, in many respects, the general process of administering an estate in Wyoming did not become any more streamlined under the new Code.<sup>42</sup> Consequently, Wyoming courts and scholars alike have suggested state legislators should revisit, and perhaps rethink, the 1980 Code.<sup>43</sup> Aside from a handful of amendments and additions, the Probate Code of 1980 was the last substantive review of the Wyoming Probate Code by the Wyoming legislature.<sup>44</sup>

### B. *Ancillary Administration*

Perhaps one of the most important functions state probate laws fulfill is delineating the process an executor or personal representative must undertake

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<sup>35</sup> Lawrence H. Averill, Jr., *The Wyoming Probate Code of 1980: An Analysis and Critique*, XVI LAND & WATER L. REV. No. 1, 103, 105–06 (1981).

<sup>36</sup> *In re Estate of Meyer*, 2016 WY 6, ¶¶ 26–27, 367 P.3d 629, 637–68 (Wyo. 2016) (citing Averill, *The Wyoming Probate Code of 1980*, *supra* note 35, at 108, 127).

<sup>37</sup> See Averill, *The Wyoming Probate Code of 1980*, *supra* note 35, at 106.

<sup>38</sup> *Id.* The problems asserted were voluminous in number and covered a broad range of issues. *Id.* at 106–09. See also *In re Estate of Meyer*, ¶ 26, 367 P.3d at 637; S.F. 14, 45th Leg., Budget Sess. (Wyo. 1980) (providing a review of those provisions the legislature sought to remedy).

<sup>39</sup> *In re Estate of Meyer*, ¶ 26, 367 P.3d at 637.

<sup>40</sup> Averill, *The Wyoming Probate Code of 1980*, *supra* note 35, at 105.

<sup>41</sup> Probate Code, 1980 Wyo. Sess. Laws 54 (codified as amended at WYO. STAT. ANN. §§ 2-1-101 to 2-15-106 (2017)). Because the changes swept across the entirety of the probate code, “[n]o detailed explanation of the changes made by the 1980 act has been attempted” by the legislature. WYO. STAT. ANN. tit. 2 note (2017).

<sup>42</sup> See, e.g., Averill, *The Wyoming Probate Code of 1980*, *supra* note 35, at 178 (“The new Code’s procedure [for a larger estate] is still based primarily upon continuous court involvement and supervision throughout the proceedings . . . . Consequently, the time, effort, and expense of administration will continue to be at approximately the same level as existed under prior law.”).

<sup>43</sup> See *In re Estate of Meyer*, 2016 WY 6, 367 P.3d 629 (addressing ambiguity within the Code); Stevens, *supra* note 27, at 295; Averill, *The Wyoming Probate Code of 1980*, *supra* note 35, at 105–09 (addressing technical issues with the Code).

<sup>44</sup> Stevens, *supra* note 27, at 295.

to properly distribute an estate's assets.<sup>45</sup> Under modern law, many options exist for tailoring this process to the nature and needs of an individual estate, such as petitioning for shortened proceedings with reduced formalities when administering a small or relatively noncomplex estate.<sup>46</sup> Executors and personal representatives must, therefore, take care to ensure they have selected the most advantageous procedure and, more importantly, that the procedure chosen will make a complete distribution of the estate's assets.<sup>47</sup> In some circumstances, an executor or personal representative will be required to initiate additional probate proceedings beyond those held in the decedent's domiciliary state to accomplish this objective.<sup>48</sup> Such is frequently the case when a decedent domiciled in one state dies owning real property within another state.<sup>49</sup> When this occurs, a "situs approach" is applied to dispose of that real property.<sup>50</sup> Under situs principles, the probate court in the state where the real property is located has sole jurisdiction to dispose of the real property.<sup>51</sup> This differs from a decedent's personal property, which is distributed under the jurisdiction of the state in which the decedent was domiciled at death.<sup>52</sup>

Therefore, unless a state's statutory provisions provide otherwise, situs laws dictate that a will probated in the court of one jurisdiction will not effectively convey title to real property situated in another state's jurisdiction.<sup>53</sup> To convey title to real property in these circumstances, the jurisdiction where the real property is located must hold its own probate proceedings, separate from that of the domiciliary state.<sup>54</sup> This secondary proceeding is commonly known as the "ancillary" probate proceeding, used in this context to denote a "supplementary" rather than "subordinate" procedure.<sup>55</sup> In addition to facilitating the property's conveyance, this proceeding also serves to ensure title is properly recorded in the

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<sup>45</sup> See THOMPSON ON REAL PROPERTY, *supra* note 4, § 88.13(a).

<sup>46</sup> *Id.* For example, Wyoming has enacted summary distribution proceedings as an alternative to full probate proceedings for qualifying estates. See WYO. STAT. ANN. § 2-1-205.

<sup>47</sup> See 34 C.J.S. *Executors and Administrators* § 212 (2018).

<sup>48</sup> George A. Wilson, *Ancillary Administration*, in 2 ESTATE TAX & PERSONAL FINANCE PLANNING § 20:24 (Edward F. Koren ed., 2017).

<sup>49</sup> 3 JEFFREY A. SCHOENBLUM, PAGE ON THE LAW OF WILLS § 26.15 (Matthew Bender ed., 2d ed. 2017).

<sup>50</sup> 16 AM. JUR. 2D *Conflict of Laws* § 22 (2018).

<sup>51</sup> DUKEMINIER & SITKOFF, *supra* note 1, at 158.

<sup>52</sup> *Id.*

<sup>53</sup> 79 AM. JUR. 2D *Wills* § 713 (2018).

<sup>54</sup> *Id.*

<sup>55</sup> DUKEMINIER & SITKOFF, *supra* note 1, at 44; *Ancillary*, BLACK'S LAW DICTIONARY (5th Pocket ed. 2016); *In re Estate of Reed*, 768 P.2d 566, 569 n.3 (Wyo. 1989) ("The term 'ancillary administration' does not connote a subordinate or inferiority to the domiciliary administration. Ancillary administration is simply the probate that occurs where a decedent had property but was not domiciled at the time of his death.").

situs state and local creditors are afforded an opportunity to discharge a decedent's debts.<sup>56</sup> Because full probate proceedings have likely already occurred in the domiciliary state, many courts will not "hear witnesses or pass upon the merits" of a will's validity during ancillary probate.<sup>57</sup> Rather, they admit a testator's will to probate based upon a record of the domiciliary court previously doing so.<sup>58</sup>

There has been debate among scholars as to the merits of the situs approach for disposal of real property.<sup>59</sup> It is frequently criticized for imposing additional expenditures through the requirement of a secondary proceeding.<sup>60</sup> Added costs often include local court fees, commission to a local personal representative, and attorney's fees.<sup>61</sup> Additionally, probate courts applying situs rules are often tasked with untangling difficult conflict of laws questions.<sup>62</sup> For these reasons, the situs approach became a topic of global discussion during the Hague Convention of 1989.<sup>63</sup> Several changes to the current principles on transfers of wealth upon death were suggested, including the elimination of the law of situs applicable to real property.<sup>64</sup> Following the Convention, many countries were persuaded to abandon the situs approach.<sup>65</sup> The United States took the opposite stance, however, and instead strongly advocated for retention of situs laws based on economic, political, social, and conflict resolution considerations.<sup>66</sup> The United States has not deviated from this viewpoint since the 1989 Convention, and today the situs approach is applied in all fifty states.<sup>67</sup>

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<sup>56</sup> DUKEMINIER & SITKOFF, *supra* note 1, 44.

<sup>57</sup> SCHOENBLUM, *supra* note 49, § 26.13.

<sup>58</sup> *Id.*

<sup>59</sup> Jeffrey Schoenblum, *Choice of Law and Succession to Wealth: A Critical Analysis of the Ramifications of the Hague Convention on Succession to Decedents' Estates*, 32 VA. J. INT'L L. 83, 88–89 (1991) [hereinafter *Choice of Law and Succession to Wealth*].

<sup>60</sup> DUKEMINIER & SITKOFF, *supra* note 1, at 44.

<sup>61</sup> *Id.*

<sup>62</sup> 16 AM. JUR. 2D *Conflict of Laws* § 22 (2018). Wyoming courts commonly resolve this issue through the application of *lex loci rei sitae*, meaning "the law of the place where property is located controls." *In re Estate of Reed*, 768 P.2d 566, 569–70 (Wyo. 1989); *see also* WYO. STAT. ANN. § 2-6-104 (2017).

<sup>63</sup> Schoenblum, *Choice of Law and Succession to Wealth*, *supra* note 59, at 88–89. The Hague Convention was assembled for the purpose of changing the choice of law rules applicable to the succession of decedents' estates. *Id.* at 84–86.

<sup>64</sup> *Id.* at 86.

<sup>65</sup> *Id.* at 88–89.

<sup>66</sup> *Id.* For example, the United States argued retention was necessary to preserve title reporting systems and reduce restraints on alienation. *Id.* at 89 n.27. Other nations (including Australia, Canada, and France) joined the United States' show of support for retention of the situs approach. *Id.* at 87.

<sup>67</sup> 16 AM. JUR. 2D *Conflict of Laws* § 22.



Situs principles are firmly established in Wyoming and, indeed, Wyoming courts have acknowledged their advantage when applied to land transactions.<sup>68</sup> Because the validity of a nonresident testator's will and distribution of a nonresident testator's real property located in Wyoming are governed solely by the laws of this state, the Wyoming Probate Code offers nonresidents two primary statutory processes for ancillary administration.<sup>69</sup> The first is under Wyoming Statute § 2-11-104.<sup>70</sup> It reads:

If upon presentation it appears to the satisfaction of the court that the will has been duly proved, allowed and admitted to probate outside of this state and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it shall be admitted to probate, which probate has the same force and effect as the original probate of a domestic will.<sup>71</sup>

This statute is a mechanism for admitting foreign wills to probate.<sup>72</sup> It can cure defects in compliance with will execution formalities that could arise when a foreign will is executed in another state with different formality requirements than those set forth in Chapter six of the Wyoming Probate Code.<sup>73</sup> However, the statute has no effect upon the administration of the will once it is admitted to probate—a full probate proceeding still takes place.<sup>74</sup>

The second statute is Wyoming Statute § 2-11-201.<sup>75</sup> Under this statute, a nonresident estate can probate Wyoming property valued at less than \$200,000 if the estate has been duly settled in the domiciliary state.<sup>76</sup> The petitioning executor must file certain documents with the Wyoming court, including: “a petition under oath showing the facts in the case together with certified copies of the petition,

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<sup>68</sup> *In re Estate of Reed*, 768 P.2d 566, 570 (Wyo. 1989) (citations omitted) (“[I]t is particularly important that there be certainty, predictability and uniformity of result and ease in the determination and application of the law to be applied concerning transactions of land.”).

<sup>69</sup> WYO. STAT. ANN. §§ 2-11-104, -201 (2017).

<sup>70</sup> *Id.* § 2-11-104.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Lawrence H. Averill, Jr., *Wyoming's Law of Decedents' Estates, Guardianship and Trusts: A Comparison with the Uniform Probate Code—Part III*, IX LAND & WATER L. REV. 567, 568–569 (1974).

<sup>75</sup> WYO. STAT. ANN. § 2-11-201.

<sup>76</sup> *Id.*

order of appointment of executor or administrator, inventory and final decree of distribution of estate therein, and a full showing that debts of the estate have been paid.<sup>77</sup> The district court must then provide three weeks' notice by publication, including a statement that the petitioner intends to admit the foreign proceedings as the probate of the estate in Wyoming.<sup>78</sup> This publication serves as notice to interested local creditors or heirs and is often fulfilled by an announcement within a local newspaper.<sup>79</sup> After publication, the district court holds a hearing on the petition and, in the absence of any objections, the Wyoming property will be disposed of.<sup>80</sup>

Thus, § 2-11-201 places two restrictions on use by a nonresident.<sup>81</sup> First, the property must be valued at \$200,000 or less.<sup>82</sup> Second, the estate must be duly settled in the domiciliary jurisdiction.<sup>83</sup> Therefore, this procedure cannot be used by nonresidents whose properties have high net values or who would like to administer the Wyoming property before the primary probate proceedings have been completed.<sup>84</sup> Nonresident estates falling outside of these qualifications must use § 2-11-104, wherein full administration proceedings will take place.<sup>85</sup> The processes laid forth in these two statutory provisions have remained substantively unchanged since their original enactment, aside from periodical increases to the monetary limit under § 2-11-201.<sup>86</sup> The present value, \$200,000, became effective on March 13, 2013.<sup>87</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*; see also Averill, *The Wyoming Probate Code of 1980*, *supra* note 35, at 175.

<sup>79</sup> WYO. STAT. ANN. § 2-7-201; see generally *In re Estate of Reed*, 768 P.2d 566 (Wyo. 1989) (examining the sufficiency of notice under Wyoming Statute § 2-7-201 by publication in a local newspaper).

<sup>80</sup> WYO. STAT. ANN. § 2-11-201. If an objection is raised at the hearing by a creditor whose claims were not addressed in the domiciliary state, the court will postpone the matter, and the creditor may petition for letters of administration to be issued. *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Averill, *The Wyoming Probate Code of 1980*, *supra* note 35, at 175.

<sup>85</sup> WYO. STAT. ANN. § 2-11-104.

<sup>86</sup> Sections 2-11-201 and 2-11-104 were originally enacted in 1913 and 1921, respectively. WYO. STAT. ANN. §§ 2-11-201, -104.

<sup>87</sup> *Id.* § 2-11-201. At the time the executor in the principal case undertook Wyoming ancillary proceedings, the monetary limitation was set much lower, at \$30,000. *Id.*; *Lon V. Smith Found. v. Devon Energy Corp.*, 2017 WY 121, ¶ 26 n.7, 403 P.3d 997, 1005 n.7 (Wyo. 2017) (“The value of Mr. Smith’s Wyoming property did not exceed that limit when he died, presumably because no wells had been drilled on the lease at that time.”).

## III. PRINCIPAL CASE

## A. Facts

This case considers the distribution of Lon V. Smith's estate.<sup>88</sup> Though Mr. Smith was a resident of California, in 1973, he obtained a Federal Bureau of Land Management (BLM) oil and gas lease located in Carbon County, Wyoming.<sup>89</sup> One year later, Mr. Smith assigned this lease to another entity, but retained a 5% overriding royalty interest (ORRI).<sup>90</sup> In 1979, Mr. Smith died with a valid will that provided for all of his oil and gas interests, including the above described Wyoming ORRI, to be distributed to his wife as a life estate, and then, upon her death, to be distributed to the Lon V. Smith Foundation (the Foundation).<sup>91</sup> Mr. Smith's will also contained a residuary clause, which devised the remainder of his estate to his wife in fee simple.<sup>92</sup>

Upon his death, Mr. Smith's will was admitted to probate in California and, in 1983, a California court entered its final order upon probate.<sup>93</sup> This final decree included several pages describing the oil and gas interests owned by Mr. Smith and ordered them to be transferred to Mrs. Smith as a life estate upon Mr. Smith's death, and then, upon Mrs. Smith's death, to be distributed to the Foundation.<sup>94</sup> However, the California probate order only referenced California property, and consequently did not explicitly transfer the Wyoming ORRI within its listed description of oil and gas interests to be distributed to Mrs. Smith as a life estate.<sup>95</sup> Neither party disputed that this probate order did not distribute the Wyoming ORRI in accordance with Mr. Smith's will,

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<sup>88</sup> *Lon V. Smith Found.*, 2017 WY 121, 403 P.3d 997.

<sup>89</sup> *Id.* ¶ 7, 403 P.3d at 1001.

<sup>90</sup> *Id.* An ORRI is "a share of production, free of the costs of production, carved out of the lessee's interest under an oil and gas lease." WYO. STAT. ANN. § 30-5-304 (2017).

<sup>91</sup> *Lon V. Smith Found.*, ¶¶ 7–8, 403 P.3d at 1001.

<sup>92</sup> Brief of Appellant at 62, *Lon V. Smith Found. v. Devon Energy Corp.*, 2017 WY 121 (Wyo. 2017) (No. S-17-0021), 2017 WL 2655266, at \*62.

<sup>93</sup> *Lon V. Smith Found.*, ¶¶ 7–8, 403 P.3d at 1001.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* Failure to list the Wyoming ORRI within the final order was, as noted by the district court, "not necessarily an issue because the California probate court likely lacked jurisdiction to distribute an interest in real property located in Wyoming. Indeed, interests in real property located outside California are 'traditionally handled through ancillary probate administrations in the foreign jurisdictions.'" Order on Cross Motions for Summary Judgment and Other Pending Motions at 3, *Lon V. Smith Found. v. Devon Energy Corp.*, 2017 WY 121 (Wyo. 2017) (No. CV-2015-0088), 2016 WL 8715849, at \*3. The California decree specifically stated: "all of the known assets of said Estate, subject to distribution, including mineral interests, oil and gas leases and royalties remaining for distribution *in the State of California* are set forth and described in the following order." Brief of Appellant at 13, *Lon V. Smith Found. v. Devon Energy Corp.*, 2017 WY 121 (Wyo. 2017) (No. S-17-0021), 2017 WL 2655266, at \*13 (emphasis added).

which provided the ORRI would be transferred to his wife as a life estate with the remainder interest to the Foundation, along with all of his other oil and gas interests.<sup>96</sup>

In 1985, two years after the entry of the California probate order, an ancillary probate proceeding was opened pursuant to Wyoming Statute § 2-11-201 in Natrona County, Wyoming to distribute Mr. Smith's Wyoming real property.<sup>97</sup> Upon the completion of § 2-11-201 requirements, the Natrona County District Court entered its final ancillary probate order.<sup>98</sup> This order was then recorded in Carbon County, Wyoming, where the ORRI was located.<sup>99</sup> The Wyoming probate order, issued under § 2-11-201, was wholly based upon the California probate order, thus, the Wyoming probate order also omitted any reference to the Wyoming ORRI.<sup>100</sup> In 1987, the attorney who handled the Wyoming probate proceedings executed corrective affidavits, which were recorded alongside the original probate order in Carbon County.<sup>101</sup> These affidavits acknowledged the probate order's failure to address the Wyoming property and provided copies of Mr. Smith's will, which the affidavits asserted should control the disposition of the Wyoming property.<sup>102</sup>

At the end of 1989, Mrs. Smith also passed away, and the bulk of her estate flowed into a pour over testamentary trust (the Trust).<sup>103</sup> In the years following

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<sup>96</sup> *Lon V. Smith Found.*, ¶ 9, 403 P.3d at 1001.

<sup>97</sup> *Id.* ¶ 10, 403 P.3d at 1001. Although states differ on this issue, Wyoming treats an ORRI as real, rather than personal, property. *Dame v. Mileski*, 340 P.2d 205, 209 (Wyo. 1959); see also Martin J. McMahon, Annotation, *Oil and Gas Royalty as Real or Personal Property*, 56 A.L.R. 4th 539, 2a (1987). Consequently, Mr. Smith's ownership of an ORRI located in Wyoming triggered the law of situs for real property at his death and, therefore, the need for ancillary administration proceedings in this case. See *supra* notes 48–54 and accompanying text.

<sup>98</sup> *Lon V. Smith Found.*, ¶ 10, 403 P.3d at 1001.

<sup>99</sup> Brief of Defendant-Appellee Andrew Klein, as Trustee of the Marguerite-Brown Smith Trust at 4–5, *Lon V. Smith Found. v. Devon Energy Corp.*, 2017 WY 121 (Wyo. 2017) (No. S-17-0021), 2017 WL 2655267, at \*4–5.

<sup>100</sup> *Lon V. Smith Found.*, ¶ 10, 403 P.3d at 1001.

<sup>101</sup> Brief of Defendant-Appellee, *supra* note 99, at 18, \*18.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at \*5. Interestingly, the same issue that occurred when the ORRI was distributed during Wyoming ancillary proceedings upon Mr. Smith's death, namely, omission of the ORRI from the Wyoming probate order, reoccurred when it was again distributed during Wyoming ancillary proceedings upon Mrs. Smith's death. *Id.* In 2005, Devon requested documentation demonstrating a conveyance of the ORRI from Mrs. Smith, individually, to the Trust. *Id.* A trustee notified Devon that "the ORRI had been inadvertently omitted from the Wyoming ancillary probate proceedings for Mrs. Smith's estate and he was taking the steps to reopen the probate action to add the Carbon County mineral interests to her estate." *Id.* at \*8. Thereafter, "Mrs. Smith's probate estate was reopened in 2005, and the Carbon County mineral interests were added as after-discovered property, and the interests were transferred in accordance with Mrs. Smith's will. The probate court entered an order permitting the Estate of Mrs. Smith be reopened and the ORRI be transferred to Mr. Joseph Kean, as Trustee of the Trust." *Id.*

Mrs. Smith's death, the lessees of the Wyoming ORRI, Devon Energy Corporation and Devon Energy Production Company L.P. (collectively, Devon), made payments at different times with respect to different wells under the ORRI to both the Foundation and the Trust.<sup>104</sup> Devon remained the lessee from 1982 until 2014, at which time it sold its interest to Linn Operating, Inc.<sup>105</sup> Shortly after selling its interest, Devon sent a letter to the Trust stating its belief that the Foundation, not the Trust, "was entitled to royalty payments on certain wells."<sup>106</sup> The letter thus requested the Trust repay the sum of money it had received from Devon for the ORRI so that Devon could credit the money to the Foundation.<sup>107</sup>

The Trust refused to repay the royalty payments to Devon, and the Foundation subsequently brought suit against Devon, its successor Linn Operating, Inc., and the Trust.<sup>108</sup> The Foundation claimed that, under the terms of Mr. Smith's will, it was entitled to the ORRI payments.<sup>109</sup> In response, Devon brought a counterclaim "seeking declaratory judgment on the ownership of the ORRI", and a cross-claim "seeking indemnification [from] the Trust."<sup>110</sup> Thereafter, each party filed a motion for summary judgment.<sup>111</sup> The district court granted summary judgment for Devon and held that the ORRI passed to the Trust; therefore, the Foundation was not entitled to any royalty payments.<sup>112</sup> The parties each filed several appeals, which the Wyoming Supreme Court consolidated for review.<sup>113</sup>

### *B. The Court's Analysis and Holding*

On appeal, the appellants raised three primary issues.<sup>114</sup> However, this case note will only focus on the Wyoming Supreme Court's holding and analysis as to whether the "district court correctly determine[d] as a matter of law that the 1983 California probate order and the 1985 Wyoming ancillary probate

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<sup>104</sup> *Lon V. Smith Found.*, ¶ 11, 403 P.3d at 1002.

<sup>105</sup> *Id.* ¶ 6, 403 P.3d at 1001.

<sup>106</sup> *Id.* ¶ 11, 403 P.3d at 1002. The ORRI covered a total of eleven wells, the first of which was completed in 1982. Order on Cross Motions, *supra* note 95, at 2, \*2. However, only royalty payments made on four of these wells were at issue in this case. *Id.* Those wells were completed in the years 2000, 2004, and 2007. *Id.*

<sup>107</sup> *Lon V. Smith Found.*, ¶ 11, 403 P.3d at 1002.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* ¶ 12, 403 P.3d at 1002.

<sup>111</sup> *Id.* ¶ 13, 403 P.3d at 1002.

<sup>112</sup> *Id.* ¶¶ 130–14, 403 P.3d at 1002.

<sup>113</sup> *Id.* ¶ 14, 403 P.3d at 1002.

<sup>114</sup> *Id.* ¶ 3, 403 P.3d at 1000.

order govern, and that the Trust is the owner of the ORRI at issue.”<sup>115</sup> Because this appeal arose from a grant of summary judgment, the court’s analysis was conducted under a *de novo* standard of review.<sup>116</sup>

The court’s holding as to this issue was threefold. First, the court held the California probate decree governed distribution of the Wyoming ORRI, not the will.<sup>117</sup> In reaching this conclusion, the court addressed several arguments by the Foundation to the contrary.<sup>118</sup> The first argument asserted that both Wyoming and California laws require an examination of the testator’s intent which, in this case, was expressed in Mr. Smith’s will and not the probate orders.<sup>119</sup> The court acknowledged testamentary intent as a policy consideration within probate proceedings, but maintained that “the time for evaluating the intent of the testator is during probate.”<sup>120</sup> Accordingly, the court found that, because Mr. Smith’s testamentary intent was considered during the 1983 California probate proceedings, such a consideration need not have been repeated during Wyoming’s ancillary administration, wherein the court merely adopted California’s proceedings pursuant to Wyoming Statute § 2-11-201.<sup>121</sup> The court noted full probate proceedings could have taken place under Wyoming Statute § 2-11-104, during which testamentary intent could have been re-examined, but the executor of Mr. Smith’s estate instead opted for truncated proceedings under Wyoming Statute § 2-11-201.<sup>122</sup>

The court went on to hold that, after chosen probate proceedings have taken place and a probate decree is subsequently entered, that decree “supersedes the will and controls the [property] distribution.”<sup>123</sup> If a mistake is found within the decree, the court maintained that the appropriate remedy is an appeal, and, absent such an action, the decree remains a final judgment.<sup>124</sup> Though the Foundation argued based upon the Wyoming Supreme Court’s holding in *In re Estate of*

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<sup>115</sup> *Id.* The two additional issues addressed by the court were: (1) whether the “district court properly dismiss[ed] the Foundation’s claim that Devon violated Wyoming Statute § 30-5-302 (2017) when it is undisputed that Devon held ORRI proceeds in Devon’s own ‘suspense account’ and not in an interest-bearing account in a Wyoming financial institution” and (2) whether “either party [is] entitled to attorney fees under the WRPA.” *Id.*

<sup>116</sup> *Id.* § 16, 403 P.3d at 1003 (“We review the grant of summary judgment *de novo*, using the same materials and following the same standards as the district court.”).

<sup>117</sup> *Id.* § 23, 403 P.3d at 1004.

<sup>118</sup> *Id.* ¶¶ 18–31, 403 P.3d at 1003–07.

<sup>119</sup> *Id.* § 19, 403 P.3d at 1003.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* § 20, 403 P.3d at 1003.

<sup>124</sup> *Id.* § 23, 403 P.3d at 1004.

*Kimball* that the probate order must be construed in accordance with the terms of the will, the court found the referenced statement to be dicta and held that incorporation does not automatically occur whenever a decree references a will.<sup>125</sup> Therefore, after emphasizing the significance of probate order finality, the court found the appellants' action to be an improper collateral attack on the decree.<sup>126</sup>

The court next responded to the Foundation's assertion that, when an estate is dispensed with under Wyoming Statute § 2-11-201, courts should look beyond the foreign decree and also examine the decedent's will.<sup>127</sup> The court rejected this argument on the ground that relevant case law "does not stand for the proposition that when a will and decree are admitted in an ancillary proceeding, the court must look to the will to determine how property passes."<sup>128</sup> The Foundation also argued that under the language of the Wyoming order, the district court did not adopt the California order's distribution of property; it merely adopted "conclusive evidence of the facts" which were established during the California proceeding.<sup>129</sup> The court held interpreting the statute in this manner would be in contravention of its purpose, which is to make a distribution of property upon the filing of a foreign probate decree.<sup>130</sup> The Wyoming Supreme Court additionally invoked statutory interpretation principles to hold that, because it is the foreign decree which is named by statute, not the testator's will, "when the district court 'admitted' the California proceedings as 'original proceedings' of the court, the California probate order became an order of the Wyoming court," and the will did not.<sup>131</sup> The Foundation lastly argued the California court did not have jurisdiction over the Wyoming property; therefore, the California order could not distribute the Wyoming property.<sup>132</sup> The court acknowledged California's lack of jurisdiction but found that the California decree was incorporated into the Wyoming decree, which did have proper jurisdiction to dispose of the property.<sup>133</sup>

Second, the court held the Wyoming ORRI must be distributed as residue under the language of the California decree.<sup>134</sup> The court found the ORRI was

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<sup>125</sup> *Id.* ¶ 21, 403 P.3d at 1004. The *Kimball* court placed heavy emphasis on the factual circumstances compelling its decision to allow incorporation of the testator's will in that particular case; namely, that it was correcting a clerical, rather than judicial, error. *Id.*; *In re Estate of Kimball*, 583 P.2d 1274, 1278 (Wyo. 1978).

<sup>126</sup> *Lon V. Smith Found.*, ¶ 23, 403 P.3d at 1004.

<sup>127</sup> *See id.* ¶¶ 24–28, 403 P.3d at 1005–06.

<sup>128</sup> *Id.* ¶ 28, 403 P.3d at 1006 (citing *Hawks v. Creswell*, 144 P.2d 129 (Wyo. 1943)).

<sup>129</sup> *Id.* ¶ 29, 403 P.3d at 1006.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* ¶¶ 29–30, 403 P.3d at 1006–07.

<sup>132</sup> *Id.* ¶ 31, 403 P.3d at 1007.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* ¶ 32, 403 P.3d at 1007.



not explicitly listed with the other mineral interests, oil and gas leases, and properties, either to be distributed to Mrs. Smith as a life estate or to the Foundation as a remainder interest.<sup>135</sup> Therefore, the court held ownership was transferred to Mrs. Smith in fee simple under the effect of the decree's residuary clause—a provision designed to distribute any property not clearly bequeathed by the testator.<sup>136</sup> However, the California probate order also included a provision addressing “other and after-discovered property,” which was to be distributed “in accordance with decedent's said Last Will to *the said Marguerite B. Smith.*”<sup>137</sup> The Foundation argued the ORRI constituted “other and after-discovered property,” and therefore should have fallen within this provision and been distributed in accordance with the will.<sup>138</sup> The court declined to make this categorization because the ORRI was indisputably a known interest; it simply was not subject to any distribution within the order.<sup>139</sup> Additionally, the court stated even if it were to assume *arguendo* that the ORRI was “other and after-discovered property,” under the language of the order, it would have nonetheless been distributed to Mrs. Smith in fee simple.<sup>140</sup> The court then employed tools of contract construction and looked to the definition of “after-discovered property” to rebut the Foundation's contention that interpreting the decree in this manner would render the catch-all provision in Mr. Smith's will meaningless.<sup>141</sup> It found the catch-all provision was included solely to distribute any after-discovered property, which did not include the ORRI because it was a known asset at the time proceedings took place.<sup>142</sup>

Finally, the court held the corrective affidavits attached to the Wyoming probate decree had no effect on title to the property—despite purporting to modify the decree's terms.<sup>143</sup> Although Wyoming Statute § 2-2-301 requires any “judgment or decree entered by a probate court affecting title to real property . . . to ‘be recorded in the county in which the property is situated,’” the court held the language of § 2-2-301 has no simultaneous requirement that the will be recorded alongside the decree.<sup>144</sup> Therefore, parties conducting a title search would discover the probate court's decree but not the conflicting will.<sup>145</sup> The Foundation refuted

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<sup>135</sup> *Id.*

<sup>136</sup> *See id.*

<sup>137</sup> *Id.* ¶ 33, 403 P.3d at 1007–08.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* ¶¶ 33–34, 403 P.3d at 1007–08.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* ¶ 35, 403 P.3d at 1008.

<sup>142</sup> *Id.*; *see supra* note 188 and accompanying text.

<sup>143</sup> *Lon V. Smith Found.*, ¶ 37, 403 P.3d at 1008.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*



this point by arguing the will, in this case, was attached to the public land records and, therefore, was available to any party conducting a title search.<sup>146</sup> The court found this factual distinction insignificant.<sup>147</sup> Lastly, the court noted Wyoming Statute § 34-11-101(b) sets forth the subjects upon which affidavits affecting title may be filed, and in the absence of a provision for modification of a probate decree, it is an ineffective means of altering title or the probate decree.<sup>148</sup>

#### IV. ANALYSIS

##### A. *The Court's Holding was Correct*

Although it produced an outcome that was contrary to the testator's intent, the Wyoming Supreme Court was correct when it held that the Natrona County District Court properly adopted California court proceedings as the basis of its own decree, which then governed distribution of Mr. Smith's estate. Such a result was explicitly authorized under the plain language of Wyoming Statute § 2-11-201.<sup>149</sup> The statute directs a Wyoming judge not to conduct his own proceedings but, rather, to issue an order "admitting . . . certified copies of the [foreign jurisdiction's] proceedings in the estate to record in his court . . . [to] be considered and treated from that time as original proceedings in his court."<sup>150</sup> This is done so that, upon proper receipt of the foreign proceedings, "the probate of the estate in this state may be dispensed with."<sup>151</sup> When, such as here, the term "dispense" is used as an intransitive verb to form the phrase "dispense with," it is defined to mean "to set aside," "discard," or "to do without."<sup>152</sup> This language clearly prescribes Wyoming courts should "discard" or "do without" any probate proceedings of their own. Indeed, the district courts would be unable to adequately hold any such proceeding because none of the requisite filings enumerated in the statute include the testator's will.<sup>153</sup> The Wyoming Supreme Court aptly described the practical reason behind this omission when it stated that "a proceeding under this section does not require the filing of the will because . . . [it] provides a method by which probate in a different state *substitutes for the procedure in Wyoming*."<sup>154</sup>

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<sup>146</sup> *Id.* ¶ 38, 403 P.3d at 1008–09.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* ¶ 39, 403 P.3d at 1009.

<sup>149</sup> See WYO. STAT. ANN. § 2-11-201 (2017).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Dispense*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2016).

<sup>153</sup> WYO. STAT. ANN. § 2-11-201.

<sup>154</sup> *Lon V. Smith Found. v. Devon Energy Corp.*, 2017 WY 121, ¶ 26, 403 P.3d 997, 1005 (Wyo. 2017) (emphasis added).

Thus, § 2-11-201 effectively operates as the Wyoming legislature's refusal to empower its courts to exercise full jurisdiction over the disposition of real property owned by nonresidents within the state.<sup>155</sup> Undoubtedly, Wyoming has inherent jurisdiction to make final and conclusive determinations surrounding the disposition of real property within its borders, such as passing upon the validity of a will, determining how the will's provisions should be construed, directing the distribution of estate assets, and settling claims by creditors—even if a foreign jurisdiction rendered a different decision on these matters.<sup>156</sup> However, rather than pass on these issues, the language of § 2-11-201 alternatively directs the district courts to cede to the foreign jurisdiction's designations.<sup>157</sup> This concession of jurisdictional power under § 2-11-201 relieved the district court in the principal case of any obligation to examine testamentary intent or query whether the foreign proceedings were in accordance with Wyoming law.<sup>158</sup> Consequently, when the executor petitioned for ancillary proceedings under § 2-11-201 and filed the requisite documentation, the foreign proceedings were incorporated into the Wyoming court's own final decree of distribution in their entirety, with no additional findings, interpretation, or distribution made by the Wyoming district court.<sup>159</sup> A final probate decree of this nature would typically be created by interpreting and carrying out the testator's intent as depicted in his will.<sup>160</sup> However, this statute effectively eliminates that judicial process for all ancillary administration proceedings held pursuant to this provision.<sup>161</sup>

Therefore, the Natrona County District Court properly entered the Wyoming decree as a final judgment, without reviewing the decree's underlying factual

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<sup>155</sup> WYO. STAT. ANN. § 2-11-201.

<sup>156</sup> SCHOENBLUM, *supra* note 49, § 26.15; *In re Estate of Reed*, 768 P.2d 566, 570 (Wyo. 1989).

<sup>157</sup> WYO. STAT. ANN. § 2-11-201.

<sup>158</sup> *Id.*

<sup>159</sup> See *Lon V. Smith Found.*, ¶ 27, 403 P.3d at 1006. In addition to filing the appropriate documentation, the estate also met all of the other statutory prerequisites listed in § 2-11-201. *Id.* The estate was valued at less than \$30,000 and had been duly probated and settled in California, evidenced by the entry of a final probate decree by the California court. *Id.* ¶¶ 26 n.7, 27, 403 P.3d at 1005 n.7, 1006. The district court further acknowledged that “a hearing was set and held, publication of the notice was made, that no creditor or other interested person had appeared to object to the proceedings . . . .” *Id.* ¶ 27, 403 P.3d at 1006; see also WYO. STAT. ANN. § 2-11-201. The Wyoming decree within the principal case read: “[t]he certified copies of the proceedings in the Matter of the Estate of Lon V. Smith, in the Superior Court of the State of California . . . be and they are hereby admitted to this Court and to be considered and treated as original proceedings of this Court and as conclusive evidence of the facts therein shown.” *Lon V. Smith Found.*, ¶ 27, 403 P.3d at 1006.

<sup>160</sup> 34 C.J.S. *Executors and Administrators* § 687 (2018).

<sup>161</sup> WYO. STAT. ANN. § 2-11-201.

basis.<sup>162</sup> Once entered, this decree superseded Mr. Smith's will and irrefutably governed the effect of any bequests thereunder.<sup>163</sup> The Wyoming property involved was then "discharged from any further administration" and ceased to be a part of Mr. Smith's estate.<sup>164</sup> At that point, the probate court was "without control or jurisdiction to make any [further] order affecting it, except . . . as . . . necessary to compel compliance."<sup>165</sup> As a result, it was the decree that ultimately stood as the governing document over title to the estate's assets, despite Mr. Smith's conflicting will.

Thereafter, the court correctly interpreted the decree's terms to mean ownership of the Wyoming ORRI passed to the Trust under the residuary devise as part of the "rest, residue and remainder" of Mr. Smith's estate.<sup>166</sup> Generally, a residuary clause disposes of any estate property not otherwise disposed of by a specific or general devise within the will.<sup>167</sup> The purpose behind these "catch-all" provisions is to avoid the testator's property passing through intestacy by making a "complete testamentary disposition" of the estate.<sup>168</sup> Under the language of Mr. Smith's will, the Wyoming ORRI would not have fallen within the residuary devise because, as a matter of fact, it was already specifically devised.<sup>169</sup> This devise unequivocally stated the ORRI was to pass to Mrs. Smith as a life estate and, upon her death, to the Foundation as a remainder.<sup>170</sup> Such language created a clear manifestation of testamentary intent for the property to be excluded from the residuary clause.<sup>171</sup> However, based upon the final decree's operation as a final judgment, the Wyoming Supreme Court was required to look to the decree for a determination of the ORRI's ownership.<sup>172</sup> The decree made no reference to the Wyoming property, but did include the testator's residuary clause, which devised the remainder of his estate to his wife, Mrs. Smith, in fee simple.<sup>173</sup> In the

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<sup>162</sup> See *In re Estate of Novakovich*, 2004 WY 158, ¶ 19, 101 P.3d 931, 936 (Wyo. 2004); WYO. STAT. ANN. § 2-2-101; 34 C.J.S. *Executors and Administrators* § 687 ("Where a decree of distribution is made after due notice, by a court having jurisdiction, and it has not been set aside or modified in a proper and timely proceeding or reversed or modified on appeal, and no appeal therefrom is pending, the decree is final, conclusive, and res judicata.").

<sup>163</sup> 34 C.J.S. *Executors and Administrators* § 687; *Lon V. Smith Found.*, ¶ 20, 403 P.3d at 1003 ("When a decree is issued, it supersedes the will and controls the distribution.").

<sup>164</sup> 34 C.J.S. *Executors and Administrators* § 687.

<sup>165</sup> *Id.*

<sup>166</sup> *Lon V. Smith Found.*, ¶ 34, 403 P.3d at 1008.

<sup>167</sup> 96 C.J.S. *Wills* § 1322 (2018).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*; see also *Lon V. Smith Found.*, ¶ 34, 403 P.3d at 1008.

<sup>170</sup> See *supra* note 91 and accompanying text.

<sup>171</sup> 96 C.J.S. *Wills* § 1322.

<sup>172</sup> See 96 C.J.S. *Wills* § 1322; *supra* notes 123–24 and accompanying text.

<sup>173</sup> See *supra* notes 92, 135–36 and accompanying text.

absence of a specific devise of the ORRI within the decree, the court necessarily determined the ORRI fell within the residuary devise so as to give a complete disposition of all known assets.<sup>174</sup> The Wyoming ORRI thus passed to Mrs. Smith in fee simple under the residuary devise of Mr. Smith's will and, upon her death, ceded to the Trust in accordance with her pour-over will.<sup>175</sup>

Finally, after Wyoming ancillary proceedings were closed, the court was correct to hold that appellants' delayed attack on the district court's decree, nearly thirty years later, was improper.<sup>176</sup> The district court gave constructive notice in the form of publication at the time the proceedings were to be admitted in Wyoming, affording the Foundation opportunity to raise its objections.<sup>177</sup> In the absence of any such objections, once the district court entered the final probate decree, the Foundation had thirty days to file an appeal.<sup>178</sup> Two appealable orders are entered at the conclusion of probate proceedings.<sup>179</sup> One is the final decree of distribution, which identifies the beneficiaries to whom the estate is to be distributed and the portion they will receive.<sup>180</sup> The other is an order closing the pending estate, entered when the court is satisfied that the personal representative has completed his or her duties and none of the estate's known assets remain for administration or distribution.<sup>181</sup> Here, the Foundation's recourse in Wyoming for the incorrect distribution would have been to appeal the final decree of distribution.<sup>182</sup>

The Wyoming probate code only permits an estate to be reopened without an appeal in three circumstances.<sup>183</sup> The first is for the purpose of "administering after-discovered property or for the correction of the description of any property that was administered during the original probate."<sup>184</sup> The second requires

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<sup>174</sup> 96 C.J.S. *Wills* § 1322; *see supra* notes 135–36 and accompanying text.

<sup>175</sup> *See supra* notes 135–36 and accompanying text.

<sup>176</sup> *See supra* notes 123–26 and accompanying text.

<sup>177</sup> *See* WYO. STAT. ANN. § 2-11-201 (2017); *supra* note 159 and accompanying text.

<sup>178</sup> Wyoming Statute § 2-2-308 applies the provisions of the Wyoming Rules of Civil Procedure to state probate courts, including those governing appeals. WYO. STAT. ANN. § 2-2-308; Wyo. R. App. P. 2.01(a).

<sup>179</sup> *Estate of Dahlke ex rel. Jubie v. Dahlke*, 2014 WY 29, ¶ 41, 319 P.3d 116, 126 (Wyo. 2014).

<sup>180</sup> *Id.*; WYO. STAT. ANN. § 2-7-813.

<sup>181</sup> *Estate of Dahlke*, ¶ 40, 319 P.3d at 126; WYO. STAT. ANN. § 2-7-815.

<sup>182</sup> *See Lon V. Smith Found. v. Devon Energy Corp.*, 2017 WY 121, ¶ 23, 403 P.3d 997, 1004 (Wyo. 2017).

<sup>183</sup> *In re Estate of Novakovich*, 2004 WY 158, ¶ 12, 101 P.3d 931, 937 (Wyo. 2004) (identifying two of the three circumstances); *In re Estate of Kimball*, 583 P.2d 1274, 1278 (Wyo. 1978) (identifying the third circumstance).

<sup>184</sup> *In re Estate of Novakovich*, ¶ 12, 101 P.3d at 937; *see also* WYO. STAT. ANN. § 2-8-101; *In re Estate of Kimball*, 583 P.2d at 1277–78.

a showing that creditor claims were not timely filed and would otherwise be barred.<sup>185</sup> The third is an accusation of fraud in the will's execution.<sup>186</sup> Outside of these narrow circumstances, both orders stand as final judgments and settle title to the estate's assets.<sup>187</sup> As the Wyoming Supreme Court noted, the Wyoming ORRI in the principal case did not constitute after-discovered property because it was a known asset at the time of the Wyoming proceedings; indeed, knowledge of the ORRI's presence was the purpose behind petitioning for the ancillary proceedings in the first place.<sup>188</sup> Accordingly, in the absence of an appeal, the Foundation was without recourse in Wyoming for the improper estate distribution.

### *B. Competing Interests Implicated by this Holding*

Generally, probate proceedings serve to fulfill three primary functions: to facilitate and furnish record of the transfer of title, to provide a process through which creditors may secure payment of the decedent's debts, and to distribute the decedent's property to the intended beneficiaries.<sup>189</sup> Various additional state interests are often taken into consideration when state legislative bodies enact the procedures through which these functions are to be achieved.<sup>190</sup> Perhaps the primary state interest in this context is one of efficiency—born from the sharp criticisms of modern probate law as being “slow, cumbersome, and expensive.”<sup>191</sup> Indeed, Wyoming Statute § 2-1-102 attempts to specifically address such pitfalls by asserting the probate code should be “construed and applied, to promote the . . . speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors” whenever possible.<sup>192</sup>

The realm of ancillary administration is one area within probate law that is especially susceptible to such criticisms in light of its added cost and time impositions on nonresident estates.<sup>193</sup> In recognition of these concerns, Wyoming state legislators sought to afford a process to nonresidents that would enable the simplified and relatively inexpensive probate of their Wyoming real property, a goal that was ultimately effectuated through the enactment of Wyoming Statute

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<sup>185</sup> *In re Estate of Novakovich*, ¶ 12, 101 P.3d at 937; see also WYO. STAT. ANN. § 2-7-703; *In re Estate of Kimball*, 583 P.2d at 1277–78.

<sup>186</sup> *In re Estate of Kimball*, 583 P.2d at 1278 (citations omitted) (“[S]uch decrees may be attacked, even in a collateral proceeding, in the case of fraud.”).

<sup>187</sup> *Id.*; WYO. STAT. ANN. § 2-2-101.

<sup>188</sup> See *Lon V. Smith Found. v. Devon Energy Corp.*, 2017 WY 121, ¶ 33, 403 P.3d 997, 1007 (Wyo. 2017); *supra* notes 137–42 and accompanying text.

<sup>189</sup> DUKEMINIER & SITKOFF, *supra* note 1, at 44.

<sup>190</sup> See THOMPSON ON REAL PROPERTY, *supra* note 4, § 88.13(a).

<sup>191</sup> DUKEMINIER & SITKOFF, *supra* note 1, at 40.

<sup>192</sup> WYO. STAT. ANN. § 2-1-102(a)(iii).

<sup>193</sup> See *Lerner*, *supra* note 29, at 304, 321; *supra* notes 60–61 and accompanying text.

§ 2-11-201.<sup>194</sup> Section 2-11-201 is therefore written in a fashion which serves to dramatically reduce local court involvement and expenditures during ancillary administration proceedings, thereby increasing the speed and efficiency with which title to in-state real property can be transferred.<sup>195</sup> Certainly, in comparison to those states that only offer full ancillary administration to nonresident estates, this process has substantially reduced cost and time burdens on nonresidents.<sup>196</sup> However, as the foregoing analysis of the principal case demonstrated, in some cases, this increase in efficiency comes at the expense of overlooking testamentary intent.<sup>197</sup>

This problem arises from an interstate conflict between the operation of § 2-11-201 and the probate proceedings of other states.<sup>198</sup> Since this statute's enactment in 1913, the mobility of modern society has significantly increased.<sup>199</sup> In response, many states have undertaken modifications of their probate laws to improve overall efficiency and judicial economy.<sup>200</sup> One such modification has been the amendment of probate proceedings to forgo passing upon out-of-state real property during formal domiciliary probate.<sup>201</sup> Consequently, in states such as California, Maryland, Ohio, Pennsylvania, and Texas, executors are generally not required to include foreign real property within the final inventory filed with their courts.<sup>202</sup> These states are thus able to increase judicial economy by avoiding

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<sup>194</sup> WYO. STAT. ANN. § 2-11-201; *see supra* notes 75–87 and accompanying text.

<sup>195</sup> WYO. STAT. ANN. § 2-11-201; *see supra* notes 149–54 and accompanying text.

<sup>196</sup> WYO. STAT. ANN. § 2-11-201.

<sup>197</sup> *See supra* notes 149–88 and accompanying text.

<sup>198</sup> *See Lon V. Smith Found. v. Devon Energy Corp.*, 2017 WY 121, 403 P.3d 997 (Wyo. 2017); Lerner, *supra* note 29, at 321 (“Individual states must realize that probate laws do not operate in the limited arena of the individual state, but significantly affect the actions of those domiciled in other states.”); *supra* notes 149–88 and accompanying text.

<sup>199</sup> *See Wilson*, *supra* note 48, § 20:24; *supra* notes 75–87 and accompanying text.

<sup>200</sup> *See THOMPSON ON REAL PROPERTY*, *supra* note 4, § 88.13(a).

<sup>201</sup> *See, e.g., In re Conservatorship of Estate of Hume*, 42 Cal. Rptr. 3d 796, 801 n.6 (Cal. Ct. App 2006) (“Real property located in another state should *not* be listed on the inventory. It is handled through ancillary administration.”).

<sup>202</sup> BRUCE S. ROSS & JERYLL S. COHEN, CAL. PRAC. GUIDE: PROBATE ¶ 14:290 (2017) (“California representatives have no authority over property in other states; they are required to account for, ‘preserve’ and ‘manage’ foreign assets only if and when those assets are delivered to California and thus become subject to a California administration.”); OHIO REV. CODE ANN. § 2115.02 (West 2017) (“[T]he executor or administrator shall file with the court an inventory of the decedent's interest in real property located *in this state*. . . .”) (emphasis added); 20 PA. STAT. AND CONS. STAT. ANN. § 3301 (West 2017) (“Every personal representative shall file with the register a verified inventory of all real and personal estate of the decedent, *except real estate outside of this Commonwealth*”) (emphasis added); TEX. EST. CODE ANN. § 309.051 (West 2017) (“The inventory must . . . include . . . all estate real property *located in this state*. . . .”) (emphasis added); *Randall v. State*, 117 A.3d 91, 119 (Md. Ct. Spec. App. 2015) (“[I]t is the practice in Maryland that foreign real property does not need to be included in an inventory for purposes of inclusion in the Maryland probate estate; however, it must be on the information report.”).

expenditures of local resources to pass decisions upon out-of-state property which, under the law of situs, would not be binding upon the court wherein the real property is located nor function as an effective conveyance of title.<sup>203</sup>

Though certainly beneficial within those states, these amendments have effectively impaired Wyoming Statute § 2-11-201's ability to accurately distribute a decedent's property to the intended beneficiaries.<sup>204</sup> Section 2-11-201's directive to the district courts to substitute a foreign state's procedures as their own without a review of testamentary intent is illogical when the foreign proceedings omit any account of the Wyoming real property.<sup>205</sup> Nonetheless, in its efforts to maximize efficiency, Wyoming Statute § 2-11-201 effectively authorizes Wyoming courts in these circumstances to disregard the testator's donative intent and base the Wyoming decree upon foreign proceedings that ultimately ignore the Wyoming property.<sup>206</sup> Although this type of error only has potential to occur in a select number of cases wherein domiciliary proceedings took place with conflicting state probate laws, any such occurrence of this nature demands attention, as "virtually the entire law of wills derives from the premise that an owner is entitled to dispose of his property as he pleases in death as in life."<sup>207</sup> Though efficiency is an important consideration, freedom of disposition may only be restricted to the extent that the donor attempts to make a disposition or achieve a purpose "*prohibited by an overriding rule of law.*"<sup>208</sup> Although the accelerated procedure § 2-11-201 offers is not without its benefits, expedience should not override the state's interest in upholding a testator's freedom of disposition.<sup>209</sup>

Moreover, Wyoming's need to offer ancillary proceedings with such a heavy efficiency emphasis is substantially reduced given the availability of non-probate alternatives that achieve the same reduction in court supervision. For example, when a decedent owns out-of-state property at the time of his death, he can entirely avoid the need for ancillary administration in that state by placing title

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<sup>203</sup> SCHOENBLUM, *supra* note 49, § 26.15.

<sup>204</sup> *See supra* notes 149–88 and accompanying text.

<sup>205</sup> *See supra* notes 149–88 and accompanying text.

<sup>206</sup> WYO. STAT. ANN. § 2-11-201 (2017); *see supra* notes 149–88 and accompanying text.

<sup>207</sup> John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975) ("The first principal of the law of wills is freedom of testation.").

<sup>208</sup> RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003) (emphasis added) ("American law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property."); *see supra* note 4 and accompanying text.

<sup>209</sup> Benefits of increased efficiency in this area may include, for example, court proceedings that are less time consuming and less burdensome on local probate courts, and increased incentive for nonresidents to purchase Wyoming real property.



to the real property into a revocable *inter vivos* trust.<sup>210</sup> The need for probate is eliminated because the trustee holds title to the trust property so, upon the death of the settlor, the trust property is either distributed by the trustee or held in further trust pursuant to the terms of the trust.<sup>211</sup> This non-probate alternative, therefore, boasts privacy, “continuity, efficiency, and flexibility” to the testator.<sup>212</sup> For these reasons, trusts have surpassed wills as the preferred mechanism for implementing the transfer of property upon death.<sup>213</sup> Additionally, a similar result may be achieved under the effect of a joint tenancy with the right of survivorship or a “transfer on death” (TOD) deed, wherein title to real property is passed to another upon death outside of probate.<sup>214</sup> In light of these viable alternatives for testamentary transfers of real property, it is unnecessary to all but remove judicial oversight from Wyoming’s ancillary probate proceedings because a testator may voluntarily elect to eliminate such court supervision through utilization of non-probate mechanisms.<sup>215</sup>

Lastly, implications concerning the state’s interest in the finality of its probate orders should be taken into consideration under the expedited procedure of § 2-11-201. Because these probate orders act as final judgments, they are treated the same as any other final judgment within a civil proceeding, and the doctrine of *res judicata* will be applied absent an appeal.<sup>216</sup> The Wyoming Supreme Court has examined in great detail the merits of treating these orders as final rather than interlocutory.<sup>217</sup> Like other civil proceedings, probate matters include many

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<sup>210</sup> 3 J. MARTIN BURKE ET AL., MODERN ESTATE PLANNING § 37.26 (Matthew Bender ed., 2d ed. 2017).

<sup>211</sup> DUKEMINIER & SITKOFF, *supra* note 1, at 45.

<sup>212</sup> Averill, *The Wyoming Probate Code of 1980*, *supra* note 35, at 178.

<sup>213</sup> DUKEMINIER & SITKOFF, *supra* note 1, at 385.

<sup>214</sup> *Id.* at 496–97. States that have enacted statutes to allow the transfer of real property by TOD deed include: Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Illinois, Indiana, Ohio, Kansas, Missouri, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* at 497.

<sup>215</sup> *Id.* at 496.

<sup>216</sup> *See supra* notes 172–87 and accompanying text; 50 C.J.S. *Judgments* § 931 (2018) (“*Res judicata* or claim preclusion operates as a bar to a reassertion of a cause of action which has previously been adjudicated in a proceeding between the same parties or those in privity with the parties.”); *see also In re Estate of Kimball*, 583 P.2d 1274, 1278 (Wyo. 1978) (“[A] decree of distribution, even though erroneous, becomes final and *res judicata* in the absence of an appeal or any other timely challenge to the settlement and distribution decreed thereby.”); *Pitzer v. Union Bank of Cal.*, 9 P.3d 805, 812 (Wash. 2000) (“[T]he law of reopening estates is derived from the law of vacating judgments.”).

<sup>217</sup> *See In re Estate of Novakovich*, 2004 WY 158, ¶¶ 24–26, 101 P.3d 931, 937 (Wyo. 2004).



parties who may be adversely affected if the original probate decree is altered after a good faith reliance, such as beneficiaries and creditors.<sup>218</sup> Therefore, when considering the effect of a probate order, a court should be reluctant to disturb “the sanctity of a closed probate estate.”<sup>219</sup>

Additionally, notice of appeal must be filed within thirty days after the probate decree is entered.<sup>220</sup> This gives those parties with standing who wish to challenge the order a relatively short window of time to ensure all dispositions were correct before the decree becomes final.<sup>221</sup> However, § 2-11-201 imposes no requirement on either the court or the executor to provide notice of the proceedings to the listed beneficiaries of the Wyoming property other than a general publication in the local jurisdiction.<sup>222</sup> Therefore, if a beneficiary of Wyoming property is not the entity petitioning for ancillary proceedings, he may only receive constructive, rather than actual, notice of “the intention of the petitioner to have the probate proceedings admitted in this state as a probate of the estate.”<sup>223</sup> This may impede a beneficiary’s ability to file a timely appeal with the Wyoming Supreme Court. Given beneficiaries’ limited opportunity for recourse in the probate context, the statute’s increased potential for occurrence of error is disconcerting.

### C. Legislative Response

On January 11, 2017, shortly after the Natrona County District Court issued its decision in *Lon V. Smith Foundation*, House Bill No.123 was introduced during Wyoming’s 64th General Legislative Session.<sup>224</sup> This Bill, sponsored by Representatives Greear and Pelkey, and Senator Nethercott, proposed an amendment to Wyoming Statute § 2-11-201.<sup>225</sup> As originally proposed, the Bill would have eliminated the monetary limitation on a nonresident’s property,

<sup>218</sup> *Id.* ¶ 24, 101 P.3d at 937.

<sup>219</sup> *Id.* ¶ 26, 101 P.3d at 937. This emphasis is not unique to Wyoming. *See Reed v. Campbell*, 476 U.S. 852, 855–56 (1986). The United States Supreme Court has taken an identical stance upon the issue. *Id.* (holding that “[a]fter an estate has been finally distributed, the interest in finality may provide an additional, valid justification for barring the belated assertion of claims, even though they may be meritorious and even though mistakes of law or fact may have occurred during the probate process.”).

<sup>220</sup> WYO. STAT. ANN. § 2-2-308 (2017); Wyo. R. App. P. 2.01(a).

<sup>221</sup> Wyo. R. App. P. 2.01(a); WYO. STAT. ANN. § 2-2-308.

<sup>222</sup> WYO. STAT. ANN. § 2-11-201; *see supra* notes 77–80 and accompanying text.

<sup>223</sup> WYO. STAT. ANN. § 2-11-201. Though beneficiaries and heirs are typically notified of a bequest by mail during primary probate proceedings, no such notice is given under § 2-11-201 upon the initiation of ancillary proceedings. *Id.*; *see also* WYO. STAT. ANN. § 2-6-209.

<sup>224</sup> H.B. 123, 64th Leg., Gen. Sess. (Wyo. 2017); The Natrona County District Court’s *Order on Cross Motions for Summary Judgment and Other Pending Motions* was filed on October 19, 2016. *Order on Cross Motions*, *supra* note 95, at 3, \*3.

<sup>225</sup> Wyo. H.B. 123.

and thereby allowed shortened ancillary probate administration for any nonresident estate.<sup>226</sup> After its introduction, a House committee proposed amendments to the Bill, which added the requirement of filing a copy of the will, if any, and an inventory of the Wyoming estate alongside the previously requested documentation.<sup>227</sup>

Amended House Bill No.123 passed the House, and the Senate approved with further amendments of its own.<sup>228</sup> The Senate's amendments would have introduced an additional section below the first provision to clarify the legislative intent behind the statute:

**Section 2.** This act is intended as a clarification of existing law. The Wyoming legislature intends to make no substantive change to prior law. This act has always been intended to provide a simplified procedure for administration of the Wyoming estate of a nonresident decedent in conformity with the decedent's will, if any, or the Wyoming laws of intestacy in the absence of a will, without regard to how the final decree of distribution of the other state may have distributed the decedent's assets located in the other state . . . .<sup>229</sup>

The Senate's additional amendments were sent back to the House, but the House declined to concur.<sup>230</sup> Representative Greear addressed the House and expressed concern about the Senate's characterization of these changes as solely clarifications of prior law, specifically because the deletion of the \$200,000 cap was inconsistent with previous legislative intent.<sup>231</sup> For this reason, Representative Greear asked the members of the House to vote no on the Motion to Concur, so that he could further discuss this concern with the Senate.<sup>232</sup> Thereafter, a joint committee of three House members and three Senate members was established to discuss the issue.<sup>233</sup> However, the Bill was indefinitely postponed after the joint committee failed to resolve the issue before the end of the 64th General Legislative Session on March 3, 2017.<sup>234</sup>

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* (as amended by S. Comm. on the Judiciary, Feb. 8, 2017).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> 2017 General Session Archives: Hearing on H.B. 123 Before the H., 64th Leg., Gen. Sess. (Wyo. 2017) (statement of Rep. Greear), <http://legisweb.state.wy.us/2017/audio/house/h021417am1.mp3>.

<sup>232</sup> *Id.*

<sup>233</sup> H. JOURNAL, 64th Leg., Gen. Sess. 243–45 (Wyo. 2017), <http://legisweb.state.wy.us/2017/Digest/HB0123.pdf> (digest report on Wyo. H.B. 123).

<sup>234</sup> *Id.*

The legislative intent provision proposed by the Senate that references the intended operation of § 2-11-201 is contrary to the existing operation of the statute's plain language.<sup>235</sup> The statute's language presently directs Wyoming courts to dispense with holding their own probate proceedings after adopting the proceedings held in the foreign jurisdiction as original proceedings.<sup>236</sup> Inserting language into the statute which posits that Wyoming proceedings should occur "without regard to how the final decree of distribution of the other state may have distributed the decedent's assets located in the other state" would certainly constitute a "substantive change to prior law," and would create further confusion among the district courts as to the proper procedure for administration of a foreign estate.<sup>237</sup> The foreign decree of distribution is the document that evidences the foreign jurisdiction's *proceedings* in regard to how the estate's assets should be distributed—not the will.<sup>238</sup> Moreover, in order for the district courts to ensure Wyoming real property has been distributed "in conformity with the decedent's will," those courts would need to undertake an examination of the will, a process that would also constitute a "substantive change" to the prior operation of § 2-11-201.<sup>239</sup> Consequently, the amendments proposed during the 64th legislative session would have imposed an interpretive hardship upon the state's district courts without resolving the issues exposed by the principal case.

Because these issues remain unresolved, the Wyoming legislature should revisit Wyoming Statute § 2-11-201. However, rather than adding a provision that explains the legislative intent, the present statutory defects should be cured by amending the statute to incorporate both the initial amendments proposed by the House and a review mandate for the district courts. The aggregate amendments proposed herein would read:

In case of a nonresident's estate having property in this state, which estate has been duly probated and settled in another state, the probate of the estate in this state may be dispensed with upon filing with the district judge in the proper county a petition under oath showing the facts in the case together with certified copies of the petition, *the will, if any*, order of appointment of executor or administrator, *inventory of the Wyoming estate*, final decree of distribution of estate therein, and a full showing that debts of the estate have been paid. The district judge, *after being*

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<sup>235</sup> See *supra* notes 149–223 and accompanying text.

<sup>236</sup> See *supra* notes 149–223 and accompanying text.

<sup>237</sup> H.B. 123, 64th Leg., Reg. Sess. (Wyo. 2017) (as amended by S. Comm. on the Judiciary, Feb. 8, 2017).

<sup>238</sup> *Lon V. Smith Found. v. Devon Energy Corp.*, 2017 WY 121, ¶ 30, 403 P.3d 997, 1007 (Wyo. 2017) (defining "proceeding" as "the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.").

<sup>239</sup> Wyo. H.B. 123.

*satisfied upon his or her review of the above listed documentation that the Wyoming property has been properly disposed of, may give notice by publication for the period of three (3) weeks of the intention of the petitioner to have the probate proceedings admitted in this state as a probate of the estate. If on the day set for hearing on the petition no objection is made, the judge shall make an order admitting the certified copies of the proceedings in the estate to record in his court and they shall be considered and treated from that time as original proceedings in his court and shall be conclusive evidence of the facts therein shown. If, upon review, the district judge is not satisfied that the Wyoming property has been properly disposed of, he or she may redirect the petitioner to have the will admitted under section 2-11-104.*

These amendments would act in several respects to cure the statute's present defects while maintaining a simplified, efficient procedure. Currently, § 2-11-201 places the burden squarely upon the petitioner to ensure that the domiciliary jurisdiction fully and correctly disposed of the Wyoming real property before filing for distribution under § 2-11-201.<sup>240</sup> By adding a mandatory review requirement, this burden would shift to the court, which would verify the Wyoming real property was properly distributed pursuant to the applicable will, if any, during the foreign proceedings. If, upon review, the court determines the Wyoming real property was not distributed properly, the court may then direct the petitioner to have the nonresident estate admitted under § 2-11-104, whereby testamentary intent could be discerned through full ancillary proceedings. Although the inclusion of such a review would increase the level of court supervision and consequently decrease the speed with which estates can be disposed of, overall efficiency in comparison to full proceedings would be maintained. The court would simply be examining documentation submitted, not issuing any substantive judgments as to the will's validity or construction. Such determinations within the ancillary administration context would remain viable only under § 2-11-104.<sup>241</sup> Further, the implementation of judicial scrutiny during this process would provide a safeguard to interested beneficiaries who may not be in the best position to make timely assurances of a Wyoming probate decree's accuracy.<sup>242</sup>

Therefore, implementing the above amendments to the present language of Wyoming Statute § 2-11-201 would harmonize Wyoming's ancillary administration proceedings with other state probate laws and ensure donative intent is fulfilled to the maximum extent allowed by law. However, in order to maintain an easily applied and expedited procedure, these amendments would not grant

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<sup>240</sup> WYO. STAT. ANN. § 2-11-201 (2017); *see supra* notes 149–223 and accompanying text.

<sup>241</sup> WYO. STAT. ANN. § 2-11-104.

<sup>242</sup> *See supra* notes 220–23 and accompanying text.

Wyoming courts any additional authority to make substantive determinations as to the will's validity or construction under this section. Enacting a change that would increase this authority while still ensuring a simplified procedure with fewer expenditures than full ancillary proceedings would likely require a full reform of the statute, rather than mere amendment. If the legislature wished to achieve such a drastic change, an effective method of doing so would be through adoption of the UPC approach to ancillary administration, which vests greater authority in the domiciliary state's personal representative to act within the situs state.<sup>243</sup>

## V. CONCLUSION

The court's holding in *Lon V. Smith Foundation* was a correct interpretation of ancillary probate administration proceedings pursuant to Wyoming Statute § 2-11-201.<sup>244</sup> Under this statute's plain language, the Natrona County District Court was under no directive to conduct an examination of testamentary intent, nor make its own findings as to whom Mr. Smith's estate should be distributed.<sup>245</sup> Therefore, the foreign decree, which omitted reference to the Wyoming property, stood as the basis for distribution of the estate.<sup>246</sup> As the foregoing analysis demonstrated, when § 2-11-201 is applied in conjunction with other state probate statutes, a testator's freedom of disposition may be undermined by the issuance of a conflicting decree.<sup>247</sup> Such an outcome occurs from realizing the state's interest in efficient probate proceedings at the expense of making accurate estate distributions.<sup>248</sup> Any conflict of this nature should be resolved in favor of upholding the state's greater interest in fulfilling a testator's intent.<sup>249</sup> Therefore, the language of Wyoming Statute § 2-11-201 should be updated to comport with changes in the operation of probate law around the country.<sup>250</sup> These changes can be achieved by amending the statute require the district courts to conduct a review of the foreign decree in comparison with the testator's will.<sup>251</sup>

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<sup>243</sup> See UNIF. PROBATE CODE Art. IV (UNIF. LAW COMM'N 2010); Lerner, *supra* note 29; Stevens, *supra* note 27, at 310, 333–39 (discussing further the mechanics of the UPC approach to ancillary administration). Adoption of the UPC approach would have the supplemental benefit of harmonizing Wyoming probate procedures with other jurisdictions, particularly in the surrounding UPC states. See Stephen M. Brainerd, *Multi-Jurisdictional Matters*, in COLORADO ESTATE PLANNING HANDBOOK § 36.2 (2014) (“If the situs has a simplified proceeding, such as that prescribed by Article IV of the UPC, the ancillary administration may be accomplished by domiciliary counsel with little or no assistance from counsel in the foreign jurisdiction.”).

<sup>244</sup> See *supra* notes 149–88 and accompanying text.

<sup>245</sup> See *supra* notes 149–88 and accompanying text.

<sup>246</sup> See *supra* notes 149–88 and accompanying text.

<sup>247</sup> See *supra* notes 189–223 and accompanying text.

<sup>248</sup> See *supra* notes 189–223 and accompanying text.

<sup>249</sup> See *supra* notes 189–223 and accompanying text.

<sup>250</sup> See *supra* notes 224–43 and accompanying text.

<sup>251</sup> See *supra* notes 224–43 and accompanying text.