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THE UNDISCOVERED COUNTRY: WYOMING'S EMERGENCE AS A LEADING TRUST SITUS JURISDICTION

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> *A certain Jarndyce, in an evil hour, made a great, fortune and made a great will. In the question how the trusts under that will are to be administered, the fortune left by the will is squandered away; the legatees under the will are reduced to such a miserable condition that they would be sufficiently punished if they had committed an enormous crime in having money left them . . . .*
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> Charles Dickens, *Bleak House*

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I. INTRODUCTION

The modern rules governing trusts allow for opportunities only dreamed of by the beneficiaries of Dickens' Jarndyce and Jarndyce.[1] Over the last several decades, as the world has "become flat," U.S. states have adopted increasingly-varied trust laws and, more recently, as the federal Hiring Incentives to Restore Employment (HIRE) Act attempts to close a number of so-called offshore trust loopholes, wealth management professionals and their clients have more closely scrutinized onshore trust jurisdictions for the best possible situs.[2] This attention has prompted new trust legislation in a number of states and much discussion between experts as to the relative merits of various jurisdictions.[3]

Modern trust statutes, along with a number of other factors including low or non-existent state income taxes, the abolishment or expansion of the Rule Against Perpetuities, and the passage of asset protection laws, have launched a handful of states to the top of the list of beneficial trust situs jurisdictions. Alaska, Delaware, Nevada, New Hampshire, and South Dakota join Wyoming as leading trust situs jurisdictions.[4] Given its strong asset protection laws, lack of income

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[1] *See infra* notes 5–8 and accompanying text (providing a basic overview of trusts).

[2] *See* Hiring Incentives to Restore Employment (HIRE) Act, Pub. L. No. 111-147, §§ 531–532, 124 Stat. 71, 113–14 (2010) (to be codified at 26 U.S.C. § 679).

[3] *See, e.g.*, Iris J. Goodwin, *How the Rich Stay Rich: Using a Family Trust Company to Secure a Family Fortune*, 40 SETON HALL L. REV. 467, 485–87 (2010); Duncan E. Osborne & Mark E. Osborne, *Asset Protection: Trust Planning*, SR034 A.L.I.-A.B.A. 201, 230–45 (2010); David G. Shaftel, *Comparison of the Twelve Domestic Asset Protection Statutes*, 34 ACTEC J. 293 *passim* (2009); Daniel G. Worthington & Marc Merric, *Which Situs is Best?*, TR. & EST., Jan. 2010, at 54; Jerry Cooper, *America's Most Wealth Friendly States Continue to Bid for Your Clients' Trust Business*, TR. ADVISOR BLOG (Jan. 15, 2010), http://thetrustadvisor.com/news/states.

[4] *See, e.g.*, Osborne & Osborne, *supra* note 3, at 230; Worthington & Merric, *supra* note 3, at 54; Cooper, *supra* note 3.

taxes, and recently revised Limited Liability Company (LLC) statutes, Wyoming is quickly outpacing other top trust situs states in terms of attracting new business. This article compares Wyoming to other popular jurisdictions and addresses the reasons advisors and their clients looking to create or resettle an onshore trust, as well as those considering migrating offshore holdings, should put Wyoming at the top of their list of trust-friendly jurisdictions.

At its most elemental level, a trust is a conveyance of property in which legal title is given to a trustee and equitable title to a beneficiary.[5] The trustee, or legal title holder, is under an obligation to maintain or distribute trust property for the benefit of the beneficiary as per the terms of the trust.[6] Such a division of title can serve a number of purposes: it can protect a beneficiary's assets from the beneficiary's own poor judgment or from the beneficiary's creditors by vesting control of distributions in another person or entity; it serves as a vehicle to minimize estate and generation-skipping transfer taxes; it is a way of providing for family members with special needs or for pets long after their now-living caregivers are gone; and it can act as a vehicle to safeguard and grow assets for generations to come.[7] Trusts have historically been employed by the very wealthy; however, as they have grown in popularity over the last few decades, their use as an estate planning tool has expanded among the middle and upper-middle classes. As the jurisdiction in which a trust is created establishes the governing law relative to it, situs is an important matter for anyone considering establishing a trust or migrating one that already exists.[8]

The Uniform Trust Code (UTC), approved in 2000 by the National Conference of Commissioners on Uniform State Laws, is the first comprehensive act on trusts in the United States.[9] A general need for guidance in an era of increased interest in trust creation and only minimal statutory authority in most states prompted its drafting. While the UTC has been adopted, at least in part, by most jurisdictions, a number have enacted statutes that go further in terms

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[5] 76 AM. JUR. 2D *Trusts* § 1 (2010).

[6] *Id.*; RESTATEMENT (SECOND) OF TRUSTS § 2 (1959).

[7] *See infra* Part III.F (addressing the asset protection advantages of spendthrift trusts and creditor protection); *infra* Part III.A–B (discussing tax implications to trust assets including the Generation-Skipping Transfer Tax); *infra* Part III.D.4 (focusing on special purpose trusts); *infra* notes 51–63 (addressing long-term dynasty trusts).

[8] The law of the jurisdiction in which a trust is created typically governs questions of its validity and construction; questions of administration are governed by either the law of the jurisdiction specified by the settlor or the law of the jurisdiction with the most substantial relationship to the trust's administration. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 268–72 (1971); 7 AUSTIN W. SCOTT, MARK. L. ASCHER & WILLIAM F. FRATCHER, SCOTT AND ASCHER ON TRUSTS §§ 45.3–.5 (5th ed. 2008).

[9] A copy of the UTC with complete comments can be accessed through the National Conference of Commissioners on Uniform State Laws (NCCUSL) website, available at http://www.nccusl.org/Update/.

of added creditor protection, increased flexibility with respect to self-settled trusts, and provisions for trust protectors.[10] Wyoming has adopted the UTC but has made over 100 substantive changes—resulting in an especially settlor-friendly code.[11]

II. THE IMPLICATIONS OF THE HIRING INCENTIVES TO RESTORE EMPLOYMENT ACT ON OFFSHORE TRUSTS

A. Background

While the protections and benefits of onshore trusts have grown increasingly variable and sophisticated within select U.S. jurisdictions, settlors have and continue to avail themselves of offshore trust locations for a number of reasons. First, foreign trusts are more difficult to access.[12] Second, foreign jurisdictions are free from the constraints imposed by the United States Constitution.[13] Third, foreign jurisdictions allow self-settled trusts while, for many years, the general rule in U.S. jurisdictions was that trusts in which the settlor is also a beneficiary were against the tenets of conscionability.[14] Finally, for the past fifty years, the U.S. Internal Revenue Code has been structured so that settlors were allowed to take advantage of a number of estate and income tax minimization techniques, further guarding the corpus of a trust and allowing unencumbered growth in foreign jurisdictions.

Countering this, however, is the fact that many foreign locales stipulate that at least one trustee local to the foreign jurisdiction be named, a detail that for

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[10] A summary of which states have adopted portions of the UTC can be accessed through the NCCUSL website, available at http://www.nccusl.org/Update/.

[11] Mark Merric et al., *Wyoming Enters DAPT Legislation Arena*, STEVE LEIMBERG'S ASSET PROTECTION PLAN. EMAIL NEWSL., no. 109, July 2007, *available at* http://www.hro.com/files/file/publications/Merric/Asset_Protection_Planning/Domestic_Asset_Protection_Trusts/domestic assetprotection1.pdf; *see* WYO. STAT. ANN. §§ 4-10-101 to -1103 (2010) (encompassing Wyoming's Uniform Trust Code).

[12] While a creditor may be able to get a judgment against a debtor in the United States, in order to reach offshore assets to satisfy the judgment, the creditor often has to sue the debtor in the offshore jurisdiction.

[13] The Constitutional "full faith and credit" mandate requires the courts of one state to recognize the judgments from courts in another state—meaning a state may be required to recognize judgments from a state that is less debtor-friendly. U.S. CONST. art. IV, § 1; *see* Osborne & Osborne, *supra* note 3, at 245–50. Some commentators argue that asset protection laws may violate the Contract Clause of the U.S. Constitution. U.S. CONST. art. I, § 10; *see* Osborne & Osborne, *supra* note 3, at 255. Finally, the Supremacy Clause prohibits states from protecting debtors from federal law, such as in a bankruptcy proceeding. U.S. CONST. art. VI, cl. 2; *see* Osborne & Osborne, *supra* note 3, at 250–55.

[14] *See* John E. Sullivan III, *Gutting the Rule Against Self-Settled Trusts: How the New Delaware Trust Law Competes with Offshore Trusts*, 23 DEL. J. CORP. L. 423, 425–26 (1998).

many settlors means surrendering more control than they would like.[15] The risk of political upheaval, potentially unenforceable trust terms, and unaccountable trustees may also give pause to investors.[16] Furthermore, several domestic jurisdictions, Wyoming top among them, now allow for the formation of self-settled asset protection trusts.[17] With the recent passage of federal laws such as the HIRE Act, a number of tax implications that once made placing trusts in offshore jurisdictions attractive have disappeared. In their wake are higher penalties and increased reporting responsibilities imposed upon a broader selection of foreign trusts.[18] As the holders of offshore trusts perceive the benefits of foreign jurisdictions abate, they are bringing their trust assets onshore; Wyoming is one of the states to which interested parties are increasingly migrating such trusts.

B. The Hiring Incentives to Restore Employment Act and the Foreign Account Tax Compliance Act

On March 18, 2010, President Barack Obama signed into law House Resolution 2847, the HIRE Act.[19] As its name suggests, the Act focuses on job creation by providing tax incentives to businesses that hire and retain new employees. To offset the revenue losses created by these incentives, as well as to deal with several perceived reporting loopholes related to the taxation of offshore investments by U.S. residents, Congress included the Foreign Account Tax Compliance Act (FATCA), which increases taxation, reporting requirements, and enforcement for offshore accounts and trusts.[20] Most notably for the purposes of this article, FATCA affects the playing field for foreign trusts with U.S. beneficiaries by identifying a broader selection of trusts considered to have U.S. beneficiaries, increasing reporting requirements, and imposing higher penalties on taxpayers who fail to report or underreport trust income, use of trust property, or assets settled into a foreign trust.[21] Overall, FATCA significantly narrows the

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[15] *See generally* Osborne & Osborne, *supra* note 3, at 275–94 (assessing various offshore jurisdictions and their requirements).

[16] *See* GEORGE GLEASON BOGERT ET AL., BOGERT'S TRUSTS AND TRUSTEES § 223 (2010).

[17] *See, e.g.*, ALASKA STAT. § 34.40.110 (2010); DEL. CODE ANN. tit. 12, §§ 3570–3576 (2010); S.D. CODIFIED LAWS §§ 55-16-1 to -17 (2010); WYO. STAT. ANN. §§ 4-10-505, -510 to -523 (2010); *see infra* Part III.F.1 (discussing the advantages of Wyoming's Qualified Spendthrift Trust legislation).

[18] With regard to trusts settled in foreign jurisdictions, this article concerns itself with trusts having U.S. beneficiaries. For more information on foreign-settled trusts whose beneficiaries are non-resident aliens, see G. Warren Whitaker, *The U.S. May Be a Good Trust Jurisdiction for Foreign Persons*, 33 EST. PLAN. 36 (2006).

[19] HIRE Act, Pub. L. No. 111-147, 124 Stat. 71 (2010) (to be codified in scattered sections of 26 U.S.C.).

[20] The FATCA provisions are included in Title V, Subtitle A of the HIRE Act.

[21] *See* Gregory J. Dean & Michael A. Heimos, *The 2010 "FATCAt" Legislation and FBAR Proposals*, *in* 2 THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS § 11:13 (Ved P. Nanda & Ralph B. Lake eds., 2010); Todd Y. McArthur et al., *Recent U.S. Tax Bills Target Offshore Tax Abuse*, 21 J.

appeal of offshore trust jurisdictions to U.S. investors. As the impact of the HIRE Act and FATCA reverberates through the next few tax years, more and more U.S. clients will reconsider the pros and cons of foreign trust jurisdictions, likely finding they can get many of the same benefits with fewer attendant risks by resettling their trusts in a U.S. jurisdiction.

In order to more clearly assess the impact of FATCA, a closer look at the details of the Act is warranted. With respect to foreign trusts with a U.S. beneficiary, FATCA expands the definition of what is considered a foreign trust benefitting a U.S. person, thereby subjecting more trusts to certain U.S. taxation and reporting requirements.[22] Since 1996, the Internal Revenue Code has distinguished between foreign and domestic trusts for U.S. tax purposes by stating a trust is domestic if "(i) a court within the United States is able to exercise primary supervision over the administration of the trust, and (ii) one or more United States persons have the authority to control all substantial decisions of the trust."[23] Consequently, a trust created by a U.S. transferor for the benefit of one or more U.S. beneficiaries managed only by a foreign trustee is treated as a grantor trust and is subject to taxation by the United States on its worldwide income.[24]

FATCA cuts a wider swath than the former version of the Internal Revenue Code when assessing which foreign trusts have a U.S. beneficiary. First, U.S. persons with interests in a trust contingent on a future event are now unequivocally considered U.S. beneficiaries and are responsible for the new reporting requirements.[25] Second, if under the terms of a foreign trust any person has the discretion to make a distribution for the benefit of any person, the trust is presumed to have a U.S. beneficiary, unless "(A) the terms of the trust specifically identify the class of persons to whom the distributions may be made, and (B) none of those persons are United States persons during the taxable year."[26] This presumption may be overcome only if the person who directly or indirectly transfers property to a foreign trust submits information to the Secretary of the Treasury showing the trust has no U.S. beneficiaries.[27] Third, FATCA expands

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INT'L TAX'N 24, 34–36 (2010); Tom O'Donnell & Michael Parets, *FATCA: An Analysis*, 21 J. INT'L TAX'N 24, 63–64 (2010). *See generally* Kevin E. Packman & Andrew H. Weinstein, *FBAR—Foreign Bank Account Reporting Obligations: A Primer for the Practitioner*, 106 J. TAX'N 44 (2007) (giving an overview of foreign account reporting requirements).

[22] *See infra* notes 33–38 and accompanying text.

[23] 26 U.S.C. § 7701(a)(30)(E) (2006).

[24] *Id.* § 679.

[25] HIRE Act, Pub. L. No. 111-147, § 531(a), 124 Stat. 71, 113 (2010) (to be codified at 26 U.S.C. § 679(c)).

[26] *Id.* § 531(b) (to be codified at § 679(c)); *see also* Treas. Reg. § 1.679-2(a)(2)(ii), -2(a)(2)(iii), exs. (10), (11) (2010).

[27] HIRE Act § 532(a) (to be codified at § 679(d)). The presumption that a foreign trust has a U.S. beneficiary can be overcome if the terms of the trust communicate that none of the income or principal could be paid or accrue for the benefit of a U.S. person or, if the trust is terminated within

the scope of foreign trust terms by stating that an "agreement or understanding (whether written, oral, or otherwise)" resulting in the income or corpus of the trust accruing to or for the benefit of a U.S. person shall be considered a term of the trust.[28] These provisions will result in required filings by many more foreign trusts than under previous law.[29]

Regarding the use of trust property, previous law treated a loan by a foreign trust to a U.S. grantor, U.S. beneficiary, or related U.S. person as a distribution by the foreign trust to that U.S. person unless the loan was later repaid or cancelled.[30] FATCA stipulates any uncompensated use of foreign trust property, including a loan of cash or marketable securities, by a U.S. person who is a grantor, beneficiary, or related to a U.S. grantor or beneficiary, will be treated as a distribution to the extent of the fair market rental value of the property or amount of the loan.[31] If such person compensates the trust for the use of property or repays the loan at a market rate of interest within a reasonable time, then the section does not apply.[32]

FATCA also ups the ante with regard to reporting requirements for U.S. owners of interests in foreign trusts and increases the attendant penalties for non- or under-reporting.[33] Any U.S. person treated as an owner of any portion of a foreign trust under the grantor trust rules must provide information about the trust to comply with reporting obligations.[34] Exactly what information will have to be reported has not yet been determined, but this requirement erodes the promise of privacy so sought after by many of those who settle trusts in foreign locales.[35]

For failing to report, the initial penalty is now the greater of $10,000 or five percent of the value of the portion of a grantor trust owned by a U.S. person, thirty-

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the year, none of the income or principal could be paid or used for the benefit of a U.S. person. *Id.*; *see* 26 U.S.C. § 679(c)(1) (2006).

[28] HIRE Act § 531(c) (to be codified at § 679(c)(5)).

[29] *See id.*

[30] 26 U.S.C. § 643(i); McArthur et al., *supra* note 21, at 35; *see* HIRE Act § 533 (to be codified at § 643(i)).

[31] HIRE Act § 533(c) (to be codified at § 679(c)).

[32] *Id.*

[33] *Id.* §§ 534–535 (to be codified at §§ 6048(b), 6677(a)). Prior to FATCA, an owner of an interest in a foreign trust was only responsible for ensuring that the trust made a return furnishing the requisite information. *See* 26 U.S.C. § 6677 (West Supp. 2009), *amended by* HIRE Act § 534. FATCA inserted language requiring the owner to submit such information as prescribed by the Secretary of the Treasury. HIRE Act § 534(a).

[34] HIRE Act § 534 (to be codified at § 6048(b)) (governing reporting obligations imposed on those who create, make transfers to, or receive distributions from foreign trusts).

[35] *Id.* The only published guidance to date is I.R.S. Notice 2010-60, addressing § 501 of the HIRE Act, which covers reporting requirements imposed on foreign financial institutions. I.R.S. Notice 2010-60, 2010-37 I.R.B. 329 (Sept. 13, 2010).

five percent of the value of property transferred to a foreign trust by a U.S. person who does not report the transfer, or thirty-five percent of the distribution amount to a beneficiary who fails to report distribution.[36] Additionally, Congress retained the provision in § 6677 imposing a $10,000 penalty for each thirty-day period for which a failure to file continues after an initial ninety-day grace period beginning when the Internal Revenue Service notifies the person of the requirement to file.[37] In no event, however, can penalties exceed the gross reportable amount.[38]

With recent legislation in a number of states, including Wyoming, allowing for the creation of self-settled trusts, combined with the implications of the FATCA provisions, the shine of foreign trust jurisdictions is beginning to tarnish. Wyoming allows for self-settled trusts, protects the privacy of settlors and beneficiaries, and does not tax trust income, with the result that trusts settled in Wyoming are subject to the same U.S. tax as foreign trusts with U.S. beneficiaries, without exposing clients to the potential risks of unenforceable trust terms and lack of control that can arise when foreign trustees are involved.[39]

III. ONSHORE TRUST SITUS CONSIDERATIONS: WYOMING AS AN EMERGING TRUST SITUS

This section provides an overview of many issues clients and their advisors should consider when creating, migrating, or resettling a trust in Wyoming. Such issues include the Rule Against Perpetuities, tax and privacy implications, various modern trust laws, the availability of private family trust companies, and asset protection statutes.

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[36] HIRE Act § 535 (to be codified at § 6677(a)). This provision applies to returns filed after December 31, 2009. *Id.*

[37] *Id.*

[38] *Id.*

[39] Regarding transfer tax implications of offshore and onshore jurisdictions, one commentator observes:

> [T]he transfer tax consequences of establishing a foreign trust and a domestic trust are identical. Thus, if there are no NRA [non-resident alien] beneficiaries, the grantor should consider establishing the trust in a United States jurisdiction. A suitable choice would be . . . [a] state that permits the grantor to retain a discretionary interest in the trust while shielding the assets from the reach of the grantor's future creditors. One significant advantage of doing so would be to circumvent the throwback regime and the interest charge on distributions of accumulated income to U.S. persons. Another advantage would be to avoid the reporting requirements to which any United States beneficiary, the trustee, or the grantor of the trust would otherwise be subject.
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> Alternatively, the grantor may wish to establish two trusts—a foreign trust that generates foreign-source income for distribution to NRAs and a domestic trust that generates income from whatever source for distribution to United States persons.

Mark W. Smith, *Careful Pre-Immigration Planning Can Save Significant Taxes*, 34 EST. PLAN. 30, 33 (2007) (citations omitted).

A. The Rule Against Perpetuities and the Generation-Skipping Transfer Tax

The Rule Against Perpetuities (RAP) has long been a thorn in the sides of those wishing to create perpetual trusts to hold a family's assets for as long as the family may last. The common law RAP guards against such "dead hand" maneuvering by stating a property interest is not valid unless it vests not later than twenty-one years (plus a reasonable period for gestation) after some life in being at the creation of the interest.[40] When Congress adopted the generation-skipping transfer (GST) tax in 1976 and its amended version in 1986, it premised the structure of the tax on the existence of the RAP or the Uniform Statutory Rule Against Perpetuities (USRAP), which limits the duration of a trust to the RAP or ninety years, whichever is greater. While a number of jurisdictions abolished the RAP before the adoption of the GST tax, the tax itself prompted many more states to eliminate the RAP, extend it significantly, or amend their statutes to allow donors of trusts to opt out.[41]

Created in an effort to prevent one or more generations from escaping gift or estate tax as property passed to them, the GST tax is imposed when a taxable event occurs that passes property through a trust or otherwise to a person younger by two generations or more than the person transferring the property.[42] Such a taxable event occurs in three situations: (1) a direct skip, (2) a taxable termination, or (3) a taxable distribution.[43] A direct skip occurs when a transfer is made to a person more than one generation below the transferor, or, if the parties are unrelated, to a person more than thirty-seven-and-a-half years younger than the transferor.[44] With respect to trusts, such a transaction is treated as a direct skip if property is transferred to a trust in which all beneficiaries meet the requirements of a skip person as described above.[45] The Internal Revenue Code also treats the

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[40] JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES 191 (4th ed. 1942).

[41] *See* Goodwin, *supra* note 3, at 485–86; Richard W. Nenno, *Perpetual Dynasty Trusts: Tax Planning and Jurisdiction Selection*, SR034 A.L.I.-A.B.A. 1569, 1620 (2010); Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2466–70 (2006); Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2097–2105 (2003); William J. Turnier & Jeffrey L. Harrison, *A Malthusian Analysis of the So-Called Dynasty Trust*, 28 VA. TAX REV. 779, 787–88 (2009). Among the top trust situs states, Alaska, Delaware, New Hampshire, and South Dakota have eliminated the RAP. Nevada has extended the RAP for up to 365 years, and Wyoming has extended it for up to 1000 years.

[42] The GST tax is codified under Chapter 13 of the Internal Revenue Code. *See* 26 U.S.C. § 2613(a)(1) (2006); Michael E. O'Connor, *Generation Skipping Transfer Tax: Questions and Answers for the Estate Planner*, N.Y. ST. B. J., Apr. 1994, at 20, 20. A trust is fully exempt from the GST tax if it was created or made irrevocable before October 22, 1986.

[43] 26 U.S.C. § 2612.

[44] *Id.* § 2612(c); *see id.* § 2613(a)(1) (defining a "skip person").

[45] *Id.* § 2613(a)(2).

termination of an interest in property held in a trust wherein all of the beneficiaries are skip persons as a taxable event.[46] Finally, a trust distribution to a beneficiary who is a skip person constitutes a taxable distribution.[47]

While the GST tax includes a number of exemptions, the one most relevant to this discussion is embodied in the amended version of the GST tax. Adopted in 1986, the amended version of the GST tax allows individuals to transfer a certain dollar amount of property at death without paying transfer taxes, including estate, gift, and GST taxes.[48] By funding a trust with the exempt amount, future generations will benefit from the trust's appreciation free of the implications of any transfer taxes for as long as the governing jurisdiction's perpetuities rule allows, thereby prompting states to abolish or expand their RAP statutes to attract trust business.[49] Therefore, in a number of trust jurisdictions, including Wyoming, a properly-formed trust exists outside the federal transfer tax system, meaning during the trust's life, gift, estate, and GST taxes do not apply and control of trust assets stays in the hands of those named by the settlor and future beneficiaries.[50]

Wyoming has enacted a 1000 year limit on multigenerational trusts (a term-of-years approach), meaning that a valid trust in Wyoming must vest within 1000 years.[51] Currently, a number of states including Delaware, Idaho, South Dakota, and Wisconsin allow a trust to exist indefinitely. In terms of avoiding the GST tax, both abolishing the RAP as well as the term-of-years approach work equally well.[52] Aside from the policy reasons many states cite for keeping the RAP or some extended version of it, several authors have noted that while the idea of a perpetual trust sounds appealing, the reality may be less so.[53] Over time, the tax burden and administrative costs may reduce a trust's revenue enough that inflation, the expectations of future generations, as well as the ever-expanding number of beneficiaries will nullify the ability of the trust to live up to the expectations of its

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[46] *Id.* § 2612(a)(1).

[47] *Id.* § 2612(b).

[48] *Id.* §§ 2631(c), 2010(c). For example, the excludable amount in 2009 was $3,500,000. *Id.* § 2010(c).

[49] *See* Schanzenbach & Sitkoff, *supra* note 41, at 2467–70, 2476–80.

[50] *See* Sterk, *supra* note 41, at 2100.

[51] WYO. STAT. ANN. § 34-1-139 (2010). Wyoming's constitution forbids perpetuities; thus the Wyoming legislature extended rather than abolished the RAP. The 1000 year RAP was enacted at the same time as the UTC with an effective date of July 1, 2003.

[52] *See* Worthington & Merric, *supra* note 3, at 55.

[53] For a discussion of policy reasons behind the RAP, including promoting the alienability of land and intergenerational equity, encouraging entrepreneurial undertakings, limiting the time beneficial ownership and control can be separate, and limiting the duration of spendthrift restrictions, see Sterk, *supra* note 41, at 2109–77. *See also* Paul G. Haskell, *A Proposal for a Simple and Socially Effective Rule Against Perpetuities*, 66 N.C. L. REV. 545, 548–49 (1988).

settlor.[54] Families expand over time; within several generations, a trust that would have provided liberally for four or six descendants is split into twenty-four parts, and this split only increases with each successive generation. As a result, while the term-of-years approach is not indefinite, in the very strictest sense, Wyoming's 1000 year extension encompasses a span of generations that few of us can possibly imagine and will outlive much current law. Such a span may, in the end, prove to be a useful limit.

One final issue to note with respect to various jurisdictions' RAP or lack thereof is the so-called Delaware tax trap. Delaware originally enacted a statute providing that the exercise of a limited power of appointment would reset the RAP period to the date on which such power was executed.[55] Delaware's original statute, now changed, made it possible to create a perpetual trust even under the RAP by using successive limited powers of appointment.[56] In response, Congress enacted §§ 2514(d) and 2041(a)(3) of the Internal Revenue Code, stipulating if a power of appointment is created after 1942 and is exercised to create another power of appointment, the vesting may not occur "without regard to the date of the creation of the first power."[57] As a result, states that have replaced the RAP with a rule against the suspension of the power of alienation avoid the tax code sections entirely.[58] However, the Delaware tax trap may still pose problems if a state has abolished the RAP but not also adopted a rule against the suspension of the power of alienation.[59] Without such a rule, no time limit exists within which

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[54] *See* Turnier & Harrison, *supra* note 41, at 789–97.

[55] DEL. CODE ANN. tit. 25, § 503(c) (1999); Lynn Foster, *Fifty-One Flowers: Current Perpetuities Law in the States*, PROB. & PROP., Aug. 2008, at 30, 32–33. A person given a *general* power of appointment under a trust may exercise such power in favor of anyone including the power holder, the power holder's estate, the power holder's creditors, or the creditors of the power holder's estate. A *limited* power of appointment, also referred to as a special power of appointment, may be used in favor of anyone *except* the power holder, the power holder's estate, the power holder's creditors, or the creditors of the power holder's estate.

[56] DEL. CODE ANN. tit. 25, § 503(c); Foster, *supra* note 55, at 33.

[57] 26 U.S.C. §§ 2514(d), 2041(a)(3) (2006). A limited power of appointment is also considered to exist if the power to make distributions is limited by an "ascertainable standard" relating to health, education, support, and maintenance of the beneficiary. *Id.* § 2041(b)(1)(A); *see* Worthington & Merric, *supra* note 3, at 56–57 ("Flexibility for future generations is often achieved through other means, such as advisory committees, trust advisors with the power to direct distributions, as well as removal and replacement powers.").

[58] Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1333 (2003). The authors state:

> The power of alienation is not suspended at all, and therefore an exercise of a power does not suspend the power of alienation for a period of time that cannot be ascertained by referring back to the creation of the trust. Thus successive special powers of appointment can be created indefinitely in these states, without the trust property being included in the donee's taxable gross estate.

Id. The power of alienation refers to a trustee who holds the power to alienate, or sell, trust property. *Id.* at 1313–14.

[59] *Id.* at 1333–34.

the trust interests must vest, meaning the value of the trust principle is included in the settlor's taxable estate.[60]

Most states have drafted their statutes in such a way as to avoid triggering the Delaware tax trap. However, experts continue to disagree upon which state statutes have sidestepped and which may still trigger the provision.[61] While some commentators argue an extended term-of-years approach to the RAP, like Wyoming, avoids § 2041(a)(3), the consensus is not unanimous.[62] While the Delaware tax trap may not yet be put to rest in a number of onshore jurisdictions, adding language to the trust itself effectively mitigates the problem.[63]

All in all, various states' handling of the RAP have attracted a fair amount of attention. While most issues with regard to the RAP have been adequately dealt with in top trust situs states, the prudent advisor will nevertheless take the aforementioned considerations into account when assisting clients in selecting the most beneficial trust jurisdiction.

B. Ultra Tax Friendly

Another important consideration in deciding where to settle or migrate a trust is the tax burden imposed by the jurisdiction. Taxing the income of a trust results in constant erosion of assets, slower growth, and smaller trust distributions to beneficiaries. States that tax trust income or impose a capital gains tax on trust assets are significantly less advantageous to the client.

Many of the same states that have abolished or extended the RAP, including Alaska, Nevada, South Dakota, and Wyoming, have also either abolished or never imposed state tax on trust income. Delaware taxes resident income.[64] New Hampshire taxes dividends and interest.[65] In addition to assessing no income tax on trusts, Wyoming also has no individual or corporate income tax, no state gift tax, no tax on out-of-state retirement income, no tax on mineral ownership, no intangibles tax, no capital gains tax on trust income, and low property tax. The likelihood of Wyoming ever adopting an income tax is extremely low in light

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[60] *Id.*

[61] *See* Foster, *supra* note 55, at 33 (giving an overview of the ongoing discussion regarding the Delaware tax trap).

[62] *See id.*

[63] For example, when decanting a trust, the new trust created by the exercise of the power under the old trust should specify that the interests in it are "tested with reference to the creation of the first trust." Richard B. Covey & Dan T. Hastings, *Recent Developments in Transfer and Income Taxation of Trusts and Estates and State Trust and Estate Law*, 43 HECKERLING INST. ON EST. PLAN. ¶ 100, ¶ 101.8[C], at 1-39 (2009). As a result, in a state like Wyoming, the new trust must vest within 1000 years of the creation of the first trust.

[64] DEL. CODE ANN. tit. 30, § 1102 (2010).

[65] N.H. REV. STAT. ANN. §§ 77:3–:4 (2010).

of its constitutional provision essentially preventing such an imposition.[66] In addition, Wyoming's vast reserves of coal, oil, and natural gas, and revenue from severance taxes are what have and will remain available to offset the need for an income tax.[67]

The tax imposed by various states on insurance premiums is often referred to in the determination of trust situs but is only relevant in a narrow set of situations—namely when a trust, generally one settled in a state with an abolished or expanded RAP, purchases a high annual premium placement life insurance policy.[68] State insurance premium taxes are based on the annual premium amount paid into a policy, thereby reducing the amount of premium that is able to grow over time. South Dakota calls for 250 basis points (bp) (or 2.5%) paid on the first $100,000 of annual premium and 8 bp (or .08%) on any amounts thereafter.[69] Alaska imposes 270 bp on the first $100,000 of annual premium and 10 bp thereafter.[70] Wyoming assesses 75 bp, no matter the amount of annual premium.[71] New Hampshire and Delaware impose 200 bp, and Nevada calls for 350 bp.[72] When assessing trust situs jurisdictions for a client who plans to incorporate a private placement life insurance policy into a trust, insurance premium tax percentages are certainly part of the equation. The jurisdiction that will actually impose the lowest tax will depend on the amount of annual premium paid.[73]

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[66] WYO. CONST. art. 15, § 18 ("No tax shall be imposed upon income without allowing full credit against such tax liability for all sales, use, and ad valorem taxes paid in the taxable year by the same taxpayer to any taxing authority in Wyoming."). *See generally* Phil Roberts, *A History of the Wyoming Sales Tax: How Lawmakers Chose it from among Severance Taxes, an Income Tax, Gambling, and a Lottery*, 4 WYO. L. REV. 157 (2004) (outlining a complete history of Wyoming's taxation system).

[67] *See* WYOMING STATE GOVERNMENT REVENUE FORECAST, FISCAL YEARS 2010–2014, *available at* http://eadiv.state.wy.us/creg/GreenCREG_Jan10.pdf.

[68] The policies at issue in such situations are often high annual premium private placement life insurance policies. *See* Al W. King III & Pierce H. McDowell III, *Trust Administration: The Domestic Advantage*, *in* THE PPLI SOLUTION: DELIVERING WEALTH ACCUMULATION, TAX EFFICIENCY, AND ASSET PROTECTION THROUGH PRIVATE PLACEMENT LIFE INSURANCE 79, 80 (Kirk Loury ed., 2005) (discussing how private placement life insurance can be used as a wealth management tool within a trust). Private placement life insurance policies are a way for taxpayers to invest large sums of money (often more than $1 million) and ensure tax-free compounded earnings managed according to the taxpayer's own choosing. Leslie C. Giordani et al., *Private Placement Life Insurance Planning*, SP017 A.L.I.-A.B.A. 829, 833–34 (2008). Such policies are attractive more for their use as an investment vehicle than for their death benefits. *Id.*

[69] S.D. CODIFIED LAWS § 10-44-2 (2010).

[70] ALASKA STAT. § 21.09.210 (2010).

[71] WYO. STAT. ANN. § 26-4-103 (2010).

[72] N.H. REV. STAT. ANN. § 400-A:32 (2010); DEL. CODE ANN. tit. 18, § 702 (2010); NEV. REV. STAT. § 680B.027 (2010).

[73] It is relevant to note that retaliatory provisions may come into play in most states with respect to insurance premium taxes. Such provisions state that if the company providing the insurance is located in a different jurisdiction, the state may impose that other jurisdiction's premium tax rate if it is higher. *See, e.g.*, DEL. CODE ANN. tit. 18, § 532.

C. Privacy

While guarding the trust corpus is at the top of many clients' lists, protecting the family's privacy is often of equally high concern. Some families prefer to keep their names, assets, and any family business details out of the public eye. While many top trust situs jurisdictions, including Delaware, South Dakota, and Wyoming, do not require the recording of a trust or supervise its administration, thereby keeping the trust out of the public record, some states do require such recording and registration.[74] Furthermore, if the trust becomes the subject of a litigated dispute, the court may make trust information part of the public record. Some states allow a trust to be structured so that it holds interest in an LLC, which often requires public disclosure of certain information.[75]

Wyoming's recently revised LLC statutes provide complete privacy to a trust as a member of an LLC by only requiring disclosure of the registered agent, completely shielding anyone with authority if the LLC so wishes.[76] This provision of Wyoming's LLC Act takes a different approach as compared to the state's former Act as well as to other states which generally require an LLC to divulge whether it is member- or manager-managed and the names of persons with authority to act.[77] This change in Wyoming provides much greater confidentiality and privacy to those registering an LLC.[78] Therefore, a trust whose assets are held by a Wyoming LLC can attain more privacy than in other jurisdictions.

No other top trust situs state offers the kind of LLC-based privacy protection now afforded by Wyoming.[79] However, some other top trust situs states have taken measures to protect trust confidentially. South Dakota, for example, allows

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[74] *See, e.g.*, *id.* tit. 10, § 6504 (noting Delaware courts do not supervise the administration of a trust unless called upon by an interested party to do so). *But see* ALASKA STAT. § 13.36.005 (imposing a duty to register trusts). *See generally* BOGERT ET AL., *supra* note 16, § 64 (listing a number of states that do and do not require trusts to be reported); Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555 (2008) (discussing the pros and cons of privacy laws as they relate to trusts).

[75] *See infra* Part III.D.3 (addressing special purpose entities); *infra* Part III.E (regarding private family trust companies); *infra* Part III.F.3 (explaining FLP and LLC charging order provisions). Even in states requiring LLC disclosure, the experienced lawyer is often able to structure entities within a trust to meet the state requirements and yet disclose little actual information about a client.

[76] WYO. STAT. ANN. §§ 17-29-203, -301, -302.

[77] Dale W. Cottam et al., *The 2010 Wyoming Limited Liability Company Act: A Uniform Recipe with Wyoming "Home Cooking,"* 11 WYO. L. REV. 49, 57, 61–63 (2011).

[78] *See id.* at 57, 94–95.

[79] See sources cited *supra* note 3 for articles discussing what constitutes a top trust situs. Considerations include those discussed in this article, such as tax treatment, the extension or abolition of the RAP, modern trust laws, private trust companies, and asset protection opportunities.

those who establish a trust to petition to protect the privacy of a trust in any judicial proceeding.[80] Delaware also allows parties to petition to seal the court record for three years upon a showing of good cause.[81]

D. Modern Trust Laws

Wyoming has taken a proactive approach to fostering a trust-friendly climate by developing a comprehensive set of modern trust laws. These statutes allow for increased flexibility in the management, amendment, and reformation of trusts.

1. Directed Trust Statutes

Directed trust statutes allow the trust instrument to appoint an independent party, often called a trust advisor, to manage trust assets, thereby relieving the trustee from management decision liability and allowing hand-selected advisors (not necessarily located in Wyoming) to make sensitive decisions regarding trust assets.[82] By relieving the trustee from liability through vesting discretionary duties in a third party, such statutes allow trust assets to be invested and managed in increasingly creative and asset-appropriate directions. For example, the third party with whom investment decision functions are vested may be a committee comprised of people with expertise in each particular class of assets the trust holds. Furthermore, by avoiding the prudent investor standard trustees often work within, directed trust statutes allow management of the trust according to a more or less risk-averse standard.[83] While most states do not have directed trust statutes, the top trust jurisdiction states including Alaska, Delaware, Nevada, New Hampshire, South Dakota, and Wyoming have enacted them.[84]

2. Trust Protector Statutes

While a directed trust statute allows a settlor greater flexibility in the manner in which trust assets are managed, a trust protector statute, for many years a feature only available in offshore jurisdictions, provides flexibility with respect to unforeseen changes that may need to be made in the future of the trust.[85] A trust

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[80] S.D. CODIFIED LAWS § 21-22-28 (2010).

[81] DEL. CH. CT. R. 5(g)(3) (2010).

[82] *See* Al W. King III & Pierce H. McDowell III, *Delegated vs. Directed Trusts*, TR. & EST., July 2006, at 26.

[83] *See infra* Part III.D.5 (discussing the prudent investor standard).

[84] ALASKA STAT. § 13.36.375 (2010); DEL. CODE ANN. tit. 12, § 3313 (2010); NEV. REV. STAT. § 163.5545 (2010); N.H. REV. STAT. ANN. § 564-B:12-1201 (2010); S.D. CODIFIED LAWS § 55-1B-2; WYO. STAT. ANN. § 4-10-712 (2010).

[85] BOGERT ET AL., *supra* note 16, § 992 ("Over the past decade, the use of a trust protector has evolved from being used solely as a tool in offshore trusts to being a valuable asset in providing a settlor with flexibility and control in a wide variety of domestic trusts."); *see* Gregory S. Alexander,

protector is a disinterested third party appointed by the trust and given powers which may include the ability to modify some trust terms as the needs of future generations, tax status, or governing law change. The powers given to the trust protector depend upon what the jurisdiction's law allows and, more specifically, the powers set out in the trust instrument itself.[86] The existence of statutes recognizing trust protectors and delineating the scope of the powers that may be given to them is an important addition to modern trust laws. All of the top trust jurisdictions have effective trust protector laws: Alaska, Delaware, Nevada, New Hampshire, South Dakota, and Wyoming.[87] However, only South Dakota and Wyoming enumerate comprehensive trust protector powers.[88]

3. Special Purpose Entities

Special purpose entities are often used in conjunction with directed trusts and/or trust protectors. These separate, unregulated entities, often LLCs, offer further protection from liability risk for trust advisors, trust protectors, and other decision-making committees.[89] In contrast to individual liability insurance, which can be extremely difficult to obtain for a trust advisor or protector, it is possible to obtain insurance coverage for a special purpose entity, further insulating its members from liability. Such entities also provide legal continuity in the event a trust protector or advisor resigns or dies. While no specific statutes authorize the creation of special purpose entities, five jurisdictions currently permit unregulated special purpose entities: Alaska, Delaware, Nevada, South Dakota, and Wyoming.[90]

Trust Protectors: Who Will Watch the Watchmen?, 27 CARDOZO L. REV. 2807 *passim* (2006); Richard C. Ausness, *The Role of Trust Protectors in American Trust Law*, 45 REAL PROP., TR. & EST. L.J. 319, 324 (2010); Jeffrey Evans Stake, *A Brief Comment on Trust Protectors*, 27 CARDOZO L. REV. 2813 *passim* (2006); Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761 *passim* (2006).

[86] Potential trust protector powers include supervising trustees, modifying trust terms in response to changed circumstances, supervising purpose trusts, advising fiduciaries, contributing to continuity of administration, and arbitrating disputes. Ausness, *supra* note 85, at 327–33.

[87] ALASKA STAT. § 13.36.374; DEL. CODE ANN. tit. 12, § 3313; NEV. REV. STAT. § 163.5553; N.H. REV. STAT. ANN. § 564-B:12-1201; S.D. CODIFIED LAWS § 55-1B-6; WYO. STAT. ANN. § 4-10-710.

[88] Ausness, *supra* note 85, at 350 (citing WYO. STAT. ANN. § 4-10-410(a); S.D. CODIFIED LAWS § 55-1B-6; Alexander A. Bove, Jr., *The Trust Protector: Trust Watchdog or Expensive Exotic Pet?*, 30 EST. PLAN. 390 (2003)).

[89] *See* Worthington & Merric, *supra* note 3, at 58; *supra* notes 75–81 and accompanying text (discussing Wyoming's LLC privacy statutes).

[90] *See* ALASKA STAT. §§ 13.36.370, .375; DEL. CODE ANN. tit. 12, § 3313; NEV. REV. STAT. § 163.5553; S.D. CODIFIED LAWS § 55-1B-6; WYO. STAT. ANN. § 4-10-710.

4. Purpose Trusts

The purpose trust was a unique creation by the drafters of the UTC.[91] Traditionally, a trust has three elements: "a trustee, a corpus, and one or more beneficiaries."[92] Aside from charitable trusts, the common law rule has long required the existence of an ascertainable beneficiary.[93] The two primary causes of the unenforceability of purpose trusts were (1) the RAP and (2) the fact that no one could sue to enforce the trust's purpose.[94] This created problems for settlors seeking to create non-charitable trusts with no identifiable beneficiary, such as one created to maintain and support a family pet, business, or collection of Charles Bronson memorabilia.[95] The UTC pioneered the concept of a non-charitable honorary trust created for a specific purpose but without specified beneficiaries.[96] However, the uniform version limits such trusts to a term of twenty-one years, after which they are unenforceable.[97] This can interfere with the long-term goals of a settlor attempting to achieve a non-charitable purpose, such as maintaining a private building without endangering the property by commingling it with a trust that has identifiable beneficiaries.[98] As a result, settlors have traditionally been advised to locate such trusts in offshore jurisdictions.[99]

In recent years, however, some states, including Wyoming, have enacted the UTC in a manner that allows for effective purpose trusts.[100] Wyoming's statute eliminates the UTC language limiting the term of honorary trusts (solving the perpetuities problem) and provides that they may be enforced by a trust advisor, trust protector, or other appointee (solving the enforcement problem).[101] Purpose

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[91] *See* UNIF. TRUST CODE § 409 (2005).

[92] Alexander A. Bove, Jr., *Trusts Without Beneficiaries—Purpose Trusts For the Family Pets or the Family Business*, TR. & EST., Aug. 2005 [hereinafter *Trusts Without Beneficiaries*], *available at* http://www.bovelanga.com/new/publications/articles/Trusts_Without_Beneficiaries.pdf.

[93] *See* RESTATEMENT (SECOND) OF TRUSTS § 2 (1959); 2 SCOTT, ASCHER & FRATCHER, *supra* note 8, § 12.1; J.B. Ames, *The Failure of the Tilden Trust*, 5 HARV. L. REV. 389, 390 (1982).

[94] Alexander A. Bove, Jr., *The Purpose of Purpose Trusts*, PROB. & PROP., May/June 2004, at 34. While attorneys general are typically authorized to sue to enforce a charitable trust, it would be somewhat difficult for a dog or collection of automobiles to sue a trustee. *Id.*

[95] *See Trusts Without Beneficiaries*, *supra* note 92.

[96] *Id.*; UNIF. TRUST CODE §§ 408 ("Trust for Care of Animal"), 409 ("Noncharitable Trust without Ascertainable Beneficiary").

[97] *See* UNIF. TRUST CODE § 409 cmt.; *Trusts Without Beneficiaries*, *supra* note 92. North Carolina goes so far as to state that such trusts terminate after twenty-one years. N.C. GEN. STAT. § 36C-4-409(1) (2010).

[98] *Trusts Without Beneficiaries*, *supra* note 92; *see also* Alexander A. Bove, Jr., *The Purpose of Purpose Trusts*, 22 GPSOLO 18, 18–19 (2005) (noting possible noncharitable purposes).

[99] *Trusts Without Beneficiaries*, *supra* note 92.

[100] Bove, *supra* note 94, at 35; *see also* WYO. STAT. ANN. § 4-10-410(a) (2010).

[101] WYO. STAT. ANN. § 4-10-410(a)(i)–(ii).

trust property may only be applied pursuant to the trust's intended purpose unless a court determines that the intended purpose can be accomplished without using all available trust assets, the residue of which will be distributed to the settlor or his or her successors.[102] States authorizing purpose trusts for an unlimited duration include Maine, New Hampshire, North Dakota, and Utah.[103] Some states retain the UTC time limitation but alter it in some fashion.[104] All such trusts must meet the other standard requirements for creating an express trust and the purpose "must be certain, reasonable, and possible."[105]

5. Prudent Investor Standard

The Prudent Investor standard governing the investment of trust assets was adopted in 1994 to supplant the Prudent Man standard.[106] This change came about in response to a growing awareness that managing risk is more often undertaken on a portfolio-wide basis rather than asset-by-asset. Most states, Wyoming among them, have adopted the Uniform Prudent Investor Act, allowing trustees more flexibility in the type of asset and overall style of management available when overseeing trust funds.[107]

6. Migrating and Resettling Trusts

Clients choose to migrate or resettle a trust for any number of reasons.[108] They may intend to take advantage of the laws of a more tax-friendly or asset-

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[102] *Id.* § 4-10-410(a)(iii).

[103] *See* ME. REV. STAT. tit. 18-B, § 409 (2010); N.H. REV. STAT. ANN. § 564-B:4-409 (2010); N.D. CENT. CODE § 59-12-09 (2010); UTAH CODE ANN. § 75-7-409 (West 2010).

[104] *See* ARIZ. REV. STAT. ANN. § 14-10409 (2010) (providing for a ninety year period); OR. REV. STAT. § 130.190(1) (2010) (same); S.C. CODE ANN. § 62-7-409 (2010) (excluding cemetery purpose trusts from the perpetuities period); TENN. CODE ANN. § 35-15-409 (2010) (providing for a ninety year period).

[105] Bove, *supra* note 94, at 36 (citing the infamous testamentary trusts of George Bernard Shaw, one of which was dedicated to determining "the number of living persons who speak and write English 'at any and every moment in the world'").

[106] UNIF. PRUDENT INVESTOR ACT 1994 §§ 1–16 (2006); RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 227 (1992). The Prudent Man standard requires that a trustee act "in the same manner as a person of prudence, discretion, and judgment would in managing his or her own affairs with the purpose of accomplishing objectives similar to those of the trustee, not for speculation but for the permanent disposition of the trustee's own funds." BOGERT ET AL., *supra* note 16, § 612. Furthermore, the Prudent Man must evaluate each investment individually. *Id.* A Prudent Investor, on the other hand, is allowed to act in the manner of a prudent investor, exercising reasonable care, skill, and caution as part of an overall investment strategy applied to the whole trust portfolio. RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 227.

[107] A list of states that have adopted the Uniform Prudent Investor Act can be accessed through the NCCUSL website, available at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upria.asp.

[108] The term "migrate" is generally used when a trust is being moved from an offshore to an onshore jurisdiction; "resettle" refers to a trust situs change from one U.S. jurisdiction to another, sometimes implying that the trust is being reformed.

protective jurisdiction; they may want to make trust administration duties easier by locating their trust in the same state as an already-established family office; or they may have simply changed locations themselves and want control of their assets to follow.

Changing the situs of a trust to Wyoming, whether from an onshore or offshore location, occurs automatically upon any Wyoming trustee accepting trusteeship of the trust and some trust administration occurring in Wyoming.[109] The relative ease of establishing a Wyoming private trust company allows for a change of situs instantaneously in the event a client needs to avail itself of the beneficial uses of the Wyoming UTC, including reformation.[110] Furthermore, a change of situs can be obtained without engaging a public trust company (which can take months or longer) for those cases requiring an immediate change. In the event a situs change encompasses a tax planning element, Wyoming's district courts are able to confirm the change of situs on a retroactive basis.[111]

More often than not, the goal of changing situs to Wyoming is permanent. In some instances, however, it is sensible to migrate to Wyoming to take advantage of the Wyoming UTC and then repatriate to the client's home state or country in the event the home state or country's laws would not facilitate a determination or reformation easily obtained in Wyoming. One can migrate a trust to Wyoming and ask a court to reform it without mandating continuing supervision by Wyoming courts.[112] A court in a UTC jurisdiction will generally limit its supervision to particular matters addressed to it and not subject the trust to mandatory supervision, as some states require.[113]

7. Reformation and Decanting Ability

As settlors and beneficiaries are often surprised to learn, the terms of an irrevocable trust are not necessarily set in stone. The ability to reform or modify an outdated trust or simply change certain terms of a trust when they have become untenable can be a useful tool. Even changes contrary to the stated purpose or intent of the trust can often be made so long as the settlor and all beneficiaries agree.[114] With the adoption of the UTC, Wyoming and a number of other states

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[109] WYO. STAT. ANN. §§ 4-10-108, -202 (2010).

[110] *See infra* Part III.E.1 (discussing private trust companies); *infra* notes 114–20 and accompanying text (discussing reformation).

[111] WYO. STAT. ANN. § 4-10-417.

[112] *See id.* § 4-10-201(a) ("The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law."); *id.* § 4-10-201(b) ("A trust is not subject to continuing judicial supervision unless ordered by the court.").

[113] *See* UNIF. TRUST CODE § 201(b) cmt. (2005).

[114] *See, e.g.*, WYO. STAT. ANN. §§ 4-10-411 to -418.

allow modification of a trust within certain parameters by court order.[115] Several states, such as South Dakota, have gone beyond the UTC in adopting more flexible reformation and modification statutes.[116] While South Dakota's non-UTC statute has a different structure, Wyoming provides the same reformation, termination, and modification opportunities.[117] The differences include Wyoming's allowance of retroactive modification to achieve a settlor's tax objectives,[118] South Dakota's lower threshold before allowing settlors to terminate uneconomic trusts,[119] and South Dakota's prohibition of beneficiaries from asserting the doctrine of laches in a modification, termination, or reformation proceeding.[120]

Likewise, the ability to transfer assets of an existing trust to a newly created trust, often called decanting, may achieve the same or additional goals. To this end, a number of states have adopted decanting statutes, including Alaska, Delaware, Nevada, New Hampshire, and South Dakota.[121] Some commentators argue that these statutes merely codify the already extant common law ability of a trustee to decant.[122] This common law doctrine is based on two principals: first, a trustee with absolute power to invade a trust corpus holds a limited power of appointment; and second, the trustee, as holder of a limited power of appointment, may use that power to create an estate that is less than that specified in the governing instrument, so long as the governing instrument does not reflect a contrary intent.[123] While the differing stances taken by the various Restatements of Property have clouded the issue, courts have accepted that a trustee's discretionary power is the equivalent of a power of appointment, thereby supporting the first principle of the argument.[124]

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[115] *See, e.g.*, *id.* A summary of which states have adopted portions of the UTC can be accessed through the NCCUSL website, available at http://www.nccusl.org/Update/.

[116] *See, e.g.*, S.D. CODIFIED LAWS §§ 55-3-23 to -30 (2010) (providing for trust modification, termination, and reformation).

[117] *See* WYO. STAT. ANN. §§ 4-10-411 to -418.

[118] *Id.* § 4-10-417.

[119] *See* S.D. CODIFIED LAWS § 55-3-27 (worth less than $50,000); WYO. STAT. ANN. § 4-10-415 (worth less than $150,000).

[120] S.D. CODIFIED LAWS § 55-3-29.1.

[121] ALASKA STAT. § 13.36.157 (2010); DEL. CODE ANN. tit. 12, § 3528 (2010); NEV. REV. STAT. § 163.556 (2010); N.H. REV. STAT. ANN. § 564-B:4-418 (2010); S.D. CODIFIED LAWS § 55-2-15.

[122] William R. Burford & Patricia H. Char, *Renegotiating the Irrevocable Trust: Amending, Decanting, and Judicially Modifying*, SP035 A.L.I.-A.B.A. 325, 333 (2009).

[123] Alan Halperin & Michelle R. Wandler, *Decanting Discretionary Trusts: State Law and Tax Considerations*, EST., GIFTS, & TR. J., Sept. 2004, at 219; *see* Jonathan G. Blattmachr & Diana S. C. Zeydel, *Tax Effects of Decanting—Obtaining and Preserving the Benefits*, J. TAX'N, Nov. 2009, at 288, 289; William R. Culp, Jr. & Briani Bennet Mellen, *Trust Decanting: An Overview and Introduction to Creative Planning Opportunities*, 45 REAL PROP., TR. & EST. L.J. 1, 4 (2010); *supra* notes 55–63 and accompanying text (discussing powers of appointment).

[124] The Restatement (First) of Property states that a fiduciary power is not a power of appointment. § 318(2) (1936). This position is also supported by the Restatement (Third) of Trusts. §§ 50 cmt. a, 84 cmt. d (2008) (distinguishing between a fiduciary power, which runs with

Regarding the second principle of a trustee's ability to decant, it is a general rule that a person with a power of appointment has broad discretion in deciding how to exercise that power.[125] If a trustee distributing assets outright to beneficiaries is exercising a power of appointment, common law provides the trustee also has the power to distribute the assets in a lesser estate.[126] This broad power is only limited by the contrary intention of a donor as evidenced by the governing instrument.[127] Therefore, if a situation exists in Wyoming in which reforming or modifying a trust does not achieve the results that decanting it would, the common law decanting doctrine supported by the Restatement (Second) of Property and caselaw suggests that a trustee of a trust under Wyoming law is able to decant the trust for the benefit of the beneficiaries.

8. Virtual Representative Statutes

While the common law doctrine of virtual representation has been in existence for some time, a number of states have statutorily expanded the doctrine's coverage to new applications.[128] The doctrine has been described as one that "permits a party having a substantially identical interest and no conflict of interest on a particular question or dispute to represent and legally bind a minor, disabled person or unborn party, or other beneficiaries with contingent interests."[129] Therefore, these

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the office of a trustee, and a power of appointment, which is personal to the power holder). The Restatement (Second) of Property characterizes a power of appointment as an "authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in property." § 11.1 (1986). And finally, the as-yet-tentative draft of the Restatement (Third) of Property appears to return to the position of the First Restatement. § 17.1 cmt. g (Tentative Draft No. 5, 2006).

See Phipps v. Palm Beach Trust Co., 196 So. 299, 301 (Fla. 1940); *In re* Spencer's Estate, 232 N.W.2d 491, 496–98 (Iowa 1975); Wiedenmayer v. Johnson, 106 N.J. Super. 161, 164–65 (App. Div. 1969). No case law in Wyoming discusses decanting. However, in *Garwood v. Garwood*, 194 P.3d 319, 327 (Wyo. 2008), the Wyoming Supreme Court recognized the broad discretion of the court to modify trusts under the common law, the Uniform Trust Code, or the equitable powers of the court. If the common law can be used to modify a trust, it is arguable that it may also be used to decant a trust.

[125] RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 12.2 (1986) ("The scope of the donee's authority as to appointees and the time and manner of appointment is unlimited except to the extent the donor effectively manifests an intent to impose limits.").

[126] Covey & Hastings, *supra* note 63, ¶ 101.3[B] (citing *Phipps*, 196 So. at 301) ("[T]he power to appoint outright to permissible appointees includes the power to appoint in further trust for them."); *see* 1 SCOTT, ASCHER & FRATCHER, *supra* note 8, § 3.1.2; Blattmachr & Zeydel, *supra* note 123, at 289.

[127] Blattmachr & Zeydel, *supra* note 123, at 289; RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 12.2; RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 19.14 (Tentative Draft No. 5, 2006).

[128] *See* Susan T. Bart & Lyman W. Welch, *State Statutes on Virtual Representation—A New State Survey*, 35 AM. C. TR. & EST. COUNS. J. 368 (2010) (providing an analysis of each state's virtual representation statutes).

[129] *Id.* at 368.

statutes clarify trust administration issues when there are contingent, unborn, or unascertainable beneficiaries by delineating who must be served in a judicial proceeding or who must be present in a nonjudicial matter in order to bind beneficiaries with similar interests, including those who are unascertainable.[130] The theory behind this doctrine is that a person representing his own interests as well as the substantially similar interests of unascertainable persons will, by protecting his own interests, adequately protect those of the represented parties; it is therefore in the interests of administrative ease and judicial economy to allow such virtual representation.[131]

While the UTC has incorporated virtual representation provisions, some jurisdictions, including Wyoming, have expanded upon the UTC, while states such as South Dakota have adopted provisions not based upon the UTC at all.[132] For example, states like Wyoming allow any matter involving a trust to be resolved by nonjudicial settlement agreements in which virtual representation is acknowledged.[133] South Dakota, however, does not appear to have a nonjudicial settlement statute except with regard to trustee accounting.[134] As a result, in South Dakota most trust administration matters involving virtual representation must be adjudicated judicially. States that have adopted enhanced virtual representation statutes include Alaska, Delaware, Nevada, South Dakota, and Wyoming.[135]

E. Private Family Trust Companies

Privately-owned, family-operated trust companies have been a part of the landscape of preserving wealth for quite some time.[136] Long assumed to be the purview of those attempting to secure a net worth of at least $200 million, changes in the laws of a number of jurisdictions, including Wyoming, have placed private family trust companies within the reach of clients with far less at stake.[137] Such companies help a family guard its wealth by taking its assets out of the federal transfer tax regime and, just as importantly, allow family members to take

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[130] At least forty-two states have expanded the common law doctrine of virtual representation. *See id.*

[131] Martin D. Begleiter, *Serve the Cheerleader—Serve the World: An Analysis of Representation in Estate and Trust Proceedings and Under the Uniform Trust Code and Other Modern Trust Codes*, 43 REAL PROP. TR., & EST. L.J. 311, 318–19 (2008).

[132] *Id.*

[133] UNIF. TRUST CODE § 111 (2000); WYO. STAT. ANN. § 4-10-111 (2010).

[134] S.D. CODIFIED LAWS § 55-3-45 (2010).

[135] ALASKA STAT. § 13.06.120 (2010); DEL. CODE ANN. tit. 12, § 3547 (2010); NEV. REV. STAT. § 155.140 (2010); N.H. REV. STAT. ANN. § 564-B:3-304 (2010); S.D. CODIFIED LAWS §§ 55-3-31 to -38; WYO. STAT. ANN. § 4-10-304.

[136] Goodwin, *supra* note 3, at 467–68.

[137] *Id.*

charge of their own investments, shouldering as much or as little risk as makes them comfortable.[138]

Usually structured as a corporation or LLC, a private family trust company provides the sort of services generally offered by an individual or institutional trustee and operates under the guidance of a board of directors often comprised of family members and trusted advisors. As a result, the individuals most familiar with the family itself make trust distribution and investment decisions. This structure also allows for what is often called "financial parenting" by providing opportunities to integrate future generations into the active management of the family's ongoing affairs.[139]

Private family trust companies stretch the envelope of flexibility in trust administration in a number of additional ways as well. A private family trust company is able and often better equipped to hold the sort of illiquid family assets that institutional trustees are often unwilling to oversee—family-owned businesses, for example.[140] Such consolidation often results in less fragmentation and overall coordination in asset management and protection. The formation of a private family trust company also solves the trustee successor problem because the company remains the trustee for the life of the trust, regardless of the individuals on the board. Positions on the board are filled or changed as needed, negating continual amendments to underlying trust instruments, fees associated with changing trustees, and offering added flexibility.

1. State Regulation

Originally, states required private family trust companies to be chartered and regulated in the same way as any trust company serving the public.[141] In a number of states, new laws now allow families to create unregulated or lightly-regulated trust companies with the requirement that the company serve only as trustee of a trust that benefits related people. Among the top-rated trust states, Alaska and South Dakota allow only lightly-regulated private family trust companies as does Delaware.[142] Only Wyoming and Nevada allow both regulated and unregulated entities.[143]

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[138] *Id.* at 487–511.

[139] *Id.* at 469–70 (discussing the positive aspects of "financial parenting").

[140] Large banks and other financial institutions are often reluctant to deal with real estate, operating companies, family businesses, etc. *See id.* at 479 n.55.

[141] *Id.* at 472–73.

[142] ALASKA STAT. § 06.26.200 (2010); DEL. CODE ANN. tit. 5, §§ 773–779 (2010); S.D. CODIFIED LAWS § 51A-6A-4 (2010); *see also* Goodwin, *supra* note 3, at 473 n.21.

[143] WYO. STAT. ANN. §§ 13-5-101 to -104 (2010); NEV. REV. STAT. § 669.080(1)(o) (2010).

Wyoming law allows for the creation of unregulated private trust companies.[144] According to an opinion letter issued from the Wyoming Attorney General to the State Banking Commissioner, a company that does not provide trust business to the general public cannot be subject to mandatory regulation as a "trust company."[145] The legislature has defined "trust business" as holding forth to the public that one will act as a trustee and performing such duties in the ordinary course of business.[146] While the legislature removed statutory language explicitly exempting trust companies that do not engage in trust business with the general public, that revision was not intended to have a substantive effect.[147] "[U]nless a corporation exercising trust responsibilities engages in trust operations *for the general public* . . . the State of Wyoming through the Banking Commissioner does not have any powers to regulate the same."[148] Accordingly, any company that does not exercise the trust responsibilities specified in Wyoming Statute section 13-5-101(b) for the public at large will not be engaging in "trust business" and is not subject to regulation as a trust company.[149]

In 2009, in a bid to make its trust laws more competitive, the Nevada legislature exempted trust companies meeting the requirements of a "family trust company" from regulation.[150] Nevada family trust companies must not "(1) Transact trust company business with; (2) Propose to act as a fiduciary for; or (3) Solicit trust company business from, a person who is not a family member."[151] Nevada requires that unregulated trust companies do business with members of a single family.[152] In contrast, Wyoming provides more flexibility by only requiring

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[144] WYO. STAT. ANN. §§ 13-5-101 to -104. Wyoming Statute section 13-5-101(f) states, "Except as provided in this section no person shall act as a trust company or engage in the trust business without first obtaining a charter from the commissioner under this chapter." The language of this statute requires any person, including a corporation, to obtain a charter from the Banking Commissioner if such person: (1) is a "trust company," or (2) engages in "trust business." Wyoming Statute section 13-1-101(xv) defines the term "trust business" as:

> [T]he holding out by a person to the public at large by advertising, solicitation or other means that such person is available to act as an executor, administrator, guardian, conservator or trustee in this state and accepting and undertaking to perform the duties in such a capacity in the regular course of his business.

[145] Letter from Joseph B. Meyer, Wyo. Attorney Gen., to Sue Mecca, State Banking Comm'r, Wyo. Banking Comm'n (Mar. 1, 1993) [hereinafter Att'y Gen. Op.] (on file with author).

[146] WYO. STAT. ANN. § 13-1-101(xv).

[147] Att'y Gen. Op., *supra* note 145.

[148] *Id.* (emphasis added).

[149] *Id.*

[150] S.B. 365, 75th Leg., Reg. Sess. (Nev. 2009); *see* NEV. REV. STAT. § 669.080(1)(o) (2010) ("This chapter does not apply to a person who . . . [a]cts as a family trust company . . . . A family trust company which is not licensed under the provisions of this chapter shall be deemed not to have engaged in trust company business . . . ."); *id.* § 669A.100 (exempting family trust companies from licensing requirements).

[151] NEV. REV. STAT. § 669.042; *accord id.* § 669A.080(3).

[152] *Id.* § 669.042.

that a private trust company not hold itself forth to the public as providing trust services.[153] Nevada also has a much higher state insurance premium tax than Wyoming[154] and does not provide equivalent protection to LLCs and Family Limited Partnerships (FLPs).[155]

An unregulated private family trust company is exempt from the regulation normally required of an entity formed to offer trustee services to the public at large. Such companies tend to be quick and inexpensive to establish precisely because there are no reporting requirements, attendant formalities, or minimum capital investment. Due to zero state oversight, such companies are less expensive to operate than their regulated counterparts. Additionally, the absence of licensing requirements allows an unregulated private trust company to make changes to its board members, officers, and some structural provisions without the hassle and expense associated with changing institutional trustees.

A regulated private family trust company, on the other hand, requires an initial capital investment, annual state audits, policy and procedure manuals, and compliance with other regulatory requirements.[156] Such companies are often subject to state supervision regulating the number of directors (generally requiring a resident director), the number of board meetings per year, the existence of a physical office in the state, and the number of employees. Furthermore, in some states, including South Dakota, a surety bond is required.[157] As a result, a regulated private family trust company is more costly and time-intensive to set up and administer.

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[153] *See supra* notes 144–49 and accompanying text.

[154] *See supra* notes 71–72 and accompanying text.

[155] *See infra* Part III.F.3. Nevada FLPs formed after 2007 that have not opted to be governed by the old version of the Uniform Limited Partnership Act (ULPA) can be subject to foreclosure by a creditor with a charging order. Mark Merric & William Comer, *Forum Shopping for Favorable FLP and LLC Legislation—Part I*, STEVE LEIMBERG'S ASSET PROTECTION PLAN. EMAIL NEWSL., no. 112 (Aug. 2007) [hereinafter Merric & Comer, No. 112], *available at* http://www.hro.com/files/file/publications/Merric/Asset_Protection_Planning/Charging_Order/chargingorder5.pdf; *see also* NEV. REV. STAT. § 87A.480 (allowing foreclosure of a charged interest in a limited partnership governed by the new version of ULPA).

While Nevada specifies that the charging order is the sole remedy of a creditor against a member's LLC interest, its statute is silent as to the availability of broad charging orders that may restrict LLC activities and equitable remedies, such as reverse veil-piercing. Mark Merric & William Comer, *Forum Shopping for Favorable FLP and LLC Legislation—Part VI*, STEVE LEIMBERG'S ASSET PROTECTION PLAN. EMAIL NEWSL., no. 154 (May 2010) [hereinafter Merric & Comer, No. 154], *available at* http://www.hro.com/files/file/publications/Merric/Asset_Protection_Planning/Charging_Order/LLCChargingOrderTable.pdf. Wyoming expressly prohibits broad charging orders. WYO. STAT. ANN. § 17-29-503(g) (2010). Its newly enacted LLC statute also prevents the use of equitable remedies, such as reverse veil-piercing. *Id.*; Cottam et al., *supra* note 77, at 81.

[156] *See* DEL. CODE ANN. tit. 5, § 771 (2010) ($1,000,000); S.D. CODIFIED LAWS § 51A-6A-19 (2010) ($200,000); WYO. STAT. ANN. § 13-5-105 ($500,000).

[157] *See, e.g.*, S.D. CODIFIED LAWS § 51A-6A-19 (requiring a surety bond of $1 million).

One argument often made by proponents of regulated trust companies hinges on liability—if the corporate veil of an unregulated entity is pierced, the members of the family who are the members of the LLC potentially become personally liable.[158] This argument is not particularly persuasive for several reasons. First, as one commentator notes, "by virtue of the family component of these trusts, the beneficiaries suing for breach of trust will be the children, siblings, cousins, nieces, and nephews of those serving in a decision-making capacity in the trust."[159] And second, when creating an unregulated private family trust company, most attorneys will advise their clients to create and employ basic organizational documents such as bylaws, meeting minutes, and a structured decision-making process. Finally, Wyoming's newly revised LLC statute minimizes the risk of reverse-veil piercing.[160] As a result, unregulated companies are not at substantially greater risk of liability than their regulated cousins.

A Wyoming private family trust company can be wholly exempt from the regulation normally required of an entity formed to offer trustee services to the public at large; however, if a family's needs are better met by the formation of a regulated entity, Wyoming allows for chartered, and therefore regulated, private family trust companies as well.[161] Most families establishing private family trust companies in Wyoming opt for the unregulated version because it is cost effective, easy to set up and administer, requires little year-to-year reporting, and provides the greatest flexibility in terms of family control and structure. Wyoming's corporate law allows both unregulated and regulated private trust companies to be structured so as to completely shield family names, assets, and other relevant details from the public.[162] As one of only a few top-rated trust situs states that allow for the formation of unregulated as well as regulated private family trust companies, both of which provide a high degree of protection and privacy, Wyoming offers clients the ultimate in choice when creating a private family trust company.

2. Federal Regulation and the Dodd-Frank Act

The Securities and Exchange Commission (SEC) considers many trustees to be investment advisers within the meaning of the Investment Advisers Act of 1940 (IAA).[163] Such trustees must register with the SEC as investment advisers

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[158] *See* Goodwin, *supra* note 3, at 477–78.

[159] *Id.* at 478 n.49.

[160] *See* WYO. STAT. ANN. § 17-29-503(g); Cottam et al., *supra* note 77, at 81.

[161] Although there are no formal regulations on the matter, the Wyoming Division of Banking has allowed a family to form a chartered trust company with the restriction that it not offer trustee services to the public at large.

[162] *See supra* notes 75–81 and accompanying text.

[163] *See* Joseph Nameth, SEC No-Action Letter, 1983 WL 30256 (Jan. 31, 1983) (applying the IAA to private trusts). The SEC's position appears to be that a trustee with discretionary power to buy and sell securities for a trust is an investment adviser within the meaning of the IAA where the

unless an exemption to registration applies. Most trustees of private family trust companies have relied on the private adviser exemption to avoid registration under the IAA.[164] Further, the SEC has a long tradition of issuing exemptive orders to family offices pursuant to its authority to rule that an office falls within the definition of an investment adviser but is "not within the intent" of that definition.[165] Not only were such companies not required to register, they did not have to comply with any of the other regulations imposed on investment advisers by the IAA.[166]

The recently-enacted Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) eliminates this exemption, effective July of 2011.[167] To avoid forcing private family trust companies to register, the Dodd-Frank Act creates a new exemption from registration under the IAA for any "family office."[168] Further, the Dodd-Frank Act directs the SEC to promulgate rules defining the term family office in a way that is consistent with previous exemptive orders issued by the SEC and recognizes the range of organizational, management, and employment structures employed by family offices.[169]

On October 12, 2010, the SEC proposed new rules defining the family office exemption and called for public comments to be submitted before November 18, 2010.[170] According to the proposed rule, the IAA does not define a family office as

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trustee undertakes such activities for compensation. *Id.* The SEC has adopted a broad definition of compensation and has stated that a trustee accepting fees for administering trust(s) constitutes compensation for investment advice. *Id.*

[164] The former private investor exemption applied to advisers who (i) have had fewer than fifteen clients in the past twelve months, (ii) do not hold themselves out generally to the public as investment advisers, and (iii) do not act as an investment adviser to a registered investment company or business development company. *See* 15 U.S.C. § 80b-3(b)(3) (2006).

[165] Family Offices, 75 Fed. Reg. 63,753, 63,754 (Oct. 18, 2010) (citing 15 U.S.C. § 80b-2(a)(11)(G)) (to be codified at 17 C.F.R. § 275.202(a)(11)(G)-1).

[166] *Id.* at 63,754–63,755.

[167] Pub. L. No. 111-203, 124 Stat. 1367 (2010). The Dodd-Frank Act, signed into law on July 21, 2010, sets forth several amendments to the IAA, as amended. *Id.* § 403 (to be codified at 15 U.S.C. § 80b-3). Under the Act, many unregistered investment advisers will be required to register for the first time with either the SEC or with state securities regulators. The purpose of removing the exemption was to force private fund advisers (such as hedge funds) to register with the SEC. Family Offices, 75 Fed. Reg. 63,753, 63,756 (Oct. 18, 2010) (to be codified at 17 C.F.R. § 275.202(a)(11)(G)-1).

[168] § 409 (to be codified in 15 U.S.C. § 80b-2(a)(11)).

[169] *Id.*

[170] Family Offices, 75 Fed. Reg. 63,753, 63,754 (Oct. 18, 2010) (to be codified at 17 C.F.R. § 275.202(a)(11)(G)-1).

an investment adviser.[171] The rule defines a family office as a company (including its employees, directors, trustees, etc.) that

> (1) Has no clients other than family clients; provided that if a person that is not a family client becomes a client of the family office as a result of the death of a family member or key employee or other involuntary transfer from a family member or key employee, that person shall be deemed to be a family client for purposes of this section . . . for four months following the transfer of assets resulting from the involuntary event;
>
> (2) Is wholly owned and controlled (directly or indirectly) by family members; and
>
> (3) Does not hold itself out to the public as an investment adviser.[172]

In proposing these requirements, the SEC sought to distill the principles developed over several decades of granting exemptive orders to specific family trust companies into a general rule.[173] Notable provisions of the proposed rule include the inclusion of non-traditional individuals as family members,[174] the non-exemption of family offices that serve or are owned or operated by more than one family,[175] the requirement that family offices not hold themselves forth to the public as investment advisers,[176] and the proposal that the SEC not rescind any of its prior exemptive rulings.[177] Until the SEC issues the final rules defining the term family office, it will remain difficult to determine whether the exemption will be available to individual trustees. However, it is likely that some trustees of private family trust companies will fall within the new exemption.

The Dodd-Frank Act requires the SEC to grandfather certain persons into the definition of family office.[178] Such persons must have not been registered or required to be registered under the IAA on January 1, 2010, solely because

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[171] *Id.*

[172] *Id.* at 63,762.

[173] *Id.* at 63,755.

[174] The proposed rules define adopted children, stepchildren, spousal equivalents, key employees, and the founders' parents, siblings, and the issue thereof as family members. *Id.* at 63,763.

[175] *Id.* at 63,762. The SEC seeks to distinguish between family offices and family-run offices. *Id.* at 63,759. It argues that families can protect their own interests within the family or through state litigation in ways that outsiders cannot. *Id.* at 63,754.

[176] *Id.* at 63,759. The SEC argues that holding a company out to the public as an investment adviser contradicts the policy rationale for not requiring family offices to register. *Id.*

[177] *Id.* The SEC argues that the rule should allow family offices to rely on prior rulings because (1) the policy of the proposed rule does not differ substantially from past exemptive rulings, and (2) family offices do not compete with each other, eliminating the need to level the playing field. *Id.*

[178] Pub. L. No. 111-203, § 409, 124 Stat. 1367, 1575–76 (2010) (to be codified at 15 U.S.C. § 80b-2(b)(3)).

they provided investment advice to one of three categories of clients specified in the Dodd-Frank Act.[179] The SEC has acknowledged that it is prohibited from not grandfathering such individuals and has incorporated the grandfathering provision into its proposed rule.[180]

F. Asset Protection

Asset protection planning is premised on the same basic notions of wealth preservation that compel most clients to seek estate planning counsel in the first place. Planners often take an approach involving the creation of a number of sheltered entities such as limited partnerships, LLCs, corporations, life insurance policies, and various trusts, all formed for the purpose of tax planning and wealth transfer but having the additional effect of protecting assets from creditors.[181] While offshore asset protection trusts have long existed, twelve U.S. jurisdictions have adopted domestic asset protection trust (DAPT) legislation, making asset protection a reality onshore.[182]

A certain degree of tension exists with regard to the rights of an individual to protect his or her assets versus the rights of creditors to recover monies they are owed.[183] While guarding against fraud in this sector of trust creation is important, the fact remains that the vast majority of clients who hire an advisor to help with estate planning have no thoughts of defrauding present or future creditors. That being said, a prudent planner does not discount this potentially important aspect when assessing a client's needs in terms of type of trust and situs selection.

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[179] *Id.* Specified clients include

> (A) natural persons who, at the time of their applicable investment, are officers, directors, or employees of the family office who—
>
> (i) have invested with the family office before January 1, 2010; and
>
> (ii) are accredited investors . . . ;
>
> (B) any company owned exclusively and controlled by members of the family of the family office, or as the Commission may prescribe by rule;
>
> (C) any investment adviser registered under the Investment Adviser Act of 1940 that provides investment advice to the family office and who identifies investment opportunities to the family office, and invests in such transactions on substantially the same terms as the family office invests, but does not invest in other funds advised by the family office, and whose assets as to which the family office directly or indirectly provides investment advice represent, in the aggregate, not more than 5 percent of the value of the total assets as to which the family office provides investment advice.

Id.

[180] Family Offices, 75 Fed. Reg. 63,753, 63,759 (Oct. 18, 2010).

[181] *See* Osborne & Osborne, *supra* note 3, at 215–16.

[182] *See supra* Part II (discussing offshore trust jurisdictions).

[183] *See* Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts*, 53 HASTINGS L.J. 287, 289 (2002); Osborne & Osborne, *supra* note 3, at 209–10.

Asset protection legislation varies widely from state to state.[184] Wyoming's laws are advantageous in several respects. First, Wyoming is one of only a few highly-ranked jurisdictions allowing self-settled spendthrift trusts by statute.[185] Second, Wyoming laws provide protection for discretionary as well as mandatory distributions in self-settled and third party trusts.[186] Third, Wyoming statutes give clear definitional guidance regarding discretionary trusts and, absent an abuse of discretion, prevent creditors from compelling discretionary distributions.[187] Finally, Wyoming has sole remedy charging order protection for LLCs and Family Limited Partnerships (FLPs).[188]

1. Self-Settled Trust Legislation

A self-settled trust is generally an irrevocable trust organized in such a way that the settlor is also a discretionary beneficiary. A spendthrift trust gives the trustee full authority to decide when and how assets are distributed as long as they are for the benefit of the beneficiary and protect assets against attachment by creditors (minus a few statutory exceptions).[189] Combined with the advantages of spendthrift protection, self-settled trusts are fairly powerful when it comes to asset protection. The majority of states and the UTC do not allow spendthrift trusts to be self-settled, or rather they do not protect a beneficiary to the extent that such a beneficiary is also the person who settled the assets in the trust.[190]

In 2007, Wyoming amended the Wyoming Uniform Trust Code to allow for the creation of self-settled spendthrift trusts.[191] A self-settled qualified spendthrift trust in Wyoming allows the settlor to receive: (1) income from the trust; (2) distributions from a charitable remainder annuity trust or unitrust; (3) annual distributions of up to five percent of the initial value of the trust; (4) distributions of principal at the trustee's sole discretion or based on an ascertainable standard;

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[184] *See* Shaftel, *supra* note 3 (including a state-by-state assessment of DAPT legislation); *see also* Osborne & Osborne, *supra* note 3, at 230–45.

[185] WYO. STAT. ANN. § 4-10-510 (2010); *see infra* Part III.F.1 (discussing self-settled trusts).

[186] WYO. STAT. ANN. § 4-10-508. This statute provides that a creditor cannot reach a mandatory distribution until it is received by the beneficiary. South Dakota has also taken this approach which follows the Restatement (Second) of Trusts view. *See infra* Part III.F.2 (discussing protection of various distribution interests).

[187] WYO. STAT. ANN. §§ 4-10-103, -504; *see infra* notes 205–08 and accompanying text (discussing protection from compelled distributions).

[188] WYO. STAT. ANN. § 17-29-503(g); *see infra* Part III.F.3 (discussing family limited partnerships and limited liability companies).

[189] The exceptions vary by state but often include exceptions for claims of child support, alimony, division of assets in divorce proceedings, and sometimes tort creditor claims.

[190] *See, e.g.*, UNIF. TRUST CODE art. 5 (2005).

[191] WYO. STAT. ANN. §§ 4-10-501 to -523. Alaska, Delaware, Hawaii, Missouri, Nevada, New Hampshire, Oklahoma, Rhode Island, South Dakota, Tennessee, and Utah also have statutes that protect self-settled discretionary trusts from creditors.

and (5) the use of real property held in a qualified personal residence trust.[192] Without affecting the trust's spendthrift protection, the settlor is statutorily allowed to retain a number of powers including: (1) the power to veto distributions; (2) an inter vivos or testamentary general or limited power of appointment; (3) the right to add, remove, or replace a trustee, a trust advisor, or a trust protector with a person other than the settlor; and (4) the right to act as an investment advisor to the trust.[193] Of the top trust situs jurisdictions, Wyoming's statutes are the broadest with respect to the powers a settlor may retain.[194]

One of the requirements for creating a Wyoming qualified spendthrift trust is that the instrument must state the laws of the state will govern the validity, construction, and administration of the trust.[195] However, if a court declines to apply the law of Wyoming, a trustee has the right to resign, at which point the court will appoint a successor trustee.[196] Wyoming protects not only the trustee, trust protector, and trust advisor, but also "any person involved in the counseling, drafting, administration, preparation, execution or funding of the trust" against any claims or causes of action by a settlor's creditor.[197] Additionally, Wyoming law requires a settlor to sign a sworn affidavit stating he is not attempting to defraud creditors, the transfer will not result in the settlor's insolvency, he is not considering filing for bankruptcy, and he has personal liability insurance of $1,000,000 or an amount equal to the value of all property transferred to the trusts, whichever is less.[198]

2. Types of Distribution Interests Protected

Both discretionary and mandatory distribution interests are potentially implicated in asset protection statutes. In discretionary trusts, a trustee has the power to make distributions to beneficiaries or to make no distributions at all. As

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[192] *Id.* § 4-10-510. These allowances are equivalent to the most generous statutory allowances of other top trust situs jurisdictions. *See* ALASKA STAT. § 34.40.110 (2010); DEL. CODE ANN. tit. 12, §§ 3570–3576 (2010); NEV. REV. STAT. §§ 166.010 to .170 (2010); N.H. REV. STAT. ANN. § 564-D:1-18 (2010); S.D. CODIFIED LAWS §§ 55-16-1 to -17 (2010).

[193] WYO. STAT. ANN. § 4-10-510.

[194] Alaska, Delaware, Nevada, New Hampshire, and South Dakota all allow a settlor the power to veto distributions. None of these states allow the settlor more than a non-general power of appointment. The aforementioned states vary regarding the settlor's power to replace trustees, trust advisors, or trust protectors. Only South Dakota and Alaska (with the caveat that the settlor does not have trustee power over discretionary distributions) join Wyoming in allowing a settlor to act as a trust advisor. *See* ALASKA STAT. § 34.40.110; DEL. CODE ANN. tit. 12, §§ 3570–3576; NEV. REV. STAT. §§ 166.010 to .170; N.H. REV. STAT. ANN. § 564-D:1-18; S.D. CODIFIED LAWS §§ 55-16-1 to -17.

[195] WYO. STAT. ANN. § 4-10-510(a)(ii).

[196] *Id.* § 4-10-522.

[197] *Id.* § 4-10-517.

[198] *Id.* §§ 4-10-512(b), -523.

a result, because a beneficiary does not have a *right* to distributions, it is generally argued the beneficiary therefore does not have a property interest in the trust.[199] It follows that a creditor may not stand in the debtor-beneficiary's shoes and attach trust distributions, thus providing creditor protection either separate from or in addition to that imparted under a spendthrift trust.[200]

Wyoming laws provide protection for discretionary distributions.[201] Alaska, Delaware, Nevada, and South Dakota provide similar protection.[202] Furthermore, Wyoming clearly defines the term "discretionary" and "discretionary trust," making it clear to which trusts certain protections apply.[203] South Dakota is the only other top trust jurisdiction with a clear definition of "discretionary."[204]

Mandatory trusts, as opposed to discretionary trusts, give no power to the trustee regarding whether or not a distribution is made, rather the trustee *must* make the disbursement required by the terms of the trust instrument. While a mandatory distribution is arguably a property interest and therefore attachable, Wyoming's statutes clearly articulate a creditor has no rights over mandatory distributions *until they reach* the beneficiary.[205] As a result, a creditor cannot compel a trustee to make a mandatory distribution.[206] As long as a trustee fails to make mandatory distributions, the creditor is thwarted.[207] Additionally, a creditor cannot bring an action against a trustee for an abuse of fiduciary duty because the trustee has failed to make mandatory distributions or compel a beneficiary to bring such an action.[208] Finally, Wyoming protects both mandatory and discretionary distributions even if the beneficiary is a trustee or cotrustee.[209]

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[199] Worthington & Merric, *supra* note 3, at 59.

[200] *Id.* Wyoming, unlike several other jurisdictions including South Dakota and Missouri, does not statutorily define whether being classified as a discretionary trust results in an expectancy right or an enforceable property right. While established precedent holds that a discretionary interest is a mere expectancy interest, language in Wyoming's trust code to such effect would strengthen this aspect of the law. *See id.* at 61.

[201] WYO. STAT. ANN. § 4-10-504(b).

[202] *See* ALASKA STAT. § 34.40.110(n)(1) (2010); DEL. CODE ANN. tit. 12, § 3536 (2010); NEV. REV. STAT. § 21.090(1)(cc)(3) (2010); S.D. CODIFIED LAWS § 55-1-43 (2010).

[203] WYO. STAT. ANN. §§ 4-10-103, -504.

[204] S.D. CODIFIED LAWS § 55-1-38.

[205] WYO. STAT. ANN. § 4-10-508.

[206] *Id.* § 4-10-504.

[207] *Id.*

[208] *Id.* This section does not limit the right of a beneficiary to maintain a court proceeding against a trustee for an abuse of fiduciary duty. *Id.*

[209] *Id.* § 4-10-505(b).

Most spendthrift statutes include exceptions for certain creditors and in certain situations. In all jurisdictions, if a creditor can prove that a settlor created a spendthrift trust in order to defraud his or her creditors, the spendthrift protection is nullified and distributions can be attached.[210] Such actions are generally governed by the Uniform Fraudulent Transfers Act as adopted by the jurisdiction.[211] Other spendthrift exception creditors often include those owed child support, alimony, or a claim for division of property pursuant to a divorce. Nevada does not allow an exception for any of these creditors. Wyoming provides an exception in favor of the settlor's children for child support or maintenance.[212] Wyoming also excepts trust property listed upon an application or financial statement used to obtain credit other than for the benefit of the trust or property transferred to the trust which was obtained by a fraudulent transfer.[213] Delaware, New Hampshire, and South Dakota all provide exceptions for child support, alimony, and property division upon divorce.[214] Delaware and South Dakota except certain tort creditors.[215] Therefore, absent one of the fairly few spendthrift exceptions available in Wyoming, the state protects both mandatory and discretionary trust distributions from creditors.

3. Family Limited Partnerships and Limited Liability Companies Charging Order Provisions

Charging order statutes protect certain state-recognized entities, FLPs and LLCs, from all types of judicial remedies except that of the charging order.[216]

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[210] *See, e.g.*, *id.* § 4-10-514.

[211] *See, e.g.*, *id.* §§ 34-14-201 to -212.

[212] *Id.* §§ 4-10-503, -520.

[213] *Id.* § 4-10-520(a)(ii).

[214] DEL. CODE ANN. tit. 12, § 3573 (2010); N.H. REV. STAT. ANN. § 564-B:5-503 (2010); S.D. CODIFIED LAWS § 55-16-15 (2010).

[215] DEL. CODE ANN. tit. 12, § 3573; S.D. CODIFIED LAWS § 55-16-15.

[216] *See* David M. Grant & Jeremy K. Cooper, *Nevada Laws Provide Top Trust Situs*, NEV. LAW., May 2010, at 20, 25; Merric & Comer, No. 112, *supra* note 155; Merric & Comer, No. 154, *supra* note 155; Mark Merric & William Comer, *Forum Shopping for Favorable FLP and LLC Legislation—Part II*, STEVE LEIMBERG'S ASSET PROTECTION PLAN. EMAIL NEWSL., no. 114 (Aug. 2007) [hereinafter Merric & Comer, No. 114], *available at* http://www.hro.com/files/file/publications/Merric/Asset_Protection_Planning/Charging_Order/chargingorder4.pdf; Mark Merric & William Comer, *Forum Shopping for Favorable FLP and LLC Legislation—Part III*, STEVE LEIMBERG'S ASSET PROTECTION PLAN. EMAIL NEWSL., no. 117 (Dec. 2007), *available at* http://www.hro.com/files/file/publications/Merric/Asset_Protection_Planning/Charging_Order/chargingorder2.pdf; Mark Merric & William Comer, *Forum Shopping for Favorable FLP and LLC Legislation—Part IV*, STEVE LEIMBERG'S ASSET PROTECTION PLAN. EMAIL NEWSL., no. 127 (Apr. 2008), *available at* http://www.hro.com/files/file/publications/Merric/Asset_Protection_Planning/Charging_Order/Forum_Shopping_For_Favorable_FLP_and_LLC_Legislation_IV.pdf; Mark Merric, William Comer & Mark Monasky, *Forum Shopping for Favorable FLP and LLC Law—Part V*, STEVE LEIMBERG'S ASSET PROTECTION PLAN. EMAIL NEWSL., no. 1637 (May 2010), *available at* http://www.hro.com/files/file/publications/Merric/Asset_Protection_Planning/Charging_Order/AdamsandthePorcupinePartV.pdf.

Under a charging order, a creditor is able to attach a right to distributions from an FLP or LLC but not all the rights a debtor may have in the entity. Consequently, the creditor cannot attach a debtor's share of the entity's assets or gain control of the debtor's management or voting rights. Without a right to some control of the entity, the creditor has no way to force a distribution. As a result, as long as no distributional interest is paid to the debtor, the creditor receives nothing. While such statutes provide protection for a debtor, the policy behind sole charging order provisions is to protect the debtor's partners from having to accept the debtor's creditor as a new partner.[217]

Along with charging order provisions, some states allow judicial foreclosure actions in situations where a distribution interest has been attached but no distributions have been paid from the entity.[218] In such a state, the creditor may apply to the court for judicial foreclosure of the debtor's interest in the partnership or LLC—effectively negating the protection offered by the charging order protection statutes.[219] Another important aspect of sole remedy charging order provisions is the ability of some state courts to craft broad charging orders affecting more than just distribution interests. While such orders do not give the creditor control of any management aspects of the entity, they may hamstring the entity in such a way that until distributions are paid and the creditor made whole, the entity is unable to undertake activities such as making loans, making capital acquisitions, or selling partnership interests.[220]

Wyoming became the first U.S. state to authorize the creation of LLCs in 1977.[221] In doing so, the legislature intended to attract foreign investment and oil and gas development.[222] With the enactment of the 2010 Wyoming Limited Liability Company Act (LLC Act), the state has remained at the forefront of asset protection trends and demonstrated its attentiveness to the needs of foreign persons and entities.[223] The Wyoming statutes for limited partnerships

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[217] Grant & Cooper, *supra* note 216, at 25.

[218] *See* Hellman v. Anderson, 233 Cal. App. 3d 840, 847 (Ct. App. 1991) (holding that California's partnership act implies the ability of a court to order foreclosure and sale of a charged interest); Madison Hills Ltd. P'ship II v. Madison Hills, Inc., 644 A.2d 363, 369 (Conn. App. Ct. 1994) (holding that strict foreclosure is an available remedy under Connecticut's partnership act); REVISED UNIF. LTD. P'SHIP ACT § 703(b) (2001) ("The court may order a foreclosure upon the interest subject to the charging order at any time.").

[219] *See* Merric, Comer & Monasky, *supra* note 216 (discussing the judicial foreclosure aspect of charging order statutes).

[220] *See* Merric & Comer, No. 114, *supra* note 216; Merric & Comer, No. 154, *supra* note 155.

[221] 1 LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES 1–7 (2d ed. 2004).

[222] ERIK M. VERMEULEN, THE EVOLUTION OF LEGAL BUSINESS FORMS IN EUROPE AND THE UNITED STATES 117 & n.78 (2003).

[223] S. File No. 0018, 60th Leg., Budget Sess. (Wyo. 2010), *available at* http://legisweb.state.wy.us/2010/Enroll/SF0018.pdf.

do not protect FLPs as completely as they do LLCs under the new LLC Act, providing only that creditors are limited to attaching distribution interests of the debtor.[224] Wyoming's new LLC Act, however, includes sole remedy charging order protection for LLCs that excludes a judicial foreclosure remedy.[225] The statute also specifically prohibits broad charging orders affecting direction of the entity or any account inquiries by a creditor.[226] Given the strength of Wyoming's LLC Act combined with the options available to private family trust companies, forming an LLC rather than an FLP may be the best option in Wyoming. Alaska and South Dakota are the only other states whose sole remedy charging order statutes encompass similar protections for both LLCs and FLPs, neither of which specifically apply such protection to single member LLCs.[227]

IV. CONCLUSION

Wyoming consistently ranks among the most preferred states in the nation in which to form, migrate, or resettle a trust. In the last decade, as families and wealth management professionals have begun to focus on the importance of selecting a jurisdiction with a favorable trust climate, Wyoming's popularity as a trust situs has seen remarkable growth. Wyoming's favored status stems from the following factors:

- Near perpetual trusts capable of avoiding transfer taxes for up to 1000 years.
- No income tax, and an extremely low probability of an income tax ever being enacted.
- Privacy, including no registration requirements and LLC protection.
- An enhanced version of the Uniform Trust Code that allows:
  - Directed trusts;
  - Trust protectors, trust advisors, and special purpose entities;
  - Purpose trusts;
  - Prudent investor standard;
  - Nonjudicial settlement agreements;
  - Flexible trust modification and reformation;
  - Possible common law decanting; and
  - Enhanced virtual representation.
- Easy trust migration and reformation.

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[224] WYO. STAT. ANN. § 17-14-803 (2010).

[225] *Id.* § 17-29-503(g).

[226] *Id.*

[227] ALASKA STAT. § 10.50.380 (2010); S.D. CODIFIED LAWS § 47-34A-504 (2010).

- Private trust companies:
  - One of the only states allowing for truly non-regulated private trust companies;
  - Low cost non-regulated private trust companies; and
  - Available regulation, if desired.
- Powerful asset protection vehicles:
  - Self-settled spendthrift trusts allowing settlors to retain inter vivos or testamentary, special or general powers of appointment;
  - Protection of discretionary and mandatory distributions; and
  - Charging order as the sole remedy against LLCs (even single-member LLCs, the owner of which can be an asset protection trust, or the trustee of a private trust company).
- A consistently trust-friendly and responsive legislature.
- A fast and efficient court system.

The combination of these factors makes Wyoming an ideal jurisdiction in which to create, migrate, or reform a trust. With the imposition of unfavorable tax treatment on foreign trusts by the recently enacted HIRE Act, individuals who once relied on foreign jurisdictions should consider taking advantage of Wyoming's superior laws.