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

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I. INTRODUCTION ......................................................................................327
II. BACKGROUND ........................................................................................329
III. HOW TO DECANT ..................................................................................333
   A. Massachusetts: A Common Law Example ........................................333
   B. Statutory Schema Permitting Trust Decanting .................................336
      1. The Uniform Trust Code: Wyoming’s Approach to Decanting ....336
      2. The Uniform Trust Decanting Act: Colorado and California ....338
   C. Other Statutory Methods of Decanting ............................................340
      1. South Dakota ....................................................................340
      2. New York .............................................................................342
      3. Florida .................................................................................343
IV. UTILIZING DECANTING ...........................................................................346
   A. Type of Trust .................................................................................347
      1. Asset Protection Trusts ...........................................................347
      2. The Qualified Terminable Interest Property Trust ....................349
      3. Grantor Retained Annuity Trust ............................................351
   B. TAX CONSEQUENCES ..................................................................357
V. A FIDUCIARY DUTY TO DECANT? ..........................................................359
VI. CONCLUSION .........................................................................................361

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. 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. 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. If allowed by the trust terms, changing the situs requires effectuation of the term. 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. Such authority, if it exists, is located in statute or common law—one option being the law of decanting. 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.

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

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3 See infra note 2, at 288.


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

II. BACKGROUND

Decanting is an emerging estate planning technique which allows trustees greater latitude to accomplish their fiduciary duties. This planning technique is analogous to pouring wine into a decanter to remove troublesome elements of the wine. Removing these imperfections requires pouring the wine from its original container (the wine bottle) into a secondary container (the decanter). As applied to trusts, decanting allows a trustee to assign all or part of the trust corpus from one trust to a secondary trust. 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.”

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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 CaroZo 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.
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.”).


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.

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

28 Dukeminier & Sitkoff, supra note 20, at 734.
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.
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. Upon receipt, the corporate trustee asked the court to determine whether this was a correct exercise of the individual trustee's power. 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." This rule, as applied to the Phipps trust, meant the individual trustee had the power to appoint any amount of funds in further trust.

Fifty-two years later, in 1992, New York became the first state to codify a trustee's decanting power. This law recognized the supremacy of the "terms of the instrument." 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. Additionally, the trustee could petition a court with jurisdiction to direct the trustee to decant. Whether occurring unilaterally or through a court, decanting had to maintain "any fixed income interest" of any beneficiaries; could not violate other typical fiduciary duties; and could not be used to increase trustee commissions. 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." Following the

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(c); 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.
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).
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*.

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. The First Trust required a trustee be “disinterested,” excluding the children from ever becoming trustees of their respective subtrusts. 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). 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. Morse argued this transfer, one interpreted as decanting by the court, served the best interests of the beneficiaries.

Perhaps unsurprisingly, tax law guided the court to the issue. 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.’”

Relying on *Loring*, the Morse court distinguished between *Loring*’s application to donees and trustees. 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. 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.’” Determining the trust generally granted the

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61 *Id.; Morse*, 992 N.E.2d at 1025–26.
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.
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.\textsuperscript{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.\textsuperscript{73}

Unlike the \textit{Morse} trustee who sought court permission to decant, the trustees in \textit{Ferri v. Powell-Ferri} decanted without court approval, and then sought a retroactive declaration that the past decanting was lawful.\textsuperscript{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).\textsuperscript{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).\textsuperscript{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.\textsuperscript{77} To address this concern, the 2011 Trust included a spendthrift provision.\textsuperscript{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.\textsuperscript{79}

The court held the transfer valid after applying the analysis in \textit{Morse}.\textsuperscript{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.\textsuperscript{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.\textsuperscript{82} The court read harmoniously the terms of the 1983

\begin{thebibliography}{99}
\item \textsuperscript{72} \textit{Id.} at 1025 (quoting the terms of the First Trust), 1026, 1028.
\item \textsuperscript{73} \textit{Id.} at 1027.
\item \textsuperscript{75} \textit{Ferri}, 72 N.E.3d at 544.
\item \textsuperscript{76} \textit{Id.}
\item \textsuperscript{77} \textit{Id.}
\item \textsuperscript{78} \textit{Id.} A spendthrift provision grants trustees complete control over the distributions of the corpus and eliminates the beneficiary’s right to compel distribution. \textit{Id.} For further information on spendthrift trusts, see \textsc{George G. Bogert et al., The Law of Trusts and Trustees § 222, Westlaw} (database updated June 2018).
\item \textsuperscript{79} \textit{Ferri}, 72 N.E.3d at 544.
\item \textsuperscript{80} \textit{Id.} at 546–50.
\item \textsuperscript{81} \textit{Id.} at 546.
\item \textsuperscript{82} \textit{Id.} at 550.
\end{thebibliography}
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

\(^{83}\) 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.\footnote{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.} 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.\footnote{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).} 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.\footnote{See infra notes 96–104 and accompanying text.} 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.\footnote{See generally King, supra note 6, at 15.}

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.\footnote{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.} In Wyoming, § 4-10-816 defines the scope of trustee powers.\footnote{2003 Wyo. Sess. Laws at 336–38 (codified as amended at WYO. STAT. ANN. § 4-10-816 (2019)).} The UTC did not, however, initially include a decanting provision, relegating Wyoming trustees to the common law for decanting support.\footnote{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.} But, beginning in 2005, the Legislature began creating the decanting power although, notably, that power is not expressly named decanting.\footnote{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.}

In 2005, the Legislature enacted the first of several amendments to § 4-10-816.\footnote{2005 Wyo. Sess. Laws at 297 (codified at WYO. STAT. ANN. § 4-10-816(b) (2019)).} 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.”\footnote{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...

In 2005, the Legislature enacted the first of several amendments to § 4-10-816.\footnote{2005 Wyo. Sess. Laws at 297 (codified at WYO. STAT. ANN. § 4-10-816(b) (2019)).} 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.”\footnote{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. 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. The result of all four amendments is an “unparalleled breadth of decanting powers available to a Wyoming trustee” under § 4-10-816.

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.” 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. Trustees may not decant trusts “held solely for charitable purposes,” nor may trustees decant if the trust’s terms expressly prohibit decanting. 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. Colorado trustees have no duty to decant as the statute specifically excludes an affirmative duty to decant from general fiduciary duties.
If the trust meets these prerequisites, Colorado trustees must next determine whether the trust grants “limited” or “expanded” distributive discretion. If the distribution power is limited by an ascertainable or reasonably definite standard, then the trustee’s power is a “limited” power. If limited, decanting is permissible, but beneficiaries of the original trust must be granted “substantially similar” interests in the second trust. Conversely, if the distribution power is not limited by such standards, then the trustee’s power is an “expanded” power. 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.” 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. 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.”

Finally, after determining whether the trustee’s power is limited or expanded, the Colorado trustee must adhere to all other statutory rules. First, the trustee must determine whether to modify the existing trust or transfer it into a new trust, and draft the trust document accordingly. 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. Unless waived by all parties, the trustee must

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112 Id. § 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 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.
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.
whether the trust at issue is a testamentary, irrevocable, or revocable trust.\(^\text{130}\) If the trust is either testamentary or irrevocable, decanting is permitted.\(^\text{131}\) 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.\(^\text{132}\)

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.\(^\text{133}\) 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.\(^\text{134}\) 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.”\(^\text{135}\) 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.”\(^\text{136}\) 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.\(^\text{137}\) 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.\(^\text{138}\)

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.\(^\text{139}\) 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,

\(^\text{130}\) Akkerman, supra note 15, at 418; see also S.D. Codified Laws § 55-2-15.

\(^\text{131}\) Akkerman, supra note 15, at 418; see also S.D. Codified Laws § 55-2-15.

\(^\text{132}\) 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).

\(^\text{133}\) S.D. Codified Laws § 55-2-15.

\(^\text{134}\) Id. § 55-2-15(1).

\(^\text{135}\) Id. § 55-2-15.

\(^\text{136}\) Id. § 55-2-15(2).

\(^\text{137}\) Id. § 55-2-15(3).

\(^\text{138}\) Cf. id. § 55-2-15(2).

\(^\text{139}\) Id. § 55-2-15(4); I.R.C. § 2503 (2019).
or a grantor retained annuity or unitrust.\textsuperscript{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.\textsuperscript{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.\textsuperscript{142}

2. New York

The settlor of an original trust may increase, limit, or wholly prohibit decanting through the trust’s terms.\textsuperscript{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.\textsuperscript{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.\textsuperscript{145} Additionally, when creating the second trust, unlimited trustees may grant discretionary powers of appointment to one or more beneficiaries of the original trust.\textsuperscript{146} This power, however, is limited as to who may be excluded from the class of the permissible appointees.\textsuperscript{147} Finally, if the original trust describes beneficiaries by class, the second trust may include all “present and future members of such class.”\textsuperscript{148}

Next, New York Estates, Powers and Trusts Law § 10-6.6(c) outlines the rules affecting trustees without unlimited discretion (limited trustees).\textsuperscript{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


\textsuperscript{141} S.D. Codified Laws § 55-2-15(7).

\textsuperscript{142} Akkerman, supra note 15, at 418; see also S.D. Codified Laws §§ 55-2-15, -18.

\textsuperscript{143} See N.Y. Est. Powers & Trusts Law § 10-6.6 (Consol. 2019).

\textsuperscript{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).

\textsuperscript{145} N.Y. Est. Powers & Trusts Law § 10-6.6(b).

\textsuperscript{146} Id. § 10-6.6(b)(1).

\textsuperscript{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”).

\textsuperscript{148} Id. § 10-6.6(b)(4).

\textsuperscript{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

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).
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
<table>
<thead>
<tr>
<th>Legal Source</th>
<th>Fiduciary Duty to Decant</th>
<th>Notice to Beneficiaries Required?</th>
<th>Can Terms of Trust Prohibit Decanting?</th>
<th>Liability for Decanting Trustees</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Colorado</strong>&lt;sup&gt;177&lt;/sup&gt;</td>
<td>No</td>
<td>Yes, subject to exceptions</td>
<td>Yes</td>
<td>Reasonable reliance standard</td>
</tr>
<tr>
<td><strong>Florida</strong>&lt;sup&gt;178&lt;/sup&gt;</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Unclear</td>
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<tr>
<td><strong>Massachusetts</strong>&lt;sup&gt;179&lt;/sup&gt;</td>
<td>Maybe</td>
<td>No</td>
<td>Yes</td>
<td>Unclear</td>
</tr>
<tr>
<td><strong>New York</strong>&lt;sup&gt;180&lt;/sup&gt;</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Likely none if prudent under the circumstances</td>
</tr>
<tr>
<td><strong>South Dakota</strong>&lt;sup&gt;181&lt;/sup&gt;</td>
<td>Maybe</td>
<td>No</td>
<td>Yes</td>
<td>Limited if good faith</td>
</tr>
<tr>
<td><strong>Wyoming</strong>&lt;sup&gt;182&lt;/sup&gt;</td>
<td>Maybe</td>
<td>No</td>
<td>Yes</td>
<td>None if good faith</td>
</tr>
</tbody>
</table>

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 (2018).**

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. Estates, Powers and Trusts Law § 10-6.6(b) to (t) (Consol. 2019).**

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).

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


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.
194 King & McDowell, supra note 129, at 282.
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).
a “legal right to transfer title or direct proceeds to creditors.”

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. Although APTs created under Wyoming law provide significant asset protection, it is uncertain how courts will reconcile public policy concerns with self-settled APTs.

Given the insulating benefits of APTs, trustees should consider decanting into an APT in certain circumstances. 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. 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). Regardless of the trustee’s position, the decanting must meet Wyoming’s legal requirements. 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. 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.

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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.’”).


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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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.
212 Henkel & Tobey, supra note 199, at 50-2 to -6.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{223} Under Wyoming law, the trustee’s broad powers appear to permit decanting into a QTIP trust unless the original trust expressly states otherwise.\textsuperscript{224}

If trustees are administering a QTIP, that too may be decanted if the trustees determine it is needed.\textsuperscript{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.\textsuperscript{226} Additionally, trustees may decant to modify the spouse’s right to invade trust principal, or to add a testamentary limited power of appointment.\textsuperscript{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.\textsuperscript{228}

\textsuperscript{218} Id. However, such tax may be circumvented through a combined approach of a QTIP and a grantor trust. Id.

\textsuperscript{219} See generally Irwin, supra note 213, at 581–82, 584.

\textsuperscript{220} See supra notes 213–18 and accompanying text.

\textsuperscript{221} I.R.C. § 2056(b)(7)(B) (2019); see also Henkel & Tobey, supra note 199, at 50-2 to -6.

\textsuperscript{222} I.R.C. § 2056(b)(7)(B); see also Henkel & Tobey, supra note 199, at 50-2 to -6.

\textsuperscript{223} I.R.C. § 2056(b)(7)(B); see also Henkel & Tobey, supra note 199, at 4-5 to -12.

\textsuperscript{224} Cf. Staehr, supra note 2, at 340 (noting that Wyoming trustees have broad powers).

\textsuperscript{225} Henkel & Tobey, supra note 199, at 4-10 to -12.

\textsuperscript{226} Id. at 4-10. For a more thorough discussion of spendthrift provisions, see supra note 78 and accompanying text.

\textsuperscript{227} Id. at 4-11, S4-16 to -18.

\textsuperscript{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).\footnote{Id. § 2702.} Existing caselaw neither supports nor negates the proposition that trustees may decant an irrevocable trust into a GRAT.\footnote{See infra notes 285–88 and accompanying text.} Regardless, logic supports the possibility and the immense benefits spur the desire for Wyoming trustees to decant into a GRAT.\footnote{See infra note 287 and accompanying text.}

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.\footnote{See Mitchell M. Gans, \textit{GRIT's, GRAT's and GRUT's: Planning and Policy}, 11 Va. Tax Rev. 761, 764 (1992).} 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.\footnote{See Gans, \textit{supra} note 232, at 765, 765 n.1 & 3.} 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.\footnote{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).} 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.\footnote{Id. at 765; I.R.C. § 7520.}

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.\footnote{Id. at 765; Gans, \textit{supra} note 232, at 763 n.3.} B’s remainder interest is valued—taking into account the time-value of money—at $30,000.\footnote{Gans, \textit{supra} note 232, at 763.} 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.\footnote{Id.; Gans, \textit{supra} note 232, at 763 n.3.} 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.\footnote{Gans, \textit{supra} note 232, at 763.}

Under the post-1990 tax regime, § 2702 of the Code established the GRAT and the Grantor Retained Unitrust (GRUT), allowing individuals to remove...
value from their estates in a manner similar to the GRIT.\textsuperscript{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.\textsuperscript{241} To qualify, the transfer must be a complete gift.\textsuperscript{242} The transfer also must not be one that would qualify as a Qualified Personal Residence Trust (QPRT) or a charitable remainder trust.\textsuperscript{243}

Second, the Code distinguishes treatment between qualified and non-qualified interests.\textsuperscript{244} Qualified annuity interests are those allowing the right to receive annuity payments.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{247} Nor may the “fixed payment” include any income generated by the trust property.\textsuperscript{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.\textsuperscript{249} If the interest is qualified, then the value of the retained interest is calculated according to the § 7520 valuation tables.\textsuperscript{250} Assuming the transfer is non-exempt and the retained interest is a qualified interest, § 2702 of the Code applies.\textsuperscript{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

\begin{itemize}
\item 240 I.R.C. § 2702 (2019). This term can be for life or for a term of years shorter than life. \textit{Id.} However, the life term is “never a good idea.” \textsc{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.
\item 241 I.R.C. § 2702(a)(1); see also Treas. Reg. § 25.2702-2(d)(1) to (6) (2019).
\item 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.
\item 244 I.R.C. § 2702(a)(2).
\item 245 \textit{Id.} § 2702(b)(1); Treas. Reg. § 25.2702-3(b)(1)(i).
\item 246 I.R.C. §§ 2701(e)(2), 2702(a)(1).
\item 247 Treas. Reg. § 25.2702-3(b)(1)(i).
\item 248 \textit{Id.} § 25.2702-3(b)(1)(iii).
\item 249 \textit{Id.} § 25.2702-3(b)(1)(ii)(A).
\item 250 I.R.C. § 2702(a)(2)(B). Alternatively, if the retained interest is not a qualified interest, then the value is zero. \textit{Id.} § 2702(a)(2)(A).
\item 251 \textit{Id.} § 2702(a); Treas. Reg. § 25.2702-1(a).
\end{itemize}
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).
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.
258 Id.
259 Id.
260 I.R.C. § 2702(c)(3).
261 HENKEL & TOBEY, supra note 199, at 22-2.
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. 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. 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. 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. 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. The gamble, however, is that the trust property could appreciate at a lower rate than the § 7520 rate. 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. 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.

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). At the completion of the term, the GRAT will

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.\footnote{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.\footnote{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.\footnote{275} The entire value of that retained interest over the course of the GRAT is $199,447.16.\footnote{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%.\footnote{277} The value of the gift, therefore, is $199,447.16.\footnote{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.\footnote{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.\footnote{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.\footnote{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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\textsuperscript{273} See Henkel & Tobey, supra note 199, at 22-2.
\textsuperscript{274} See id. at 22-16.
\textsuperscript{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.
\textsuperscript{276} To obtain this figure, compound the initial transfer of $100,000 by the § 7520 rate of 2.8%.
\textsuperscript{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).
\textsuperscript{279} Id.
\textsuperscript{280} Henkel & Tobey, supra note 199, at 22-2.
\textsuperscript{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

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).

288 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.

289 For potential uses of trust decanting with GRATs, see Broderick, supra note 110.

290 See generally Bove Jr., supra note 216, at 54.

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.


\(^{298}\) *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.\textsuperscript{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.\textsuperscript{303} Because the two mortgages interests embodied “legally distinct entitlement[s],” there was an exchange triggering Cottage Savings’s recognition of loss.\textsuperscript{304}

The PLR utilized the \textit{Cottage Savings} material difference test to determine whether a sale or exchange occurred upon division of the first trust into eight separate trusts.\textsuperscript{305} The trustee sought to transfer non-S Corporation stock from the first trust into eight new trusts.\textsuperscript{306} In applying the \textit{Cottage Savings} test, the IRS asked whether the beneficiaries’ pre-division and distribution interests were any different than their interests post-division and distribution.\textsuperscript{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.\textsuperscript{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.\textsuperscript{309} Further, because the transfer was by the trustee and not the grantor, the assets were not includable within the grantor’s estate.\textsuperscript{310}

Additionally, the IRS addressed how decanting may affect an exemption from the GST tax.\textsuperscript{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.\textsuperscript{312} Irrevocable trusts established before September 26, 1985, have grandfathered status, exempting the pre-dating trusts from the GST tax.\textsuperscript{313} If the trust was created on or after

\begin{thebibliography}{99}
  \bibitem{302} Id. at 559–62; \textit{see also} Treas. Reg. § 1.1001-1(a) (2019).
  \bibitem{303} \textit{Cottage Savings Ass’n}, 499 U.S. at 566–68.
  \bibitem{304} Id. at 568.
  \bibitem{306} Id. at 12.
  \bibitem{307} Id. at 24–26.
  \bibitem{308} Id.
  \bibitem{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.”).
  \bibitem{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.”).
  \bibitem{311} Id. at 16; \textit{see also} Committo, \textit{supra} note 132, at 15.
  \bibitem{312} I.R.C. §§ 2601, 2613(a) (2019).
\end{thebibliography}
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...
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. 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. Because of the factual background of Ferri, Massachusetts trustees must balance this potential duty against public policy concerns to determine the duty’s contours. 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.

In contrast, many of the states adopting statutory decanting provisions have clarified there is no fiduciary duty to decant. 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. Trustees in Colorado or California, therefore, face no affirmative duty to decant. Additionally, New York and Florida preclude any fiduciary duty from arising in their respective statutes. 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.

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. No caselaw currently interprets § 4-10-816(a)(xxviii) or (b), leaving Wyoming trustees without guidance on whether a fiduciary duty to decant exists. Instead, Wyoming trustees are left only with twenty-five words stating that decanting

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324 Bloostein, supra note 74, at 40.
326 Id.
327 Williams, supra note 323, at 61.
328 UNIF. TRUST DECANTING ACT § 4 (UNIF. LAW COMM’N 2015).
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.”)).
333 Id. § 4-10-816(a)(xvii), (b).
in good faith shields them from liability.\footnote{Id. § 4-10-816(b).} Although not direct evidence, other enumerated fiduciary duties indicate support for an affirmative duty to decant if decanting furthers another fiduciary duty.\footnote{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.”).} 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.\footnote{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.}

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.\footnote{See supra notes 15–56 and accompanying text.} Although a number of states, including Colorado, Florida, Massachusetts, New York, South Dakota, and Wyoming allow decanting, Wyoming arguably provides the broadest decanting powers.\footnote{See supra notes 2–8 and accompanying text.} 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.\footnote{See supra notes 89–100 and accompanying text.} If trustees manage trusts for clients outside of Wyoming, they should consider moving those trusts to Wyoming.\footnote{See supra notes 183–90 and accompanying text.} Once in Wyoming, or if already in Wyoming, trustees should consider decanting to update or otherwise improve the trusts.\footnote{See supra notes 294–321 and accompanying text.} Three potential uses for decanting include decanting into an APT or a QTIP, or modifying an existing GRAT.\footnote{See supra notes 192–208, 209–18, 219–93 and accompanying text.} However, before decanting into or modifying an existing trust, trustees must ensure the decanting would not trigger adverse tax consequences.\footnote{See supra notes 322–36 and accompanying text.} 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.\footnote{See supra notes 322–36 and accompanying text.} Decanting can serve a variety of interests and the advantages of Wyoming’s laws in this regard should not be ignored.