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The Wild, Wild West: The Mechanics and Potential Uses of Trust Decanting

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COMMENT

The Wild, Wild West: The Mechanics and Potential Uses of Trust Decanting

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I. INTRODUCTION

In addition to its scenic beauty, low population, and Cheyenne Frontier Days—the Daddy of 'em All—the State of Wyoming is a leading trust situs.[1]

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[1] *See, e.g.*, Daniel G. Worthington & Mark Metric, *Which Trust Situs is Best in 2018?*, 157 TR. & EST. 73, 73 (2018).The location in which the trust maintains its situs is important to the creation of a trust, as it dictates the applicable state tax, the allowable trust structure, and the trustee's powers under that situs's law. *See, e.g.*, Peggy K. Gardner & Morgan Wiener, *Is the Irrevocable Trust Really Irrevocable*, 47 COLO. LAW. 56, 57 (2018). *See also* CHEYENNE FRONTIER DAYS, https://www.cfdrodeo.com/ (last visited Apr. 18, 2018).

With its modern trust laws, no state income tax, and accessibility to private trust companies, Wyoming is a trust-friendly jurisdiction.[2] It is not sufficient for trustees simply to recognize Wyoming is a "dominant trust situs jurisdiction," however, as utilizing Wyoming's trust laws requires knowledge of how to transfer a trust's situs to Wyoming and how to navigate Wyoming's trust laws, both on a statutory and common law level, upon arrival.[3] For revocable trusts, transferring the trust to Wyoming from another situs requires a simple modification but, for irrevocable trusts, such a transfer requires an evaluation of the allowances of the trust.[4] If allowed by the trust terms, changing the situs requires effectuation of the term.[5] Difficulty arises for trustees when the terms of the trust do not expressly allow such a move, as the trustee requires some authority to change a trust's situs.[6] Such authority, if it exists, is located in statute or common law—one option being the law of decanting.[7] Decanting provides trustees increased flexibility to manage a trust, and Wyoming law offers both decanting and advanced estate planning techniques to best achieve a settlor's goals.[8]

This Comment discusses the express mechanics of decanting in Wyoming as well as those states from which Wyoming attorneys' clients may originate.[9] After understanding how to decant, practitioners must know when decanting may be

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[2] *See* Amy M. Staehr, *The Discovered Country: Wyoming's Primacy as a Trust Situs Jurisdiction*, 18 WYO. L. REV. 283, 289 (2018) (summarizing Christopher Reimer, *The Undiscovered Country: Wyoming's Emergence as a Leading Trust Situs Jurisdiction*, 11 WYO. L. REV. 165, 172–99 (2011)); DAVID SHAFTEL ET AL., 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; *Virtual Representation Statutes Chart*, AM. COLL. OF TR. & EST. COUNS., http://www.actec.org/assets/1/6/Bart-Virtual-Representation-Statutes-Chart.pdf (last updated Oct. 1, 2018); Steve Oshins, *5th Annual Dynasty Trust State Rankings Chart*, LAW OFFICES OF OSHINS & ASSOC. (Apr. 2016), http://bridgefordtrust.com/wp-content/uploads/2016/10/Dynasty_Trust_Rankings.pdf; Steve Oshins, *8th Annual Domestic Asset Protecting Trust State Rankings Chart*, LAW OFFICES OF OSHINS & ASSOC. (Apr. 2017), https://www.nevadatrust.com/wp-content/uploads/2018/12/8th_annual_domestic_asset_protection_trust_state_rankings_chart.pdf; Joseph E. McDonald, III, *Emerging Directed Trust Company Model*, 151 TR. & EST. 49, 50 (2012).

[3] Staehr, *supra* note 2, at 288.

[4] James S. Sligar, *Changing Trust Situs: The Legal Considerations of "Forum Shopping,"* 135 TR. & EST. 40, 41 (July 1996).

[5] *Id.*

[6] Al W. King, *Tips from the Pros: Decanting is a Popular Strategy, but Don't Ignore Several Key Considerations*, 157 TR. & EST. 14, 15 (2018). Certainly, a situation may arise where neither the trust document, the statute, nor the common law provide authority for a decanting, but this may not preclude transfer of the trust situs. *Id.* Estate planning strategies may still allow a trustee to change a situs, such as through appointment of a co-trustee in a jurisdiction allowing trustee decanting. *Id.* However, such a discussion is outside the scope of this Comment. For further information on these estate planning techniques, see *id.*

[7] *Id.* Decanting is only one option to change a situs, however, as state statutes may also provide a means to change a trust's situs. *See, e.g.*, WYO. STAT. ANN. § 4-10-108(c) (2019).

[8] *See infra* notes 96–109, 183–293 and accompanying text.

[9] *See infra* notes 57–176 and accompanying text.

advantageous for their clients' assets.[10] Part II of this Comment offers a step-by-step guide to decanting in California, Colorado, Massachusetts, New York, South Dakota, and Wyoming.[11] Upon the conclusion of the guide to decanting, Part II provides a chart comparing the discussed states.[12] Part III describes certain trust types into which a trustee should consider decanting and the tax consequences of that decanting.[13] Finally, Part IV discusses potential fiduciary obligations prompted by decanting.[14]

II. BACKGROUND

Decanting is an emerging estate planning technique which allows trustees greater latitude to accomplish their fiduciary duties.[15] This planning technique is analogous to pouring wine into a decanter to remove troublesome elements of the wine.[16] Removing these imperfections requires pouring the wine from its original container (the wine bottle) into a secondary container (the decanter).[17] As applied to trusts, decanting allows a trustee to assign all or part of the trust corpus from one trust to a secondary trust.[18] Decanting "allows a trustee (or other empowered party), without court permission or involvement, to abandon or modify problematic provisions of an existing trust by 'decanting' or pouring out some or all of the contents of that trust into a new trust with the desired provisions."[19]

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[10] *See infra* notes 183–321 and accompanying text.

[11] *See infra* notes 57–176 and accompanying text. This Comment focuses on these states because they are those in which Wyoming practitioners may practice due to their licensure or because clients from those states changed their residency to Wyoming.

[12] *See infra* notes 177–82 and accompanying text.

[13] *See infra* notes 183–321 and accompanying text.

[14] *See infra* notes 322–36 and accompanying text.

[15] *See, e.g.*, Staehr, *supra* note 2, at 300; Mary Akkerman, *Decanting: A Practical Roadmap for Modernizing Trusts in South Dakota*, 61 S.D. L. REV. 413, 417 (2016). Generally, "[d]ecanting statutes rest on the premise that a trustee with absolute discretion to invade principal is the functional equivalent of the holder of a nongeneral power" of appointment. Stewart E. Sterk, *Trust Decanting: A Critical Perspective*, 38 CARDOZO L. REV. 1993, 2002 (2017). Such powers of appointment are nongeneral, as the trust terms limit the holder of a power to appoint trust corpus or income. *Id.* For example, a settlor can give her husband a nongeneral power of appointment over a trust established for the benefit of their children, allowing the husband to appoint the trust corpus or income to their children in any proportion he so chooses. *See id.* While the spouse can appoint in any proportion, the spouse may exercise that power in favor of the children. *See id.*

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

[17] *See, e.g.*, Alexander Bove, Jr., *Another Look at Trust Decanting*, 24 TRS. & TRUSTEES 338, 338 (2018).

[18] *Id.*

[19] *Id.*

The power to modify a trust without court involvement allows trustees to save on court costs and delay, which improves trustees' ability to manage their trusts.[20]

For example, *In re Estate of Pulitzer* provides a potential fact pattern where decanting would have been beneficial to save the trustees time and money when simply attempting to generate trust income.[21] *Pulitzer* involved an irrevocable trust, created in the early 1900s, forbidding the trustees from selling its shares of the Press Publishing Company.[22] Those shares comprised a significant portion of the trust's corpus.[23] While the share price was initially stable, losses started occurring in an average amount of nearly $500,000 annually.[24] This situation—where the trust corpus loses value drastically and the trust prohibits the trustees from selling the capital stock—is a classic example of changed circumstances: the settlor in *Pulitzer* believed the stock would increase in value to garner income for the benefit of his children, but instead, the stock lost value, threatening the very existence of the trust.[25]

When confronting changed circumstances, trustees typically must seek modification from a court to amend the trust so the settlor's purpose can be accomplished.[26] For charitable trusts, trustees must seek court approval to apply the *Cy Pres* doctrine, which allows for modification of a trust's purpose if the original purpose becomes illegal, impossible, or impracticable.[27] Likewise, for non-charitable trusts, trustees must seek court approval to apply the equitable deviation doctrine, allowing a trustee to "deviate from the administrative terms of a trust . . . if compliance would defeat or substantially impair the accomplishment

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[20] *See generally* JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 444 (10th ed. 2017); *see also* John H. Martin, *Reconfiguring Estate Settlement*, 94 MINN. L. REV. 42, 49 (2009) ("Delay, expense, and lack of privacy are three universal criticisms of probate."); JOEL C. DOBRIS ET AL., ESTATES AND TRUSTS, CASES AND MATERIALS 46 (2d ed. 2002) ("Many testators seek to avoid the probate process because of its reputation—sometimes but not always deserved—for delay and expense."); WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES 469 (2d ed. 2001) ("Administration is needless expense.").

[21] *In re* Pulitzer's Estate, 139 Misc. 575, 577, 249 N.Y.S. 87 (Sur. Ct. 1931).

[22] *Id.* at 577, 582.

[23] *Id.* It is possible that the capital stock in the Press Publishing Company comprised the entire trust corpus, but it is ultimately unclear from the court's opinion. *See id.* at 578.

[24] *Id.* at 582, 583. Calculated for inflation, the annual losses were approximately $10,870,729.90. *See* US INFLATION CALCULATOR, COINNEWS, https://www.usinflationcalculator.com (last visited Apr. 6, 2019).

[25] *See, e.g.*, *In re* Estate of Pulitzer, 139 Misc. at 575.

[26] DUKEMINIER & SITKOFF, *supra* note 20, at 743.

[27] *See generally* Jackson v. Phillips, 96 Mass. (14 Allen) 539, 589–90 (1867). A charitable trust is a trust created when the settlor manifests an intent to create a trust for charity and holding the trustee "to equitable duties to deal with the property for a charitable purpose." RESTATEMENT (SECOND) OF TRUSTS § 348 (AM. LAW INST. 1959). For further information on the *Cy Pres* doctrine, see Edith L. Fisch, *Cy Pres Doctrine and Changing Philosophies*, 51 MICH. L. REV. 375 (1953).

of the purposes of the trust in light of changed circumstances not anticipated by the settlor."[28] While these doctrines require court involvement, the decanting power, if available to trustees, does not.[29]

As *Pulitzer* pre-dated any statutory or common law authority to decant, only a court could provide recourse to the *Pulitzer* trustees.[30] The *Pulitzer* court recognized the inequities of enforcing the trust's prohibition-on-sale provision, so it applied equitable deviation to grant the trustees the "general power and authority to act in the conveyance of the [securities]."[31] Today, with the possibility of decanting, trustees have another option: without seeking court approval, trustees may decant to remove the troublesome provision and, if they so wish, amend the trust to add other beneficial terms, such as a provision crafted by the Uniform Prudent Investor Act.[32] While this example pertains only to decanting away an individual provision, decanting may also be used to completely vacate the original trust in favor of a second trust.[33]

While decanting offers trustees increased freedom to maintain trust corpus, the breadth of that freedom is defined by common law, state statutes, the Restatements, and Uniform Law Commission provisions.[34] In 1940, Florida became the first jurisdiction to allow decanting through its common law in *Phipps v. Palm Beach Trust Co.*[35] In 1932, Margarita Phipps established a trust for her three children, one of whom (John H. Phipps) was the primary beneficiary.[36] Margarita's husband, an individual trustee (John S. Phipps), and a corporate trustee (the Palm Beach Trust Company) served as co-trustees.[37] Notably, the trust granted to the individual trustee the "absolute power to administer a trust estate in the interest of designated beneficiaries."[38] On July 25, 1939, the individual trustee

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[28] DUKEMINIER & SITKOFF, *supra* note 20, at 734.

[29] Sterk, *supra* note 15, at 1995.

[30] *Pulitzer*, 139 Misc. at 583.

[31] *Id.*

[32] *See generally* UNIF. PRUDENT INV'R ACT (UNIF. LAW. COMM'N 1995). The Uniform Prudent Investors Act (UPIA) is just one example of the provisions that could be added. The UPIA would have been advantageous for the trustees in *Pulitzer* because it grants trustees the ability to sell trust assets to diversify and protect the trust corpus. *See id.* § 2.

[33] Robert Sitkoff, *The Rise of Trust Decanting in the United States*, 23 TRS. & TRUSTEES 976, 976 (2017).

[34] *Id.*

[35] Phipps v. Palm Beach Tr. Co., 196 So. 299, 301 (Fla. 1940) (recognizing "the power of the individual trustee to create [a] second trust provided one or more of the descendants of the donor of the original trust are made the beneficiaries"). *Id.*

[36] *Id.* at 300.

[37] *Id.*

[38] *Id.* at 301.

acted pursuant to that provision, notifying the corporate trustee to appoint the entirety of the corpus to a second trust.[39] Upon receipt, the corporate trustee asked the court to determine whether this was a correct exercise of the individual trustee's power.[40] The court articulated the following rule: "the power vested in a trustee to create an estate in fee includes the power to create or appoint any estate less than a fee unless the donor clearly indicates a contrary intent."[41] This rule, as applied to the Phipps trust, meant the individual trustee had the power to appoint any amount of funds in further trust.[42]

Fifty-two years later, in 1992, New York became the first state to codify a trustee's decanting power.[43] This law recognized the supremacy of the "terms of the instrument."[44] If the trustee had "absolute discretion . . . to invade the principal of a trust" for the benefit of beneficiaries, then New York trustees had unilateral power under the statute to appoint "so much or all" of the trust corpus in further trust.[45] Additionally, the trustee could petition a court with jurisdiction to direct the trustee to decant.[46] Whether occurring unilaterally or through a court, decanting had to maintain "any fixed income interest" of any beneficiaries;[47] had to be in favor of the trust beneficiaries;[48] could not violate other typical fiduciary duties;[49] and could not be used to increase trustee commissions.[50] Finally, the statute required the decanting to be filed in writing with the court in the trust's situs, signed and acknowledged by the trustee, and, if the trustee sought to decant unilaterally, signed "by all the persons interested in the trust."[51] Following the

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[39] *Id.* at 300.

[40] *Id.* at 301.

[41] *Id.*

[42] *Id.*

[43] *See* Act of July 24, 1992 ch. 591, 1992 N.Y. Laws 3520, 3521 (codified as amended at N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b) (Consol. 2019)). *See also infra* notes 44–51 and accompanying text (discussing the requirements in New York as they were in 1992). These requirements have since changed. *See infra* notes 143–60 and accompanying text.

[44] N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b); 1992 N.Y. Laws 3521.

[45] N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b)(1); 1992 N.Y. Laws 3521.

[46] N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b)(2); 1992 N.Y. Laws 3521.

[47] N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b)(1)(A), (b)(2)(A); 1992 N.Y. Laws 3521.

[48] N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b)(1)(B), (b)(2)(B); 1992 N.Y. Laws 3521.

[49] N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b)(1)(C), (b)(2)(C); 1992 N.Y. Laws 3521; *see also* Act of Apr. 27, 1967, ch. 686, 1967 N.Y. Laws 1711, 1740 (codified as amended at N.Y. EST. POWERS & TRUSTS LAW § 11-1.7 (Consol. 2019)).

[50] N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(c); 1992 N.Y. Laws 3521.

[51] N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(d); 1992 N.Y. Laws 3521. The phrase "all persons interested in the trust" is defined as "upon whom service of process would be required in a proceeding for the judicial settlement of the account of the trustee." N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(e); 1992 N.Y. Laws 3521.

enactment of New York's statute, several states followed suit allowing trustees to decant with varying discretion.[52]

As the frequency of common law decisions and state statutes increased, the American Law Institute (ALI) and the Uniform Law Commission (ULC) promulgated decanting proposals.[53] Originally published on May 12, 1998, the ALI's Restatement (Third) of Property: Wills and Other Donative Transfers recognized the decanting power.[54] The ULC published its Uniform Trust Decanting Act (UTDA) in 2015.[55] Finally, in 2018, the ULC amended its Uniform Trust Code (UTC) recognizing the opportunity for state legislatures to permit decanting through changes in the already-adopted UTC.[56]

III. HOW TO DECANT

A. Massachusetts: A Common Law Example

At the time of writing this Comment, twenty-eight states have decanting statutes in some form.[57] Of the states discussed in this Comment, only Massachusetts has not adopted a decanting statute, but still permits decanting through state common law.[58] Massachusetts's caselaw on decanting began with *Loring v. Karri-Davies*, where the Supreme Judicial Court held "a donee of a special power of appointment may distribute assets in further trust on behalf of the objects of the special power, provided the donor manifest[s] no intent to the contrary."[59] The decision did not concern decanting in name; rather, *Loring* analyzed a donee's exercise of her power of appointment in further trust to the benefit of the beneficiaries.[60] While this Comment does not attempt to discuss

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[52] *See infra* notes 177–82 and accompanying text.

[53] *See* UNIF. TRUST DECANTING ACT prefatory note (UNIF. LAW COMM'N 2018), *available at* https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=d1bed9bb-7882-6b4a-2c23-916d4b28536d&forceDialog=0.

[54] *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 19.14 cmt. f (AM. LAW INST. 2011).

[55] *See* UNIF. TRUST DECANTING ACT, *supra* note 53.

[56] UNIF. TRUST CODE (UNIF. LAW COMM'N 2018) "[T]erms of the trust . . . may change over time . . . in accordance with applicable law." *Id.* § 103(18).

[57] M. Patricia Culler, Hahn, Loeser & Parks LLP, *State Decanting Statutes Passed or Proposed*, AM. C. TR. & EST. COUNS. (ACTEC) (Aug. 20, 2018), https://www.actec.org/assets/1/6/Culler-Decanting-Statutes-Passed-or-Proposed.pdf; *see also* ALA. CODE §§ 19-3D-1 to -29 (2019).

[58] *See* Culler, *supra* note 57; *see also* Morse v. Kraft, 992 N.E.2d 1021 (Mass. 2013).

[59] Loring v. Karri-Davies, 357 N.E.2d 11, 14 (Mass. 1976); *Morse*, 992 N.E.2d at 1025.

[60] *Loring*, 357 N.E.2d at 14.

such a power, *Loring* informs the legal background of Massachusetts' allowance of the decanting power in *Morse v. Kraft.*[61]

On January 4, 1982, Robert and Myra Kraft established a trust (First Trust) including four separate "subtrusts" for the benefit of their four children individually.[62] The First Trust required a trustee be "disinterested," excluding the children from ever becoming trustees of their respective subtrusts.[63] Richard Morse, serving as sole trustee of the First Trust and the four subtrusts from the outset, sought "to transfer all of the property of the subtrusts into [new] trusts" (Second Trust).[64] These new subtrusts included one significant departure from the First Trust framework: the children could serve as "trustees with distributive power" of their respective subtrusts.[65] Morse argued this transfer, one interpreted as decanting by the court, served the best interests of the beneficiaries.[66]

Perhaps unsurprisingly, tax law guided the court to the issue.[67] Specifically, Morse requested declaratory relief to determine whether his proposed transfer would trigger the Generation-Skipping Transfer Tax (GST), an inquiry requiring the court to determine "whether '[t]he terms of [the First Trust] authorize[d] distributions to [the Second Trust] . . . without the consent or approval of any beneficiary or court.'"[68] Relying on *Loring*, the *Morse* court distinguished between *Loring*'s application to donees and trustees.[69] Unlike the general power read into a "donor manifest"—allowing a donee of a special power of appointment to exercise that power in further trust—the court was unwilling to adopt a similar rule reading-in the decanting power for trustees.[70] Instead, the court looked to the terms of the trust, articulating that "it is nevertheless clear that a trustee's decanting authority 'turn[s] on the facts of the particular case and the terms of the instrument creating the trust.'"[71] Determining the trust generally granted the

[61] *Id.*; *Morse*, 992 N.E.2d at 1025–26.

[62] *Morse,* 992 N.E.2d at 1022–23.

[63] *Id.* at 1023. The sons were disallowed because, "at the time of [the First Trust's] creation, the sons were minors and it was impossible to know whether they would develop the skills and judgment necessary to make distribution decisions concerning their respective subtrusts." *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* The decanting was in the best interest of the beneficiaries because Morse believed each beneficiary was mature enough to manage his respective subtrust. *Id.*

[67] *Id.* at 1023–24.

[68] *Id.* at 1022, 1024 (quoting Treas. Reg. § 26.2601-1(b)(4)(i)(A)(1)(i) (2019) (as amended in 2004)).

[69] *Id.* at 1025.

[70] *Id.* at 1027.

[71] *Id.* at 1025 (quoting Phipps v. Palm Beach Tr. Co., 196 So. 299, 301 (Fla. 1940)).

trustee complete power to benefit the beneficiaries without court involvement, the court held that the terms of the First Trust authorized decanting.[72] While this signaled to Massachusetts trustees that decanting would be allowed, it left open the important question of whether decanting was permissible when the first trust is silent on the decanting power.[73]

Unlike the *Morse* trustee who sought court permission to decant, the trustees in *Ferri v. Powell-Ferri* decanted without court approval, and then sought a retroactive declaration that the past decanting was lawful.[74] There, the settlor, Paul J. Ferri, Sr., established a trust for the benefit of his son, Paul J. Ferri, Jr., in 1983 (1983 Trust).[75] Ferri, Jr. married in 1995, but after his wife Powell-Ferri's 2010 filing to dissolve the marriage, the uninterested trustees decanted to a new trust without court approval (2011 Trust).[76] In particular, the trustees decanted "out of concern that Powell-Ferri would reach the assets of the 1983 Trust as a result of the divorce action" and neither informed nor sought the consent of Ferri, Jr.[77] To address this concern, the 2011 Trust included a spendthrift provision.[78] After decanting, the trustees sought a declaratory judgment against Ferri, Jr. and Powell-Ferri, and asked the court to validate the decanting to protect the 2011 trust assets from any claims which may have been made by Powell-Ferri.[79]

The court held the transfer valid after applying the analysis in *Morse*.[80] The court found that the 1983 Trust granted the trustees "extremely broad discretion" to administer the trust, evidencing the settlor's intent to allow decanting.[81] Although Powell-Ferri argued the trustees' discretion was limited when Ferri, Jr.'s right to compel distributions of corpus vested, the court found the trustees had a fiduciary duty to protect trust assets that did not end until trust corpus was depleted.[82] The court read harmoniously the terms of the 1983

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[72] *Id.* at 1025 (quoting the terms of the First Trust), 1026, 1028.

[73] *Id.* at 1027.

[74] Ferri v. Powell-Ferri, 72 N.E.3d 541, 543 (Mass. 2017); *see also* Marc J. Bloostein, *Case Focus: Ferri v. Powell-Fern: Expansion of Common Law "Trust Decanting" in Massachusetts*, 61 BOS. B.J., no. 3, 2017, at 39.

[75] *Ferri*, 72 N.E.3d at 544.

[76] *Id.*

[77] *Id.*

[78] *Id.* A spendthrift provision grants trustees complete control over the distributions of the corpus and eliminates the beneficiary's right to compel distribution. *Id.* For further information on spendthrift trusts, see GEORGE G. BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 222, Westlaw (database updated June 2018).

[79] *Ferri,* 72 N.E.3d at 544.

[80] *Id.* at 546–50.

[81] *Id.* at 546.

[82] *Id.* at 550.

Trust—namely, the broad trustee discretion and an anti-alienation clause—as evidence of the settlor's intent to protect the entirety of the trust's assets until the trust terminated.[83] The court's holding, however, left open a question as to the extent to which the fiduciary duty applies.[84]

In rearticulating the intent of the settlor, the court enunciated a fiduciary "duty to decant."[85] Unfortunately for Massachusetts trustees, however, the court simply stated this duty "without explaining."[86] Although the Supreme Judicial Court of Massachusetts, the Boston Bar Association, and local attorneys have requested that Massachusetts's courts and state legislature adopt formal decanting rules, this request has gone unanswered.[87] Regardless, advisors armed with *Morse* and *Ferri* indicate a "trend of trustees decanting to discretionary trusts without any term for asset protection purposes."[88]

B. Statutory Schema Permitting Trust Decanting

While states vary in their statutory approach to decanting, state statutes typically fall into three categories: UTC states,[89] UTDA states,[90] and states with other statutory methods of decanting.[91]

1. The Uniform Trust Code: Wyoming's Approach to Decanting

Through a combination of general trust, tax, and decanting laws, Wyoming is on the threshold of becoming—if it has not already become—the pinnacle of trust situses in the United States because it provides maximum planning

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[83] *Id.*

[84] *Id.*

[85] *Id.* ("[U]nless and until all of the trust assets were distributed in response to the beneficiary's request for a withdrawal, the trustee could exercise his or her powers and obligations under the 1983 Trust, including the duty to decant if the trustee deemed decanting to be in the beneficiary's best interest.").

[86] Bloostein, *supra* note 74, at 40. For a further discussion on the duty to decant, see *infra* notes 322–36 and accompanying text.

[87] *Ferri,* 72 N.E.3d at 554; Kristin T. Abati & Renat V. Lumpau, *Common-Law Decanting of Trusts: Lessons From Massachusetts,* 44 EST. PLAN. J. 3, 7 (Oct. 2017); Brief of the Boston Bar Association, Amicus Curiae at 3, Morse v. Kraft, 992 N.E.2d 1021 (Mass. 2013) (SJC-11233), http://www.bostonbar.org/docs/default-document-library/morse-v-kraft-amicus.pdf; *see also, e.g.*, Bloostein, *supra* note 74, at 40 ("The Massachusetts legislature should adopt a decanting statute to provide a path for trustees to decant with clear limits and safeguards.").

[88] King, *supra* note 6, at 16.

[89] *See infra* notes 96–104 and accompanying text.

[90] *See infra* notes 105–27 and accompanying text.

[91] *See infra* notes 128–76 and accompanying text.

flexibility.[92] Although most jurisdictions that permit decanting do so through statute, Wyoming's statute differs by allowing trustees to exercise unparalleled discretion to react to changing trust circumstances.[93] This breadth of power suggests trustees administering trusts outside of Wyoming should transfer the trust situs to Wyoming to take advantage of its favorable laws.[94] Transferring a situs may be simple if the trust document allows such a transfer, but, if it does not, decanting provides the means through which the trust can be moved to Wyoming.[95]

Initially, the Uniform Trustees' Powers Act (UTPA) governed the scope of trustee powers, but, in 2003, the Wyoming State Legislature (Legislature) repealed the UTPA and adopted the UTC.[96] In Wyoming, § 4-10-816 defines the scope of trustee powers.[97] The UTC did not, however, initially include a decanting provision, relegating Wyoming trustees to the common law for decanting support.[98] But, beginning in 2005, the Legislature began creating the decanting power although, notably, that power is not expressly named decanting.[99]

In 2005, the Legislature enacted the first of several amendments to § 4-10-816.[100] Next, in 2013, the Legislature amended § 4-10-816 to include decanting as a trustee power if the trust granted the trustee the power "to make discretionary distributions."[101] In 2015, the Legislature amended § 4-10-816 to further restrict

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[92] Reimer, *supra* note 2, at 166–67. "[T]hese factors make[] Wyoming an ideal jurisdiction in which to create, migrate, or reform a trust." *Id.* at 200.

[93] *See* Culler, *supra* note 57; Staehr, *supra* note 2, at 302 (stating that Wyoming is one of the only states to allow decanting when trustees have only a mandatory distribution power, and Wyoming also permits trustees to decant without providing notice).

[94] *See infra* notes 96–104 and accompanying text.

[95] *See generally* King, *supra* note 6, at 15.

[96] *See* §§ 4-10-101 to -103, Act of Mar. 4, 2003 ch. 124, 2003 Wyo. Sess. Laws 304, 305. The Legislature repealed the UTPA in favor of updates to the UTC. Wyo. Legislative Serv. Office, H.B. 77 Digest, 57th Leg., Budget Sess., WYO. LEG. (2014), https://www.wyoleg.gov/2003/Digest/HB0077.htm.

[97] 2003 Wyo. Sess. Laws at 336–38 (codified as amended at WYO. STAT. ANN. § 4-10-816 (2019)).

[98] *See* WYO. STAT. ANN. § 4-10-816 (2013); Reimer, *supra* note 2, at 185. Although no Wyoming case expressly permits decanting, the Wyoming Supreme Court in *Garwood v. Garwood* granted broad discretion for trustees to modify trusts under common law. Garwood v. Garwood 2008 WY 129, ¶ 21, 194 P.3d 319, 327 (Wyo. 2008). "[I]f the common law can be used to modify a trust, it is arguable that it may also be used to decant a trust." Reimer, *supra* note 2, at 185 n.124.

[99] *See* Act of Feb. 25, 2005, ch. 126, sec. 2, 2005 Wyo. Sess. Laws 291, 297 (codified as amended at WYO. STAT. ANN. § 4-10-816(a)(xxvii), (b) (2019)); *infra* notes 100–04 and accompanying text.

[100] 2005 Wyo. Sess. Laws at 297 (codified at WYO. STAT. ANN. § 4-10-816(b) (2019)).

[101] Act of Mar. 13, ch. 178, sec. 2, 2013 Wyo. Sess. Laws 449, 455–57 (codified as amended at WYO. STAT. ANN. § 4-10-816 (2019)). As of 2013, it appears as though the decanting power

the decanting power in two key respects: (1) prohibiting the exercise "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"; and (2) shielding trustees from liability if decanting was in good faith.[102] Finally, in 2017, the Legislature amended § 4-10-816 to extend the decanting power to trustees endowed with the power to make "discretionary or mandatory distributions," but preventing trustees who are also beneficiaries from increasing their interest as a beneficiary by decanting.[103] The result of all four amendments is an "unparalleled breadth of decanting powers available to a Wyoming trustee" under § 4-10-816.[104]

2. The Uniform Trust Decanting Act: Colorado and California

In 2016, Colorado adopted the UTDA, which applies to all trusts created "before, on, or after August 10, 2016."[105] Under the UTDA, trustees may decant irrevocable and revocable trusts, but the UTDA does not apply to revocable trusts unless the settlor may only revoke with consent of either the trustees or an adverse interest holder.[106] Trustees may not decant trusts "held solely for charitable purposes," nor may trustees decant if the trust's terms expressly prohibit decanting.[107] If the trust does not expressly prohibit decanting, the decanting power is "deemed to be included" in all trusts subject to a trustee's fiduciary duties.[108] Colorado trustees have no duty to decant as the statute specifically excludes an affirmative duty to decant from general fiduciary duties.[109]

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applied only to trustees with a discretionary power, excluding trustees from administering trusts with mandatory distribution provisions. *See id.*; WYO. STAT. ANN. § 4-10-816.

[102] Act of Mar. 2, 2015, ch. 88, sec. 2, 2015 Wyo. Sess. Laws 294, 295–96 (codified as amended at WYO. STAT. ANN. § 4-10-816(b) (2019)).

[103] Act of Feb. 17, 2017, ch. 37, sec. 1, 2017 Wyo. Sess. Laws 69, 69 (codified as amended at WYO. STAT. ANN. § 4-10-816(a)(xxviii), (b) (2019)).

[104] Staehr, *supra* note 2, at 340.

[105] COLO. REV. STAT. ANN. § 15-16-905 (2018). California recently adopted the UTDA in a very similar manner to Colorado, but with some differences. *Compare* COLO. REV. STAT. ANN. §§ 15-16-906, -924, -929 (protecting trustees' reasonably relying upon the validity of distributions; specifying the second trust falls under the Colorado statute's authority; and clarifying the Colorado UTDA modifies, limits, or supersedes a federal electronic signatures act, respectively), *with* CAL. PROB. CODE § 19529 (West 2019) (clarifying that the California UTDA does not limit trustees' ability to petition a court for instructions).

[106] COLO. REV. STAT. ANN. §§ 15-16-905(1), -903(1). While this Comment specifically discusses trustees, any "authorized fiduciary" may decant. *Id.* § 15-16-902(3).

[107] *Id.* §§ 15-16-903(2), -903(3). A charitable purpose is one such as, for example, assisting the poor. For more information on charitable purposes, see *"Charitable" Purposes,* I.R.S., https://www.irs.gov/charities-non-profits/charitable-purposes (last visited Apr. 18, 2019).

[108] COLO. REV. STAT. ANN. § 15-16-904(2), (1).

[109] *Id.* § 15-16-904(2).

If the trust meets these prerequisites, Colorado trustees must next determine whether the trust grants "limited" or "expanded" distributive discretion.[110] If the distribution power is limited by an ascertainable or reasonably definite standard, then the trustee's power is a "limited" power.[111] If limited, decanting is permissible, but beneficiaries of the original trust must be granted "substantially similar" interests in the second trust.[112] Conversely, if the distribution power is not limited by such standards, then the trustee's power is an "expanded" power.[113] If expanded, the second trust must not include new beneficiaries, new "presumptive remainder beneficiar[ies] or successor beneficiar[ies]," nor "reduce or eliminate a vested interest."[114] The second trust may, subject to these limitations, retain or omit a power of appointment, create or amend a power of appointment if the powerholder is a current beneficiary or "a presumptive remainder beneficiary or successor beneficiary" of the original trust, or both.[115] Whether limited or expanded, the decanting power may be exercised to the extent the original trust provides "distributive discretion over part but not all of the principal."[116]

Finally, after determining whether the trustee's power is limited or expanded, the Colorado trustee must adhere to all other statutory rules.[117] First, the trustee must determine whether to modify the existing trust or transfer it into a new trust, and draft the trust document accordingly.[118] Second, the trustee must provide notice to the necessary parties: the settlor, every qualified beneficiary and holder of a presently exercisable power of appointment of the original trust, every person with the right to remove or replace the trustee, and each fiduciary of both the original and the second trust.[119] Unless waived by all parties, the trustee must

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[110] *Id.* §§ 15-16-911, -912; Jessica L. Broderick, *Modifying Irrevocable Trusts Under the New Colorado Uniform Trust Decanting Act*, 45 COLO. LAW. 55, 56 (Nov. 2016).

[111] COLO. REV. STAT. ANN. § 15-16-912(1). A reasonably definite standard would be one for health, education, maintenance, and support. Treas. Reg. § 1.674(b)-1(b)(5)(i) (2019). For more information on reasonably definite standards, see PHILIP M. LINDQUIST, DRAFTING DEFECTIVE GRANTOR TRUSTS 12 (July 11, 2012), https://www.americanbar.org/content/dam/aba/events/real_property_trust_estate/step/2012/materials/rpte_step_2012_07_11_Lindquist_Grantor_Trusts_The_Basics_Speech_Outline.pdf.

[112] COLO. REV. STAT. ANN. § 15-16-912(3).

[113] *Id.* § 15-16-911.

[114] *Id.* § 15-16-911(3).

[115] *Id.* § 15-16-911(4). What cannot be retained or omitted are "presently exercisable general power[s]" of appointment. *Id.*

[116] *Id.* §§ 15-16-911(6), -912(5). For further discussion on limited and expanded distributive discretions, see Broderick, *supra* note 110, at 56–57.

[117] Broderick, *supra* note 110, at 57.

[118] *Id.*

[119] *Id.*; COLO. REV. STAT. ANN. § 15-16-907(3)(a)–(h). If the trust is a charitable trust, the Attorney General must be notified as well. *Id.* § 15-16-907(3)(g). Additionally, if the trust's beneficiaries include minors, incapacitated persons, unborn individuals, or unknown or unreachable persons, a representative may need to be notified. *Id.* § 15-16-908.

wait sixty-three days after notice is given before decanting.[120] At the conclusion of this period, the trustee may decant in a document adhering to the formalities.[121] Additionally, while not required, a trustee may petition the court to declare the decanting a lawful exercise of the trustee's powers.[122]

On January 1, 2019, California adopted the Uniform Trust Decanting Act (CUTDA) and, although very similar, there are three notable differences between the UTDA and the CUTDA.[123] First, the CUTDA requires California trustees to give notice to minors and unascertained or unborn beneficiaries unless the trust document provides otherwise.[124] Second, the CUTDA compels trustees to include specific language—in bold—describing a beneficiary's decanting right.[125] Third, while California still restricts trustees from decanting in a manner that increases their compensation, the CUTDA clarifies the situations in which the restriction applies.[126] In all other respects, the CUTDA adheres to the standard UTDA provisions described above.[127]

C. Other Statutory Methods of Decanting

1. South Dakota

South Dakota adopted its decanting statute in 2007.[128] Providing substantial flexibility to trustees, South Dakota's decanting law is best understood through a discussion of its limitations.[129] Prior to decanting, a trustee must first determine

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[120] *Id.* § 15-16-907(6), (3).

[121] *Id.* § 15-16-910.

[122] Broderick, *supra* note 110, at 58; COLO. REV. STAT. ANN. § 15-16-909.

[123] CAL. PROB. CODE §§ 19501–19530 (Deering 2019). For facial differences between the Colorado and California UTDAs, *compare* COLO. REV. STAT. ANN. §§ 15-16-906, -924, -929, *with* CAL. PROB. CODE § 19529; 3 JOHN A. HARTOG & ALBERT G. HANDELMAN, CALIFORNIA WILLS & TRUSTS § 114.11[2] (Matthew Bender, ed. 2019).

[124] HARTOG & HANDELMAN, *supra* note 123, § 114.11[2]; CAL. PROB. CODE § 19507(d).

[125] HARTOG & HANDELMAN, *supra* note 123, § 114.11[2]; CAL. PROB. CODE § 19507(g)(5).

[126] HARTOG & HANDELMAN, *supra* note 123, § 114.11[2]; CAL. PROB. CODE § 19516(a), (b), (c).

[127] *Compare supra* notes 123–26 and accompanying text, *with supra* notes 110–22 and accompanying text.

[128] Thomas E. Simmons, *Decanting and its Alternatives: Remodeling and Revamping Irrevocable Trusts*, 55 S.D. L. REV. 253, 263 (2010). *See also* S.D. CODIFIED LAWS § 55-2-15 (2019). The South Dakota statute was "seemingly modeled after Delaware's decanting statutes." Simmons *supra.*

[129] Al W. King, III & Pierce H. McDowell, III, *A Bellwether of Modern Trust Concepts: A Historical Review of South Dakota's Powerful Trust Laws*, 62 S.D. L. REV. 266, 266 (2017); *see also* AL W. KING, III, S.D. TRUST CO., ARE IRREVOCABLE TRUSTS TRULY IRREVOCABLE? REFORMATION, MODIFICATION, DECANTING AND TRUST PROTECTORS, ADDRESS AT THE BERKS COUNTY ESTATE PLANNING COUNCIL (Mar. 16, 2016), *available at* http://www.berkscountyepc.org/assets/Councils/BerksCountyEPC-PA/library/00119813.PDF.

whether the trust at issue is a testamentary, irrevocable, or revocable trust.[130] If the trust is either testamentary or irrevocable, decanting is permitted.[131] Trustees must then determine whether decanting is justified under the circumstances after considering the original trust's purpose, the second trust's terms, and any consequences of decanting.[132]

If the trust may be decanted and the trustee determines that decanting is justified under the circumstances, a trustee is permitted to decant subject to limitations on the form of the second trust.[133] The second trust cannot include any beneficiaries whom the original trust's trustees could not have exercised their power, either currently or upon a specified future event.[134] If trustees are beneficiaries "of the first trust or if a beneficiary of the first trust has a power to change the trustees," then the trustee is termed a "restricted trustee."[135] If trustees are restricted, the decanting may not result in a benefit to the trustee as a beneficiary, nor may it remove "restrictions on discretionary distributions to a beneficiary" unless limited by "an ascertainable standard based on or related to health, education, maintenance, or support."[136] Additionally, a restricted trustee may not decant if doing so increases distributions made from the second trust to either a restricted trustee or a beneficiary with the power to change trustees, unless limited by the same ascertainable standard.[137] Although legislative history on the issue is slim, it is undoubtable that the purpose of these limitations is to prevent trustees from abusing the decanting power for their benefit, either directly through an increased interest in the trust or by removing a beneficiary's power to force their removal.[138]

Regardless of whether they are restricted, trustees may not increase the vesting time of a beneficiary's remainder interest in the case of contributions treated as gifts.[139] They also may not reduce an income-beneficiary's interest if the trust is used for a marital deduction under federal tax law, a charitable remainder trust,

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[130] Akkerman, *supra* note 15, at 418; *see also* S.D. CODIFIED LAWS § 55-2-15.

[131] Akkerman, *supra* note 15, at 418; *see also* S.D. CODIFIED LAWS § 55-2-15.

[132] S.D. CODIFIED LAWS § 55-2-15. While the statute does not define what consequences must be considered by trustees prior to decanting, the consequences would likely include losing "grandfathered" status or triggering the generation-skipping transfer tax. *See id. See also generally* Thomas F. Committo, *IRS Issues Positive Ruling on Trust Decanting*, 71 J. FIN. SERV. PROF. 12, 12–15 (2017).

[133] S.D. CODIFIED LAWS § 55-2-15.

[134] *Id.* § 55-2-15(1).

[135] *Id.* § 55-2-15.

[136] *Id.* § 55-2-15(2).

[137] *Id.* § 55-2-15(3).

[138] *Cf. id.* § 55-2-15(2).

[139] *Id.* § 55-2-15(4); I.R.C. § 2503 (2019).

or a grantor retained annuity or unitrust.[140] If property under the original trust is subject to a presently exercisable power of withdrawal, trustees may not decant such property unless the second trust maintains the beneficiary's power over the property.[141] Finally, while trustees decanting into a second trust have the option to notify beneficiaries of their intent to decant, trustees modifying an existing trust are required to notify beneficiaries.[142]

2. New York

The settlor of an original trust may increase, limit, or wholly prohibit decanting through the trust's terms.[143] New York's statute can be broken into three categories: (1) rules affecting only trustees with "unlimited discretion"; (2) rules affecting only trustees "without unlimited discretion"; and (3) rules affecting both.[144] With respect to trustees with unlimited discretion to invade trust principal (unlimited trustees), the decanting power may be exercised in favor of any combination of the beneficiaries of the original trust.[145] Additionally, when creating the second trust, unlimited trustees may grant discretionary powers of appointment to one or more beneficiaries of the original trust.[146] This power, however, is limited as to who may be excluded from the class of the permissible appointees.[147] Finally, if the original trust describes beneficiaries by class, the second trust may include all "present and future members of such class."[148]

Next, New York Estates, Powers and Trusts Law § 10-6.6(c) outlines the rules affecting trustees without unlimited discretion (limited trustees).[149] While limited trustees may decant, their ability to decant is more limited than unlimited trustees because they may not add or remove beneficiaries of the second trust who were not beneficiaries of the original trust in the same manner unlimited

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[140] S.D. CODIFIED LAWS § 55-2-15(6). A unitrust is one where there is no delineation between income and corpus, directing trustees to distribute a percent of total trust assets to the beneficiaries. Kenneth W. Bergen, *Current Trust Developments: Multiple Trusts/Reformation/Voting Control/Unitrust*, 4 REAL PROP. PROB. & TR. J. 182, 187 (1969).

[141] S.D. CODIFIED LAWS § 55-2-15(7).

[142] Akkerman, *supra* note 15, at 418; *see also* S.D. CODIFIED LAWS §§ 55-2-15, -18.

[143] *See* N.Y. EST. POWERS & TRUSTS LAW § 10-6.6 (Consol. 2019).

[144] Joseph T. La Ferlita, *New York's Newly Amended Decanting Statute Typifies Trend Toward Greater Flexibility*, 26 PROB. & PROP. 34, 36–37 (2012); N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b), (c), (d).

[145] N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b).

[146] *Id.* § 10-6.6(b)(1).

[147] *Id.* § 10-6.6(b)(2)–(3) (including "one or more of the beneficiary, the creator, or the creator's spouse, or any of the estates, creditors, or creditors of the estates of the beneficiary, the creator or the creator's spouse").

[148] *Id.* § 10-6.6(b)(4).

[149] *Id.* § 10-6.6(c).

trustees may do so.[150] Limited trustees must include the exact language in the original trust authorizing distribution of income or invasion of principal.[151] If the trust's term is extended for a period beyond which the original trust would have terminated, however, the limited trustee may provide unlimited discretion during the subsequent term.[152] Moreover, if the original trust is for the benefit of a class of beneficiaries, or if it provides a power of appointment to a beneficiary, then the second trust must include the same beneficiaries and powers of appointment.[153]

Finally, § 10-6.6(d) through (t) outline the rules impacting unlimited and limited trustees.[154] Generally, if a single trust includes a mix of limited and unlimited trustees, the unlimited trustees may exercise the decanting power over the trust notwithstanding the existence of limited trustees.[155] The decanting power may be exercised whether a current need exists under the original trust's terms.[156] To decant, trustees must give notice to all persons with an interest in the trust in writing or by seeking court approval.[157] If trustees give notice, the decanting becomes effective either thirty days following service or once all persons entitled to notice consent by writing.[158] Prior to decanting, the trustee must determine a number of things, including whether decanting adheres to her fiduciary duties, whether decanting is a decision that a "prudent person" would make under "the prevailing circumstances," and whether any negative tax implications would result.[159] Ultimately, trustees may not, absent court approval, decant if the second trust increases the trustee's compensation.[160]

3. Florida

Florida's decanting statute was intended to be an addition to, rather than a replacement of, the state's preexisting common law.[161] The Florida statute, similar to New York's, is split into three parts: (1) rules applying to trustees with "absolute power"; (2) rules applying to trustees without such power; and (3) rules applying to both.[162] If trustees with absolute power seek to decant, they may only do so

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[150] *See* La Ferlita, *supra* note 144, at 37; N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(c).

[151] N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(c)(1).

[152] *Id.* § 10-6.6(c)(2).

[153] *Id.* § 10-6.6(c)(3), (4).

[154] *Id.* § 10-6.6(d)–(t).

[155] *Id.* § 10-6.6(f).

[156] *Id.* § 10-6.6(g).

[157] *Id.* § 10-6.6(j), (j)(1).

[158] *Id.* § 10-6.6(j)(1).

[159] *Id.* § 10-6.6(h), (o).

[160] *Id.* § 10-6.6(q).

[161] FLA. STAT. § 736.04117(11) (2018).

[162] *Id.* § 736.04117(1)(a), (2)–(11).

if the second trust maintains the same beneficiaries and does not decrease any vested interest.[163] Trustees may retain or omit powers of appointment unless the power is a presently exercisable general power.[164] Additionally, trustees may create or modify powers of appointment if the powerholder is a current beneficiary of the original trust or, if not a current beneficiary, if the "exercise of the power of appointment may take effect only after the power holder becomes, or would have become if then living, a current beneficiary" of the original trust.[165] The permissible objects of created or modified powers may differ from the original trust's identified class.[166]

Alternatively, trustees without the absolute power to invade trust corpus may decant subject to further limitations.[167] Such trustees must maintain a "substantially similar" interest in the second trust as compared to beneficiaries' interests in the original trust.[168] Trustees may not create, modify, or remove any powers of appointment by decanting unless the term of the second trust is extended beyond the original trust's term.[169] If the term is extended beyond the period in which the original trust would have terminated, trustees may include language in the second trust granting absolute power to invade trust principal and to create a power of appointment.[170] Regardless of the power granted to the trustee in the original trust, the Florida statute outlines certain regulations for trustees.[171] Trustees may not decant if it would result in contributions to the trust that fail to qualify for, or would reduce, a tax benefit.[172]

Any exercise of decanting must be in a writing, signed, and acknowledged by trustees exercising their decanting power.[173] The statute prohibits trustees from utilizing their decanting power to increase their compensation or to insulate themselves from liability through indemnification.[174] If choosing to decant, trustees must give notice to all beneficiaries, anyone with the power to remove or replace the trustee of the original trust, and the original trust's settlor and trustees.[175] Finally, Florida trustees have no fiduciary duty to decant.[176]

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[163] *Id.* § 736.04117(2)(a).

[164] *Id.* § 736.04117(2)(b)(1)–(2).

[165] *Id.* § 736.04117(2)(b)(3)–(4).

[166] *Id.* § 736.04117(2)(c).

[167] *Id.* § 736.04117(3).

[168] *Id.* § 736.04117(3)(a).

[169] *See id.* § 736.04117(3)(b)–(d).

[170] *Id.*

[171] *Id.* § 736.04117(4)–(11).

[172] *Id.* § 736.04117(4)(a).

[173] *Id.* § 736.04117(6).

[174] *Id.* § 736.04117(7)(d)(1)–(2).

[175] *Id.* § 736.04117(8)(a).

[176] *Id.* § 736.04117(10).

	Legal Source	Fiduciary Duty to Decant	Notice to Beneficiaries Required?	Can Terms of Trust Prohibit Decanting?	Liability for Decanting Trustees
Colorado[177]	Colo. Rev. Stat. Ann. §§ 15-16-901 to -930 (2018)	No	Yes, subject to exceptions	Yes	Reasonable reliance standard
Florida[178]	Fla. Stat. § 736.04117 (2018)	No	Yes	Yes	Unclear
Massachusetts[179]	Common Law	Maybe	No	Yes	Unclear
New York[180]	N.Y. Estates, Powers and Trusts Law § 10-6.6(b) to (t) (Consol. 2019)	No	Yes	Yes	Likely none if prudent under the circumstances
South Dakota[181]	S.D. Codified Laws § 55-2-15 (2019)	Maybe	No	Yes	Limited if good faith
Wyoming[182]	Wyo. Stat. Ann. §§ 4-10-816(a)(xxviii), (b) (2019)	Maybe	No	Yes	None if good faith

[177] COLO. REV. STAT. ANN. §§ 15-16-904, -907(3)(b) (2018). Requiring notice be excused when there is a "beneficiary who is a minor and has no representative or to a person that is not known to the fiduciary or is known to the fiduciary but cannot be located by the fiduciary after reasonable diligence." *Id.* § 15-16-907(4). Moreover, if the trustee acts with "reasonable care" in attempting to comply with this requirement, the decanting is valid even if the trustee failed to provide notice to a required party. *Id.* §§ 15-16-907(8), -903(3), -906, -911 to -912.

[178] FLA. STAT. § 736.04117(2)–(3), (8), (10).

[179] Because Massachusetts favors the settlor's intent as evidenced by the terms of the trust, this chart's contents are only true insofar as the trust terms do not require otherwise. *See* Morse v. Kraft, 992 N.E.2d 1021, 1026 (Mass. 2013); Ferri v. Powell-Ferri, 72 N.E.3d 541, 543–44 (Mass. 2017).

[180] N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(b)–(c), (h), (l)–(m).

[181] Comment (a) to RESTATEMENT (THIRD) OF TRUSTS § 70 (AM. LAW INST. 2018) has been used by some courts, hinting at a fiduciary duty to use all things available to do their job. *See, e.g.*, *In re* Admin. of the Lee R. Wintersteen Revocable Trust Agreement, 2018 S.D. 12, ¶ 14, 907 N.W.2d 785, 790 (2018). *See also* S.D. CODIFIED LAWS §§ 55-2-10, -15, -18 (2019).

[182] *See supra* notes 96–104 and accompanying text; WYO. STAT. ANN. §§ 4-10-816(a)(xxviii), (b) (2019).

IV. UTILIZING DECANTING

Given trustees' breadth of discretion in Wyoming to modify a trust through decanting, current federal transfer tax provisions should encourage trustees to reconsider the estate plans they manage.[183] Such provisions include the doubling of the estate tax exemption from $5.6 million for individuals and $11.2 million for married couples effective in 2017 to $11.2 million for individuals and $22.4 million (marked for inflation) for married couples beginning in 2018.[184] Of the above-mentioned states, only Florida, South Dakota, and Wyoming do not impose an income tax on nongrantor trusts.[185] Unless the situs of the trust is located within one of these jurisdictions, a trust's potential goal to minimize tax exposure is likely frustrated to the detriment of the settlor, the beneficiaries, and the fiduciary.[186] Regardless of whether a trust is already within such jurisdictions, trusts may have been crafted before the effective date of current beneficial statutes applicable to trusts restricting their ability to take advantage of permissible statutory trust provisions.[187] Additionally, even if a trust has its situs in such jurisdictions and the trust is drafted to take full advantage of current trust laws, changing circumstances—whether administrative, beneficiary related, practical, or other reasons—may necessitate a different trust form.[188] Finally, if a trust's situs is within a jurisdiction that creates a fiduciary duty to decant, trustees may face liability for the failure to decant.[189] This section, therefore, discusses three trust forms into which Wyoming trustees may decant to more efficiently manage a trust's corpus.[190]

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[183] *See generally* Rebecca Sallen, *Tax Cuts and Jobs Act: What Planners Need to Discuss with Their Clients*, THE LEGAL INTELLIGENCE (Feb. 12, 2018), https://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2018/02/12/tax-cuts-and-jobs-act-what-estate-planners-need-to-discuss-with-their-clients/?slreturn=20180626114856 (pointing to the Tax Cuts and Jobs Act changes to estate taxes, including creative uses of powers of appointment and increased exemption amounts); Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 1, 131 Stat. 2054 (2017) [hereinafter TCJA] (codified as amended in scattered sections of 26 U.S.C.). Many provisions of the TCJA sunset in 2026. *See generally id.*

[184] Sallen, *supra* note 183; *see* 26 U.S.C. § 2010(c)(3)(A), (C) (2019).

[185] Richard W. Nenno, *Minimizing or Eliminating State Income Taxes on Trusts*, *in* EST., TAX & PERS. FIN. PLAN. UPDATE 6 (Edward F. Koren, ed., 2018), *available at* https://www.wilmingtontrust.com/repositories/wtc_sitecontent/PDF/Minimizing-or-Eliminating-State-Income-Taxes-on-Trusts.pdf; *see also* Reimer, *supra* note 2, at 176–77.

[186] *Cf.* Reimer, *supra* note 2, at 176.

[187] *See infra* notes 192–293 and accompanying text.

[188] *See, e.g.*, *infra* notes 203–08 and accompanying text.

[189] *See infra* notes 322–36 and accompanying text. These reasons, however, require an evaluation that is beyond the scope of this Comment.

[190] *See supra* notes 183–89 and accompanying text; *infra* notes 191–293 and accompanying text. While this Comment discusses how decanting can help utilize these trusts, this Comment only analyzes the trusts under Wyoming decanting law.

A. Type of Trust

Many uses for decanting exist in Wyoming, but this Comment focuses on three in particular, which are, in order of complexity, Asset Protection Trusts (APT), Qualified Terminable Interest Property Trusts (QTIP), and Grantor Retained Annuity Trusts (GRAT).[191]

1. Asset Protection Trusts

A staple of Wyoming trust law, the APT exists in only a minority of states.[192] Of the states discussed above, only Wyoming and South Dakota have statutes authorizing APTs.[193] APTs generally take the form of "a discretionary irrevocable trust where the grantor/settlor is a permissible beneficiary."[194] APTs implicate public policy issues—such as the potential for doctors to utilize APTs to shield their personal assets from malpractice creditors—but Wyoming and South Dakota permit APTs notwithstanding such concerns.[195] Wyoming's APT statutes prohibit creation of an APT if creation would violate the Uniform Fraudulent Transfers Act.[196] Additionally, Wyoming's APT statutes require any APT creation to be accompanied by a "qualified transfer affidavit," stating that the settlor is not creating the APT to defraud any existing or expected creditors.[197] Absent clear and convincing proof of a fraudulent transfer, APTs allow trustees to insulate trust corpus from attachment by creditors.[198]

APTs are beneficial to trustees for various reasons, including tax planning techniques, protection from creditors, and control by the settlor.[199] Principally, APTs allow the settlor to "enjoy[] the fruits of the trust assets" while not having

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[191] *See supra* notes 183–89 and accompanying text; *infra* 191–293 and accompanying text.

[192] Staehr, *supra* note 2, at 311. States allowing APTs include Alaska, Delaware, Hawaii, Michigan, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming. For more information on APTs in states other than Wyoming, see Shaftel, *supra* note 2.

[193] *See* WYO. STAT. ANN. §§ 4-10-505, -510 to -523 (2019); S.D. CODIFIED LAWS §§ 55-16-1 to -17 (2019).

[194] King & McDowell, *supra* note 129, at 282.

[195] Patricia Cohen, *States Vie to Shield the Wealth of the 1 Percent*, N.Y. TIMES, Aug. 8, 2016, at B1.

[196] WYO. STAT. ANN. § 4-10-517. The Uniform Fraudulent Transfers Act generally prohibits transfers that would otherwise prevent a lawful creditor from collecting upon incurred debts. *See* WYO. STAT. ANN. §§ 34-14-201 to -212.

[197] WYO. STAT. ANN. § 4-10-523. For an example of a court nullifying an APT, finding the settlors created the APT to defraud creditors, see *Toni 1 Trust v. Wacker*, 413 P.3d 1199 (Alaska 2018).

[198] *See, e.g.*, WYO. STAT. ANN. §§ 4-10-514, -517.

[199] *See* KATHRYN G. HENKEL & JUDITH K. TOBEY, ESTATE PLANNING AND WEALTH PRESERVATION S53-11 to -12 (2003 & Supp. 2019); Michael P. Panebianco, *10 Non-Tax Reasons You Should Have an Estate Plan: When All is Said and Done, Control is the Most Important*, N.H. BUS. REV. 24, 24 (July 6, 2018).

a "legal right to transfer title or direct proceeds to creditors."[200] In addition to control, a trustee's authority to distribute trust corpus to the settlor does not alone cause the trust corpus to be included within the taxable estate of the settlor.[201] Although APTs created under Wyoming law provide significant asset protection, it is uncertain how courts will reconcile public policy concerns with self-settled APTs.[202]

Given the insulating benefits of APTs, trustees should consider decanting into an APT in certain circumstances.[203] While Wyoming settlors, trustees, or trust protectors can make an election to transform an irrevocable trust into an APT, the transformation could ultimately require a party to petition the court.[204] In Wyoming, if the trustee of the original trust decants, the trustee may maintain her position as the trustee in the second trust (creating an APT) or appoint the settlor as the trustee or co-trustee (creating a "self-settled" APT).[205] Regardless of the trustee's position, the decanting must meet Wyoming's legal requirements.[206] The second trust must be irrevocable, state that it is a "qualified spendthrift trust" under § 4-10-510, expressly incorporate Wyoming law, and provide that the settlor's interest is subject to a spendthrift provision under § 4-10-502.[207] If trustees determine it is appropriate, they may include various provisions, such as a settlor's veto power over distributions, certain powers of appointment, and the settlor's right to add or remove trustees without fear of being deemed revocable by Wyoming courts.[208]

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[200] Eric Boughman, *Practical Considerations for Using Self-Settled Trusts*, FORBES (Feb. 9, 2017, 8:00 AM), https://www.forbes.com/sites/forbeslegalcouncil/2017/02/09/practical-considerations-for-using-self-settled-trusts/#7a8ab67b2844 ("[T]he grantor may 'have his cake (protection) and eat it (the assets) too.'").

[201] I.R.S. Priv. Ltr. Rul. 200944002, at 10 (July 15, 2009).

[202] *See, e.g.*, Bogert et al., *supra* note 78, § 223 ("[T]he validity of the domestic asset protection trusts has not yet been challenged in a court of a state that does not enforce spendthrift provisions for the settlor."); Brendan Duffy, *In States We Trust: Self-Settled Trusts, Public Policy, and Interstate Federalism*, 111 NW. U. L. REV. 205, 218 (2016) (citing a lack of plaintiffs to sue, settlements saving court disposition, and court inhibition to determine issues on APTs with hope state legislatures would settle the debate).

[203] *See infra* notes 193–202 and accompanying text.

[204] *See* WYO. STAT. ANN. §§ 4-10-516, -111, -112.

[205] WYO. STAT. ANN. § 4-10-513(b) ("A transfer by a trustee that is not a qualified trustee to a trustee that is a qualified trustee shall be treated as a qualified transfer.").

[206] *See infra* notes 207–08 and accompanying text.

[207] WYO. STAT. ANN. § 4-10-510(a)(i)–(iii).

[208] *Id.* § 4-10-510(a)(iv)(A), (B), (G).

2. The Qualified Terminable Interest Property Trust

The Internal Revenue Code (Code) imposes a tax "on the transfer of the taxable estate of every decedent."[209] If transfers exceed $1,000,000 and the transferor has no available deductions or exclusions, for example, the Code imposes a tax of $345,800 plus 40% of the value of the gift in excess of $1,000,000.[210] For married clients wishing to maintain control of property after death while simultaneously avoiding any estate tax liability for the assets passing through the estate of the first-to-die spouse and ensuring the surviving spouse receives a benefit from such assets for the remainder of her lifetime, a special tax election is available.[211] This election may, however, only be made in conjunction with the creation of a QTIP.[212]

The primary purpose of a QTIP trust is to utilize the marital deduction while allowing the decedent to maintain control over the ultimate disposition of the assets held by the QTIP.[213] The QTIP is a useful tool for managing estates, as it provides the ability to craft efficient tax planning and offers relative flexibility.[214] For example, QTIPs allow clients to weigh the importance of creating a credit shelter trust with the non-elected portion of the exclusion amount (achieved through a partial QTIP election) against the importance of obtaining a stepped-up tax basis on property upon the surviving spouse's death (achieved through a full QTIP election).[215] Further, if the couple's estate value is under the $22,400,000 threshold, then a QTIP simplifies the estate planning strategy by controlling the disposition of assets with a single trust.[216] Once in a QTIP, the surviving spouse's creditors cannot reach the trust assets.[217] Property within a QTIP, however, is

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[209] I.R.C. § 2001(a) (2019).

[210] *Id.* § 2001(c). Deductions exist for such transfers, including the option to transfer the property during life, but discussion of such transfers is hardly useful for Wyoming practitioners. *Cf. id.* § 2001.

[211] *Id.* § 2056(b)(7). This election is made on IRS Form 706. *See About Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return,* I.R.S., https://www.irs.gov/forms-pubs/about-form-706 (last visited Apr. 2, 2019) (providing links to pdf *Form 706* and pdf *Instructions for Form 706*).

[212] HENKEL & TOBEY, *supra* note 199, at 50-2 to -6.

[213] Dana R. Irwin, *Removing the Scaffolding: The QTIP Provisions and the Ownership Fiction*, 84 NEB. L. REV. 571, 581–82, 584 (2005).

[214] Louis S. Harrison, *Estate & Succession Planning Corner: The Orwellian Look to the Future of Our Practice, or At Least Our Estate Planning Practice in 2018*, J. PASSTHROUGH ENTITIES 13, 14 (Nov./Dec. 2018).

[215] *Id.*

[216] *Id.* at 14 n.1. A single QTIP also guards against costly trustee mistakes, such as causing the trust to lose the tax savings it was created to utilize. *See* Alexander A. Bove Jr., *Should Your Client's GRAT, CRUT, SLAT, ILIT, QPRT, MQT, DAPT, or SNT Have a Protector?*, 20 PROB. & PROP. MAG. 54, 54 (2016).

[217] David Pratt & Nathan R. Brown, *Estate Planning in 2015 and Beyond: No Longer a One-Size-Fits-All Approach*, 89 FLA. B.J. 24, 28 (Feb. 2015).

subject to tax upon the surviving spouse's death on appreciation accumulated after the original transfer into the QTIP.[218]

Decanting into a QTIP is advisable only if the original trust is one in which the trust's assets would be included within the settlor's estate upon death.[219] If, upon the death of a settlor, a trustee of an existing trust settled by the decedent-spouse wishes to make use of the marital deduction, then decanting into a QTIP may be beneficial.[220] If so, the second trust must meet the QTIP requirements under the Code: the surviving spouse must receive all trust income, must be the sole beneficiary during her lifetime, and the decedent-spouse, or her executor, must make an election for QTIP treatment.[221] With the exception of the election, each of the QTIP provisions command the trust document to specify certain provisions as stated in the Code.[222] Those provisions include requiring the trustee to have authority to create, in further trust, a second trust granting the surviving spouse all trust income for his or her sole benefit during life.[223] Under Wyoming law, the trustee's broad powers appear to permit decanting into a QTIP trust unless the original trust expressly states otherwise.[224]

If trustees are administering a QTIP, that too may be decanted if the trustees determine it is needed.[225] Trustees may decant to a QTIP trust with a spendthrift provision, prohibiting the surviving spouse or beneficiaries from assigning their interests, which may add more protection from "subsequent husbands, subsequent divorces, [surviving spouse's] creditors, overly importunate charities, family members," or other creditors unforeseen at the time of drafting.[226] Additionally, trustees may decant to modify the spouse's right to invade trust principal, or to add a testamentary limited power of appointment.[227] If choosing to decant an existing QTIP, however, trustees should ensure that the second trust—or the original trust after modification—qualifies for the marital deduction at that time or whether a subsequent election must be made.[228]

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[218] *Id.* However, such tax may be circumvented through a combined approach of a QTIP and a grantor trust. *Id.*

[219] *See generally* Irwin, *supra* note 213, at 581–82, 584.

[220] *See supra* notes 213–18 and accompanying text.

[221] I.R.C. § 2056(b)(7)(B) (2019); *see also* HENKEL & TOBEY, *supra* note 199, at 50-2 to -6.

[222] I.R.C. § 2056(b)(7)(B); *see also* HENKEL & TOBEY, *supra* note 199, at 50-2 to -6.

[223] I.R.C. § 2056(b)(7)(B); *see also* HENKEL & TOBEY, *supra* note 199, at 4-5 to -12.

[224] *Cf.* Staehr, *supra* note 2, at 340 (noting that Wyoming trustees have broad powers).

[225] HENKEL & TOBEY, *supra* note 199, at 4-10 to -12.

[226] *Id.* at 4-10. For a more thorough discussion of spendthrift provisions, see *supra* note 78 and accompanying text.

[227] *Id.* at 4-11, S4-16 to -18.

[228] I.R.C. § 2056.

3. Grantor Retained Annuity Trust

The final trust type into which Wyoming trustees may wish to decant is the Grantor Retained Annuity Trust (GRAT).[229] Existing caselaw neither supports nor negates the proposition that trustees may decant an irrevocable trust into a GRAT.[230] Regardless, logic supports the possibility and the immense benefits spur the desire for Wyoming trustees to decant into a GRAT.[231]

The GRAT was created in 1990 as the result of Congress's repeal of § 2036(c) of the Code to prevent the rampant use of the Grantor Retained Income Trust (GRIT) to make inter vivos gifts.[232] A grantor established a GRIT by transferring property into an irrevocable trust, retaining a right to income for some period of years, and granting the remainder to the remaindermen.[233] The grantor's transfer into the GRIT was taxable in the amount of the value of the remainder interest as defined under the Internal Revenue Service (IRS) valuation tables.[234] This benefited grantors because the remainder interest's present-day value took into account the time-value of money and was significantly lower than the fair market value of the property.[235]

For example, *A* transfers property with a fair market value of $100,000 into a GRIT, retaining income for a term of ten years, at which time the GRIT is to terminate and distribute to *A*'s child, *B*.[236] *B*'s remainder interest is valued—taking into account the time-value of money—at $30,000.[237] Gift tax is due upon *A*'s transfer, but *A* only paid tax upon the $30,000 remainder interest *B* receives instead of the $100,000 fair market value.[238] As illustrated in this example, the GRIT allows grantors to make more money for the remaindermen than a comparable outright gift—a possibility Congress sought to limit.[239]

Under the post-1990 tax regime, § 2702 of the Code established the GRAT and the Grantor Retained Unitrust (GRUT), allowing individuals to remove

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[229] *Id.* § 2702.

[230] *See infra* notes 285–88 and accompanying text.

[231] *See infra* note 287 and accompanying text.

[232] Mitchell M. Gans, *GRIT's, GRAT's and GRUT's: Planning and Policy*, 11 VA. TAX REV. 761, 764 (1992).

[233] *See* Gans, *supra* note 232, at 765, 765 n.1 & 3.

[234] *Id.* at 765; I.R.C. § 7520.

[235] *Cf.* Wheeler v. United States, 116 F.3d 749, 758 (5th Cir. 1997) (discussing an example where the fee simple value of the property was $100,000 and the value of the remainder interest, calculated according to the valuation tables, no more than $30,000).

[236] *See* Gradow v. United States, 11 Cl. Ct. 808, 815 (1987).

[237] *Id.*

[238] *Id.*; Gans, *supra* note 232, at 763 n.3.

[239] Gans, *supra* note 232, at 763.

value from their estates in a manner similar to the GRIT.[240] Section 2702 of the Code determines whether the transfer of an interest in trust to, or for the benefit of, a family member is a gift that qualifies for the section's valuation treatment.[241] To qualify, the transfer must be a complete gift.[242] The transfer also must not be one that would qualify as a Qualified Personal Residence Trust (QPRT) or a charitable remainder trust.[243]

Second, the Code distinguishes treatment between qualified and non-qualified interests.[244] Qualified annuity interests are those allowing the right to receive annuity payments.[245] The individual retaining an interest, deemed the "holder" by the Code, includes the transferor and her spouse, the lineal descendants of either, and any spouses of such descendants.[246] The qualified annuity interest cannot be one that includes a right of withdrawal, nor may it be paid through the issuance of "a debt instrument, option, or other similar financial instrument."[247] Nor may the "fixed payment" include any income generated by the trust property.[248] The amount of the annuity must be fixed, but it may periodically change to the extent the amount changed is not in excess of 120% of the stated amount in the previous year.[249] If the interest is qualified, then the value of the retained interest is calculated according to the § 7520 valuation tables.[250] Assuming the transfer is non-exempt and the retained interest is a qualified interest, § 2702 of the Code applies.[251]

Section 2702's general rule is that, "by setting value of the retained interest at zero," the remainder interest transferred and the full fee interest are valued the

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[240] I.R.C. § 2702 (2019). This term can be for life or for a term of years shorter than life. *Id.* However, the life term is "never a good idea." HENKEL & TOBEY, *supra* note 199, at 22-2. Section 2702 is merely a valuation provision. I.R.C. § 2702(a). This Comment only discusses the requirements of the GRAT, but the same general Code and Regulation apply to GRUTs.

[241] I.R.C. § 2702(a)(1); *see also* Treas. Reg. § 25.2702-2(d)(1) to (6) (2019).

[242] I.R.C. §§ 2702(a)(3)(A)(i), (a)(3)(B). A "complete gift" requires the grantor to part with "dominion and control" so that she cannot change the disposition of the property held in trust. Treas. Reg. § 25.2511-2(b).

[243] I.R.C. § 2702(a)(3)(A)(i), (ii). For further information on the QPRT and the charitable remainder trust, see Treasury Regulation § 25.2702-5 and § 644 of the Code, respectively.

[244] I.R.C. § 2702(a)(2).

[245] *Id.* § 2702(b)(1); Treas. Reg. § 25.2702-3(b)(1)(i).

[246] I.R.C. §§ 2701(e)(2), 2702(a)(1).

[247] Treas. Reg. § 25.2702-3(b)(1)(i).

[248] *Id.* § 25.2702-3(b)(1)(iii).

[249] *Id.* § 25.2702-3(b)(1)(ii)(A).

[250] I.R.C. § 2702(a)(2)(B). Alternatively, if the retained interest is not a qualified interest, then the value is zero. *Id.* § 2702(a)(2)(A).

[251] *Id.* § 2702(a); Treas. Reg. § 25.2702-1(a).

same.[252] If the interest is not a qualified interest, then the value of the gift is the entire value of the transferred property.[253] If the retained interest is a qualified annuity interest, however, then the amount of the gift is determined by subtracting the value of the retained interest from the value of the transferred property.[254] While the current valuation of the property transferred, its fair market value, is simple enough to calculate, the heart of § 2702 is its valuation of a retained interest.[255] If the retained interest is a qualified annuity, then the value of the retained interest is calculated by the § 7520 valuation tables.[256] When compared to granting a gift outright, § 2702's treatment of qualified annuity interests reduces the grantor's gift tax burden by the value of the retained interest, as opposed to paying gift tax on the fair market value of the gift.[257]

The GRAT, allowed if § 2702 applies, is a beneficial estate planning technique because it removes property from the grantor's estate, triggering little to no gift tax in the process.[258] This is true, however, only if the grantor survives the term chosen and the transferred property appreciates faster than the § 7520 rate.[259] When the grantor transfers property to the GRAT, she states a term of years to retain an annuity.[260] If the grantor outlives the term's expiration, then upon completion of the term the assets will pass to the named beneficiaries either in further trust or outright.[261] If the grantor dies prior to the expiration of the term, the entire GRAT corpus is included within the grantor's estate.[262] Maximum tax savings, therefore, require the grantor to choose an annuity term shorter than the grantor's life expectancy.[263]

If the grantor survives the term and the trust property passes to the remaindermen, the GRAT's appeal comes to fruition only if the transferred property

[252] Wheeler v. United States, 116 F.3d 749, 767 (5th Cir. 1997); I.R.C § 2702(a)(2).

[253] Treas. Reg. § 25.2702-1(b).

[254] *Id.*

[255] *Cf.* HENKEL & TOBEY, *supra* note 199, at 22-2 to -26.

[256] Treas. Reg. § 25.2702-2(b); I.R.C. § 7520.

[257] Jonathan G. Blattmachr & Diana S.C. Zeydel, *Evaluating the Potential Success of a GRAT Against Competing Strategies to Transfer Wealth,* TAX MGMT. MEMO. 19, 19–20 (Jan. 23, 2006).

[258] *Id.*

[259] *Id.*

[260] I.R.C. § 2702(c)(3).

[261] HENKEL & TOBEY, *supra* note 199, at 22-2.

[262] *See, e.g.*, T.D. 9414, 2008-2 C.B. 454, 8 (2008); I.R.S. Priv. Ltr. Rul. 9451056, 17 (Sept. 26, 1994). For more information, see *generally* Michael Whitty, *Repercussions of Walton Estate Tax Inclusion of GRAT Remainder*, 19 PROB. & PROP. 12, 17 (May/June 2005); Blattmachr & Zeydel, *supra* note 257, at 20.

[263] *See* Blattmachr & Zeydel, *supra* note 257, at 19–20. One method of planning for the grantor dying prior to the term completion—as well as the risk that the GRAT property does not outperform the § 7250 rate—is to utilize the parallel GRAT plan. *Id.* For further information on parallel GRAT plans, see *id.*

appreciates faster than the § 7520 rate.[264] This result ensues because the grantor computes her gift tax liability by subtracting the value of the retained interest from the value of the gift.[265] The value of the retained interest is stated on the GRAT's governing document, obtained by multiplying the term of the retained interest by the annual payments due.[266] The value of the gift is calculated at the end of the term when the GRAT corpus transfers to the remaindermen, obtained by compounding the initial fair market value of the gift annually by the § 7520 rate.[267] If the trust property appreciates at a higher rate than the retained interest, and the retained interest exceeded the fair market value of the property at the time of transfer, then the excess appreciation and corpus will pass to the remaindermen.[268] The gamble, however, is that the trust property could appreciate at a lower rate than the § 7520 rate.[269] Assuming the grantor retained an interest in excess of the initial fair market value of the transferred property, there will not be enough corpus in the trust to satisfy the annuity paid to the holder; with nothing left in the GRAT at the end of the term, the remaindermen get nothing.[270] Exacerbating such an injury, if the GRAT appreciates slower than the § 7520 rate, it is possible that a direct gift to the intended beneficiaries—including having to pay the applicable gift tax—would have resulted in less gift tax liability.[271]

For example, *K* is a fifty-year-old married woman with a combined estate presently valued at $22,000,000. One year ago, *K* purchased 10,000 shares of X-stock, a promising tech start-up company, for which she paid $5 a share. Over the past year, *K* watched the price of X-stock increase to $10 a share. Expecting X-stock to increase in value and wishing to take advantage of the Tax Cuts and Jobs Act of 2017's (TCJA) increased basic exemption amount, *K* transfers 10,000 shares of her X-stock into a GRAT. After consulting the IRS life expectancy tables—expecting she has 34.2 years remaining—*K*'s GRAT provides for a retained interest of $199,447.16 over a twenty-five-year term (receiving $7,977.89 annually).[272] At the completion of the term, the GRAT will

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[264] *Id.* ("[T]he GRAT captures for the remainder beneficiaries the outperformance not just on the remainder interest, but also on the funds that will be used to pay the annuity.").

[265] *See id.*

[266] *Id.*

[267] *Id.*

[268] *Id.*; Gans, *supra* note 232, at 800–03.

[269] Gans, *supra* note 232, at 833.

[270] Blattmachr & Zeydel, *supra* note 257, at 20–21.

[271] *Id.* (stating if, for example, the § 7520 rate was 5% and the GRAT earned less than 5%, but no less than 4%, "the remainder beneficiaries of the GRAT will receive less than if a direct gift . . . had been made.") *Id.*

[272] *See* Distributions from Individual Retirement Arrangements (IRAs), I.R.S. Pub. 590-B, 44–45 (2018) (Table I, Single Life Expectancy). Because the transferred property is stock expected to appreciate significantly, *K* may wish the GRAT to periodically increase the annuity. This scheme is

terminate and distribute to the benefit of *L*, the sole child of *K* and her husband, in further trust.[273]

Assuming *K* lives beyond the twenty-five-year term, *K* will pay no gift tax upon transfer of X-stock into the GRAT and the subsequent distribution to *L*. To calculate the tax burden, *K* will determine the value of the entire property, increased by the § 7520 rate for the term of years, at the time of transfer and subtract the amount of her retained interest.[274] *K*'s retained interest, as stated in the governing documents of the GRAT, is an annual right to $8,791.29 for twenty-five years.[275] The entire value of that retained interest over the course of the GRAT is $199,447.16.[276] Next, *K* will calculate the amount of the gift by compounding the $100,000 initial transfer by the § 7520 rate over twenty-five years. The current § 7520 rate for June 2019 is 2.8%.[277] The value of the gift, therefore, is $199,447.16.[278] Subtracting the retained interest from the value of the gift ($199,447.16 less $199,447.16), *K*'s transfer results in zero gift tax liability.[279]

If *K*, who already gifted an amount equal to her lifetime exclusion amount, made an outright gift of X-stock instead of utilizing the GRAT technique, the transfer would be treated as a taxable gift causing her to lose the use of a portion of her exemption.[280] To calculate the total gift tax due upon *K*'s transfer of 10,000 shares of X-stock to *L*, the first step is to determine the corresponding tax bracket with respect to the value of the gift.[281] Because *K* has used her entire lifetime exclusion amount, the Code states the $100,000 gift corresponds to a tax of

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lawful under § 2702 but, because it adds unnecessary complexity, it will not be used here. For further information on graduated annuities, see Treas. Reg. § 25.2702-3(b)(1)(ii)(A), (e) ex. 2 (2019).

[273] *See* HENKEL & TOBEY, *supra* note 199, at 22-2.

[274] *See id.* at 22-16.

[275] To obtain this figure, compound the initial transfer of $100,000 by the § 7520 rate of 2.8%, then divide the result by the 25-year GRAT term.

[276] To obtain this figure, compound the initial transfer of $100,000 by the § 7520 rate of 2.8%.

[277] I.R.S. Rev. Rul. 2019-04, tbl. 5 (Jan. 28, 2019); *Section 7520 Interest Rates*, I.R.S., https://www.irs.gov/businesses/small-businesses-self-employed/section-7520-interest-rates (last visited Mar. 4, 2019). For past § 7520 rates, see *Section 7520 Interest Rates for Prior Years*, I.R.S., https://www.irs.gov/businesses/small-businesses-self-employed/section-7520-interest-rates-for-prior-years (last visited Feb. 3, 2019). While the § 7520 rate is current as of publication, it changes monthly. For the current rate, see *Section 7520 Interest Rates*, I.R.S., https://www.irs.gov/businesses/small-businesses-self-employed/section-7520-interest-rates (last visited Apr. 24, 2019).

[278] For an online interest calculator, see *Compound Interest Calculator,* MONEYCHIMP, http://www.moneychimp.com/calculator/compound_interest_calculator.htm (last visited Apr. 12, 2019).

[279] *Id.*

[280] HENKEL & TOBEY, *supra* note 199, at 22-2.

[281] I.R.C. § 2001(c) (2019).

$18,200 plus 28% of that in excess of $80,000.[282] As calculated, the total tax liability *K* must pay upon transfer to *L* is $23,800.[283] Utilizing a GRAT, therefore, obtains greater tax savings than an outright gift.[284]

One application of the decanting power with respect to GRATs is allowing trustees the power to react to changed circumstances.[285] Specifically, decanting may be beneficial with respect to GRATs in two situations: decanting either an existing GRAT to modify provisions, or decanting an irrevocable trust into a GRAT.[286] While support exists for the proposition that trustees may decant an existing GRAT, it is unclear whether trustees may decant an irrevocable trust into a GRAT.[287] This Comment suggests a novel application of the Wyoming decanting power to benefit Wyoming settlors by modifying GRAT provisions.[288]

Trustees should decant existing GRATs in the face of changed circumstances or drafting errors.[289] Of the above-mentioned states, only South Dakota explicitly restricts trustees decanting a GRAT.[290] In South Dakota, trustees may not decant if the decanting reduces the income interest of any beneficiaries of a GRAT.[291] Practically, however, this restriction may exist in all decanting jurisdictions because a beneficiary would likely sue for the violation of some other fiduciary

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[282] *Id.*

[283] *Cf. id.* The total tax liability is calculated by adding $18,200 to 28% of the difference of $100,000 and $80,000. In equation form, total gift tax liability is calculated as such: $18,200 + (0.28 x ($100,000 - $80,000)) = $23,800.

[284] *Compare supra* note 283 and accompanying text, *with supra* note 279 and accompanying text. This assumes the property would have increased in value at a greater rate than the § 7520 rate because, if it did not, then there could be a time-value-of-money consideration potentially making an outright gift a more efficient transfer. *See infra* notes 235–38 and accompanying text.

[285] *See infra* notes 286–93 and accompanying text.

[286] *Cf.* Bove Jr., *supra* note 216, at 54. Other circumstances can occur, but this Comment limits its discussion to these two examples.

[287] *See infra* notes 289–93 and accompanying text. Decanting from an irrevocable trust into a GRAT, if possible, provides significant tax opportunities for income otherwise taxable to the irrevocable trust. *See generally* I.R.C. §§ 641, 671–677 (2019). The rate of that tax is dependent on a number of factors, including whether the trust is a grantor trust. *Id.* § 671–677. If the trust is a non-grantor trust, the TCJA amended § 1 of the Code providing a rate schedule for determining the income tax payable by the trust upon income generated by trusts. *Id.* § 1(j)(2)(E) (2019). This rate schedule sunsets in 2026. *Id.* § 1(j). For income generated between the years 2018 and 2025, the TCJA taxes income over $12,500 as $3,011.50 plus 37% of that over $12,500. *Id.* § 1(j)(2)(E). In addition to the income tax, the Code imposes a Net Investment Income Tax (NIIT) of 3.8% in certain circumstances. *Id.* § 1411(a). Just as GRATs freeze the estate by transferring income generated by estate assets to beneficiaries tax-free, so too may decanting from irrevocable trusts to GRATs allow trustees to freeze the trust assets. *Cf. supra* notes 232–84 and accompanying text.

[288] For potential uses of trust decanting with GRATs, see Broderick, *supra* note 110.

[289] *See generally* Bove Jr., *supra* note 216, at 54.

[290] S.D. CODIFIED LAWS § 55-2-15(6)(c) (2019).

[291] *Id.*

duty if the decanting reduced that beneficiary's income interests.[292] If trustees do not decrease the income interest of a GRAT, then decanting is lawful in South Dakota and practical in all other jurisdictions.[293]

B. Tax Consequences

Although decanting allows significant planning benefits, Wyoming trustees must be mindful of the tax consequences of decanting prior to acting upon their statutory authority.[294] The tax consequences of decanting are continually evolving, but some clarity exists from the IRS.[295] As of March 3, 2017, decanting, in and of itself, is a nonrecognition event if the interests in the first and second trust are "basically the same."[296] Private Letter Ruling (PLR) 201709020 addresses the consequences of a trustee decanting a trust created after 1985.[297] Pursuant to the terms of the trust, the trustee sought to divide the original trust into eight separate trusts for the benefit of the beneficiaries.[298] Prior to making any division, the trustee sought guidance on the tax consequences of such a division and distribution.[299] The IRS determined the resolution of the trustee's question hinged on whether the distribution was a material difference under *Cottage Savings Association v. Commissioner*.[300]

In *Cottage Savings*, the Supreme Court addressed whether Cottage Savings's exchange of its interests in one group of mortgages for another lender's interest in a separate group of mortgages was a recognition event.[301] Cottage Savings sought to treat the exchange as a recognition event so as to trigger losses built into its holdings of mortgages; but, for a recognition event to occur, there must

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[292] William P. Lapiana, *Balancing the Duty of Impartiality and Decanting to Eliminate an Interest*, 45 EST. PLAN. 41, 42 (2018). Functionally, decanting to reduce a beneficiary's interest in a GRAT could make the initial gift tax calculation incorrect, resulting in a potential IRS audit. *Cf.* HENKEL & TOBEY, *supra* note 199, at 22-16 to -26 (stating that the remainder beneficiary's interest is used to calculate gift tax liability, indicating that a change to the beneficiary's interest would change the gift tax calculation).

[293] S.D. CODIFIED LAWS § 55-2-15(6)(c).

[294] *See infra* notes 295–321 and accompanying text.

[295] Committo, *supra* note 132, at 15; I.R.S. Rev. Proc. 2019-03, 2019-01 I.R.B. 130 (Jan. 2, 2019).

[296] Committo, *supra* note 132, at 14; I.R.S. Priv. Ltr. Rul. 201709020, 1 (Sept. 12, 2016). A nonrecognition event is a tax-free disposition of property. *See generally* BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS, ¶ 44.1.1, Westlaw (database updated Mar. 2019).

[297] I.R.S. Priv. Ltr. Rul. 201709020, 36.

[298] *Id.* at 12.

[299] *Id.* at 13.

[300] *Id.* at 24–26; Cottage Savings Ass'n v. Comm'r, 499 U.S. 554, 562 (1991).

[301] *Cottage Savings Ass'n*, 499 U.S. at 556.

be a material difference in the exchange.[302] Although the Court agreed with the Commissioner's argument that the exchanged interests were substantially identical, the Court concluded there was a material difference between the exchanged mortgages notwithstanding the interests' similarities.[303] Because the two mortgages interests embodied "legally distinct entitlement[s]," there was an exchange triggering Cottage Savings's recognition of loss.[304]

The PLR utilized the *Cottage Savings* material difference test to determine whether a sale or exchange occurred upon division of the first trust into eight separate trusts.[305] The trustee sought to transfer non-S Corporation stock from the first trust into eight new trusts.[306] In applying the *Cottage Savings* test, the IRS asked whether the beneficiaries' pre-division and distribution interests were any different than their interests post-division and distribution.[307] As the first trust required any division into new trusts to be pro-rata, the IRS determined there was no material difference upon transfer—the division and distribution were non-recognition events.[308] Therefore, because there was no sale or exchange, the IRS held the decanting triggered neither capital gains tax to the trust nor income tax to the beneficiaries.[309] Further, because the transfer was by the trustee and not the grantor, the assets were not includable within the grantor's estate.[310]

Additionally, the IRS addressed how decanting may affect an exemption from the GST tax.[311] The Code imposes a tax upon any transfer to an individual two or more generations below the grantor (skip persons) or to a trust whose interest holders are either entirely skip persons or (if there is no current interest holder) the trust may only ever distribute property to skip persons.[312] Irrevocable trusts established before September 26, 1985, have grandfathered status, exempting the pre-dating trusts from the GST tax.[313] If the trust was created on or after

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[302] *Id.* at 559–62; *see also* Treas. Reg. § 1.1001-1(a) (2019).

[303] *Cottage Savings Ass'n*, 499 U.S. at 566–68.

[304] *Id.* at 568.

[305] I.R.S. Priv. Ltr. Rul. 201709020, at 24–26 (Sept. 12, 2016).

[306] *Id.* at 12.

[307] *Id.* at 24–26.

[308] *Id.*

[309] *Id.* at 14 ("[T]he pro-rata transfer of assets from Trust to the Article THIRD Trusts will not result in a sale or exchange, or other disposition, of any property for purposes of § 1001(a), and thus no gain or loss will be recognized by the beneficiaries or the trusts on the division for purposes of § 61(a)(3) or § 1001(c). We further conclude that the pro-rata transfer of assets from Trust into the Article THIRD Trusts is not a distribution under § 661 or § 1.661(a)-2(f) and therefore not included in the gross income of any Article THIRD trust beneficiary under § 662.").

[310] *Id.* at 35 ("[N]o part of Trust or any other trust under the trust agreement is includible in the gross estate of Grantor under §§ 2033, 2035, 2036, 2037, or 2038.").

[311] *Id.* at 16; *see also* Committo, *supra* note 132, at 15.

[312] I.R.C. §§ 2601, 2613(a) (2019).

[313] Treas. Reg. § 26.2601-1(b)(1)(i) (2019).

September 26, 1985, the trust may be exempted from GST tax by an allocation of the settlor's GST exemption.[314]

The trust at issue in PLR 201709020, created after the Code's 1985 imposition of the GST tax and, therefore, subject to the tax, was exempted by means of an allocation.[315] Similar to the capital gains and income tax analyses, the IRS concluded the division and distribution did not trigger any GST tax because the new trusts maintained the same beneficiaries in the same ratios.[316] Even if the trust had been created before September 26, 1985, decanting the trust would not necessarily have forfeited the grandfathered status.[317]

With the increased basic exemption amount under the TCJA, decanting provides trustees increased efficiency in managing a trust's corpus as long as trustees carefully avoid potential tax pitfalls.[318] The complex tax consequences of decanting should not discourage Wyoming trustees from decanting; however, significant caution should be exercised prior to decanting certain types of trusts.[319] If Wyoming trustees are administering a grandfathered GST trust, then decanting, if improperly carried out, could void the grandfathered nature of the trust.[320] If properly carried out, however, decanting allows trustees to breathe new life into trusts.[321]

V. A FIDUCIARY DUTY TO DECANT?

After the *Ferri* court announced a potential duty to decant in Massachusetts, trustees have faced the possibility of being subjected to a fiduciary duty to

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[314] *See* I.R.C. §§ 2631–2632.

[315] I.R.S. Priv. Ltr. Rul. 201709020, 40 (Sept. 12, 2016) ("[S]ufficient GST exemption was allocated to Trust so that Trust has an inclusion ratio of zero under § 2642.").

[316] *Id.* at 41 ("[T]he transfer of assets from [the first trust] to the [eight new] trusts will not alter the inclusion ratio of [first trust], and each [of the eight new trusts] will have the same inclusion ratio as Trust for GST tax purposes.").

[317] *Cf. id.*; *see also* Blattmachr et al., *supra* note 16, at 166.

[318] *Cf.* WILLIAM G. GALE ET AL., URBAN-BROOKINGS TAX POL'Y CTR., EFFECTS OF THE TAX CUTS AND JOBS ACT: A PRELIMINARY ANALYSIS 5 (June 13, 2018), https://www.brookings.edu/wp-content/uploads/2018/06/ES_20180608_tcja_summary_paper_final.pdf; *see also* Sallen, *supra* note 183.

[319] The specifics of decanting a grandfathered trust are outside the scope of this Comment. However, for further information on decanting GST grandfathered or exempt trusts, see Blattmachr et al., *supra* note 16, at 166–67 and Committo, *supra* note 132, at 15.

[320] Treas. Reg. § 26.2601-1 (2019); *see also* Diana S.C. Zeydel & Jonathan G. Blattmachr, *Tax Effects of Decanting—Obtaining and Preserving the Benefits*, 111 J. TAX'N 288, 292 (2009) ("[T]he trust remains grandfathered even if a beneficiary holds and exercises a special power of appointment as long as the vesting of ownership of the trust property occurs by the end of the historic rule against perpetuities"). *See generally* 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, 1 (2010).

[321] *See supra* notes 294–320 and accompanying text.

decant.[322] Of the two types of authority for decanting (common law and statutory), a fiduciary duty to decant is more likely to be imposed in common law jurisdictions.[323] First, looking to Massachusetts, trustees still have no guidance on the limits, or even an affirmation of the existence of, the fiduciary duty to decant.[324] Because of the factual background of *Ferri*, Massachusetts trustees must balance this potential duty against public policy concerns to determine the duty's contours.[325] For example, trustees must determine whether public policy supports decanting in a manner which deprives a divorcing spouse from trust corpus that would otherwise be included within the marital estate.[326]

In contrast, many of the states adopting statutory decanting provisions have clarified there is no fiduciary duty to decant.[327] Recognizing that a potential fiduciary duty exists in some states under common law, the UTDA expressly states that its decanting statute does not establish a duty to decant.[328] Trustees in Colorado or California, therefore, face no affirmative duty to decant.[329] Additionally, New York and Florida preclude any fiduciary duty from arising in their respective statutes.[330] In South Dakota, the statute is silent on whether a fiduciary duty exists, but the South Dakota Supreme Court favorably relied on a comment to the Restatement indicating a fiduciary duty to decant does not exist.[331]

Trustees in Wyoming should be cautious of a potential fiduciary duty to decant even though it is unclear whether Wyoming trustees have such a duty.[332] No caselaw currently interprets § 4-10-816(a)(xxviii) or (b), leaving Wyoming trustees without guidance on whether a fiduciary duty to decant exists.[333] Instead, Wyoming trustees are left only with twenty-five words stating that decanting

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[322] Ferri v. Powell-Ferri, 72 N.E.3d 541, 550 (Mass. 2017).

[323] Melissa J. Williams, *Decanting Trusts: Irrevocable, Not Unchangeable*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 35, 61 (2013).

[324] Bloostein, *supra* note 74, at 40.

[325] Rebecca Tunney, *Decanting in Massachusetts: Where Do We Stand Now*, 99 MASS. L. REV. 62, 67 (2018).

[326] *Id.*

[327] Williams, *supra* note 323, at 61.

[328] UNIF. TRUST DECANTING ACT § 4 (UNIF. LAW COMM'N 2015).

[329] COLO. REV. STAT. ANN. § 15-16-904(2) (2018); CAL. PROB. CODE § 19504(b) (Deering 2019).

[330] N.Y. EST. POWERS & TRUSTS LAW § 10-6.6(l) (Consol. 2019); FLA. STAT. § 736.04117 (10) (2018).

[331] *In re* Admin. of the Lee R. Wintersteen Revocable Trust Agreement, 907 N.W.2d 785, 790 (S.D. 2018) (quoting RESTATEMENT THIRD OF TRUSTS § 70 gen. cmt. a (AM. LAW INST. 2007) ("[A]ll powers held in the capacity of trustee must be exercised, or not exercised, in accordance with the trustee's fiduciary obligations.")).

[332] WYO. STAT. ANN. § 4-10-816(a)(xxvii) (2019).

[333] *Id.* § 4-10-816(a)(xvii), (b).

in good faith shields them from liability.[334] Although not direct evidence, other enumerated fiduciary duties indicate support for an affirmative duty to decant if decanting furthers another fiduciary duty.[335] Should decanting best provide for the interests of the trust beneficiaries, then it is at least comprehensible that a Wyoming court could find an affirmative duty to decant.[336]

VI. CONCLUSION

Decanting provides an efficient and effective tool for trustees to manage trust assets and react to changed circumstances not anticipated when the trust was originally created.[337] Although a number of states, including Colorado, Florida, Massachusetts, New York, South Dakota, and Wyoming allow decanting, Wyoming arguably provides the broadest decanting powers.[338] Taking into account Wyoming's laws, the broad powers available to Wyoming trustees place them in a competitive position to best move, manage, and protect a trust's corpus compared to trustees in other jurisdictions.[339] If trustees manage trusts for clients outside of Wyoming, they should consider moving those trusts to Wyoming.[340] Once in Wyoming, or if already in Wyoming, trustees should consider decanting to update or otherwise improve the trusts.[341] Three potential uses for decanting include decanting into an APT or a QTIP, or modifying an existing GRAT.[342] However, before decanting into or modifying an existing trust, trustees must ensure the decanting would not trigger adverse tax consequences.[343] Finally, before a trustee makes a determination not to decant, the trustee should consider whether they are potentially subject to a fiduciary duty to decant.[344] Decanting can serve a variety of interests and the advantages of Wyoming's laws in this regard should not be ignored.

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[334] *Id.* § 4-10-816(b).

[335] *Cf. id.* § 4-10-801 (2019) (outlining a trustee's duty to administer a trust "in good faith, in accordance with . . . the interests of the beneficiaries"); *see also id.* § 4-10-1001 ("A violation by a fiduciary of a duty the fiduciary owes to a beneficiary is a breach of trust.").

[336] WYO. STAT. ANN. § 4-10-1001. Such ambiguity supports a future amendment to § 4-10-816, clarifying either way the duty to decant. *See supra* notes 92–104. For further discussion on the duty to decant, see *supra* notes 322–36 and accompanying text.

[337] *See supra* notes 15–56 and accompanying text.

[338] *See supra* notes 2–8 and accompanying text.

[339] *See supra* notes 89–100 and accompanying text.

[340] *See supra* notes 89–100 and accompanying text.

[341] *See supra* notes 183–90 and accompanying text.

[342] *See supra* notes 192–208, 209–18, 219–93 and accompanying text.

[343] *See supra* notes 294–321 and accompanying text.

[344] *See supra* notes 322–36 and accompanying text.