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Maintaining Client Privacy in an Increasingly Public World

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Individuals have long been interested in protecting their private family and financial matters from broad public disclosure. Motives vary, of course, but can range from safety concerns to saving certain family members from public embarrassment that could jeopardize future business and social opportunities.[1] While motives may have changed little over time, the urgency to protect privacy is more pronounced in today's world.[2] For example, 100 years ago the primary vehicle for wide dissemination of news — including a family's or individual's private matters — was newspapers. While disclosure through this medium could certainly be embarrassing, the disclosure would be the result of journalistic and editorial processes and, even then, limited to the circulation of the newspaper. In today's digital age, with widespread ownership of smartphones and the 24/7 news cycle, public disclosure of private information can be virtually instantaneous, global in scope, and without procedural safeguards. Further, bad actors have an ever-expanding toolbox for committing a growing list of financial and cyber-crimes with the information that could be disclosed. With these rapidly developing threats in mind, client families may have a heightened interest in maintaining privacy for themselves and their loved ones.

This article will review some traditional techniques estate planners use for maintaining client privacy and how the protections those techniques provide may be eroding as developments in the law intersect with the interest of client privacy. Additionally, the article will explore techniques and best practices families could employ to maintain a balance

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1 *See, e.g.*, Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 583-84 (2008).

2 Americans for Prosperity Found. v. Bonta, No. 19–251 (U.S. Jul. 1, 2021) (noting the risks associated with public disclosure of personal information "are heightened in the 21st century and seem to grow with each passing year.").

between transparency to beneficiaries and the protection of family privacy with respect to third parties.[3]

I. Traditional Tools – Trusts and Limited Liability Entities

As most planners know instinctively, trusts are frequently-used tools to achieve efficient tax planning, creditor protection for beneficiaries and, importantly, maintain client privacy. Trust agreements are generally not filed in court unlike a will.[4] A settlor can use a name for the trust that does not reveal the identity of the settlor or any member of the settlor's family. Because a trust agreement is usually kept from public view, a settlor's trust may address sensitive family issues like children with drug, alcohol or gambling issues. Estate planners have come to expect that trustees need only to provide proof of a trust's existence and of the trustee's authority to act in order to open a bank account or sign a contract.[5] While non-grantor, non-charitable trusts are separate taxpayers and file their own tax returns, like individuals, those returns are subject to strict federal confidentiality protections.[6]

Entities such as corporations and limited liability companies (LLCs) provide limited liability protection for their owners and are available to be formed under the laws of each of the fifty states. Many businesses throughout the country form one or more entities under these statutes in connection with starting their operations. Individuals and families also use entities like LLCs to purchase or hold real estate or other assets to help shield the identity of the owners of such assets.[7] For example, when one purchases real estate, the identity of the grantee and the grantor appear on the face of the deed, which is a public record.

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[3] It is important to note that some advocate for fuller disclosure of financial information. See, for example, Allison Anna Tait, *The Law of High-Wealth Exceptionalism*, 71 Ala. L. Rev. 981, 1016 (2020), arguing that extreme financial secrecy can shift "tax burdens from high-wealth families to ordinary- and low-income families, helping to fortify 'rising inequality' and 'creat[ing] a threat to democracy itself.'"

[4] *See* Natalie M. Banta, *Death and Privacy in the Digital Age*, 94 N.C. L. Rev. 927, 946-47 (2016) ("Privacy is one of the most compelling reasons to have a revocable trust instead of a will.").

[5] Historically, the practice was different. For example, because a third person making payment to a trustee could be held liable for a trustee's misapplication of funds, "[t]he result was careful scrutiny by the third persons of the terms of the trust." David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 Mo. L. Rev. 143, 208-09 (2002).

[6] *See generally* 26 U.S.C. §§ 6103, 7213 (discussing federal rules governing the confidentiality and disclosure of returns and return information, and the unauthorized disclosure of information).

[7] See Bradford S. Cohen & Alexander L. Bruin, *Achieving True Privacy for Public Figures Through Privacy Trusts*, L.A. Law., May 2019, at 22, 25, preferring privacy trusts to LLCs for personal residences.

If either or both parties to the deed are LLCs, then those LLC owners are not easily identifiable from the deed if a third-party manager or officer has authority to sign public record documents on behalf of the LLC. Further, in certain states, including Delaware[8] and Wyoming,[9] the Certificate of Formation or Articles of Organization, as the case may be, need not identify the LLC's manager or any member who may act as manager. Therefore, a properly formed and administered LLC allows families to add extra layers of privacy protection. In some instances, families may even form multiple layers of LLCs to add additional liability protection and further privacy protection. For many, the use of trusts and LLCs provide a degree of privacy that allows individuals to own assets and provide for their families free from public knowledge of the underlying owners or the terms on which the assets are held for those individuals.

II. Trends in Federal and State Laws

The use of trusts and LLCs to help protect individuals' privacy is generally a result of state law. Important privacy-serving policy goals, however, are increasingly intersecting with geopolitical changes and technological advances in committing and fighting financial crimes. In response to the 9/11 terrorist attacks in the United States, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001 (enacted October 26, 2001; hereinafter the "Patriot Act") as a tool to combat money laundering activities in an attempt to cut off funding sources for suspected terrorist organizations.[10] The Patriot Act, among other things, required the Secretary of the Treasury to "prescribe regulations setting forth the minimum standards for financial institutions and their customers regarding the identity of the customer that shall apply in connection with the opening of an account at a financial institution."[11] In response to the Patriot Act and subsequent regulations (now commonly known as "know your customer" or "KYC" regulations), many financial institutions became more insistent on requiring review of complete copies of trust documents when trustees sought to open accounts for the trusts they administered.[12] Many customers com-

8 *See* Del. Code Ann. tit. 6, § 18-201(e) (2021).

9 *See* Wyo. Stat. Ann. § 17-29-201(a), (c) (2021).

10 *See USA Patriot Act*, ODNI, https://www.dni.gov/index.php/who-we-are/organizations/ise/ise-archive/ise-additional-resources/2116-usa-patriot-act [https://perma.cc/U45J-3HWV]; *see also Patriot Act*, History, https://www.history.com/topics/21st-century/patriot-act (Aug. 21, 2018) [https://perma.cc/W8P4-N6H7].

11 31 U.S.C. § 5318(l)(1).

12 Jennifer Lowe, *What is KYC and Why Does it Matter?*, Plaid (Aug. 12, 2021), https://plaid.com/resources/banking/what-is-kyc/ [https://perma.cc/W8KX-KCDH].

plied with these requests, but others pushed back citing privacy concerns. This led sometimes to awkward conversations with financial institutions and their clients for what many viewed as the simple act of opening a checking account for a trust.

Around this same time, the Uniform Trust Code ("UTC") was beginning to be enacted at the state level. Although the Uniform Law Commission approved the UTC as of August 4, 2000 – over a year prior to the 9/11 terrorist attacks and enactment of the Patriot Act – Kansas was the first state to enact the UTC in 2002.[13] When the iPhone was released in 2007, only 19 states and the District of Columbia had enacted the UTC.[14] As of July 1, 2021, 35 states and the District of Columbia have adopted the UTC and legislation has been introduced in New York.[15]

In developing the UTC, transparency to beneficiaries was an original guiding principle.[16] UTC section 813 provides that the trustee "shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests."[17] The trustee's duty to inform and report specifically includes the duty to provide: (i) to a beneficiary upon request, a complete copy of the trust instrument,[18] and (ii) to the trust's qualified beneficiaries, the current trustee's contact information,[19] notice of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report of the trust's property, liabilities, receipts and disbursements,[20] advance notice of any change in trustee compensation,[21] and accountings.[22] While the UTC provisions are mostly default rules that

13 *See Trust Code,* UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=193ff839-7955-4846-8f3c-ce74ac23938d [https://perma.cc/5Y7A-WVES].

14 *Id.*

15 *See id.*

16 It was, however, also highly controversial. *See, e.g.*, UNIF. TR. CODE § 105(b)(8)-(9) (UNIF. L. COMM'N, amended 2010). In 2004 the UTC amended those sections by bracketing them, indicating they were no longer mandatory. *See infra* note 24.

17 UNIF. TR. CODE § 813(a).

18 *Id.* § 813(b)(1).

19 *Id.* § 813(b)(2).

20 *Id.* § 813(b)(3), (c).

21 *Id.* § 813(b)(4).

22 See *id.* § 813(c), which provides in pertinent part that, "[a] trustee shall send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values."

can be modified by a trust instrument, to underscore the importance of beneficiary transparency, UTC sections 105(b)(8) and 105(b)(9) as originally enacted in 2000 provided the duty to notify qualified beneficiaries over age 25 of the existence of the trust, the identity of the trustee, and their right to request trustee's reports, as well as the duty to respond to a qualified beneficiary's request for trustee's reports and other information reasonably related to the administration of a trust, may not be waived.[23] The mandatory nature of this reporting requirement generated significant backlash. In 2004, the UTC amended the two provisions by bracketing them, signaling they were no longer mandatory.[24]

While the UTC drafters originally defaulted to transparency with respect to beneficiaries, they were careful not to expand disclosure to third parties. UTC section 1012(b) provides that in dealing with a trustee, a non-beneficiary who is acting in good faith "is not required to inquire" about the trustee's powers and the propriety of their exercise. Consequently, "there is no need to request or examine" the trust.[25] Further, UTC section 1013 allows the trustee to provide a certification of trust to a third party in lieu of providing an entire trust agreement.[26] The certification of trust would provide only certain trust information including the trust date and a representation that the trust still exists,[27] the identity of the settlor and trustee,[28] the trustee's powers,[29] whether the trust is revocable or irrevocable and who has the power, if any, to revoke the trust,[30] and the trust's taxpayer identification number.[31] To underscore the point, the section explicitly states the certification of trust need not contain the dispositive terms of the trust[32] yet allows for a third party to demand the trustee furnish copies of trust excerpts designating the trustee and showing the trustee's powers.[33] Understanding that third parties may hesitate to deal with a trustee if they are with-

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23 *Id.* § 105(b)(8)-(9).

24 *See id.* § 105 cmt. (stating that by placing sections 105(b)(8) and 105(b)(9) in brackets, this will signal that uniformity is not expected); *see also* Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 ARIZ. STATE L. J. 713, 761-62 (2006).

25 UNIF. TR. CODE § 1012 cmt.

26 English, *supra* note 5, at 152. "To protect the privacy of the trust, a procedure is provided whereby [third parties] may verify [the] authority by means of a certificate . . . ." See also UNIF. TR. CODE § 1013 cmt., noting that the section adds "another layer of protection."

27 UNIF. TR. CODE § 1013(a)(1).

28 *Id.* § 1013(a)(2)-(3).

29 *Id.* § 1013(a)(4).

30 *Id.* § 1013(a)(5).

31 *Id.* § 1013(a)(7).

32 *Id.* § 1013(d).

33 *Id.* § 1013(e).

out the entire trust agreement for fear the withheld trust provisions may show the trustee actually lacks authority for the transaction, the drafters specifically provide that a third party who deals with the trustee in good faith reliance on the certification of trust may enforce the transaction as if the representations in the certification were correct.[34] Because of this protection for good faith reliance afforded by UTC section 1013, the drafters attempt to deter those third parties from nevertheless demanding the entire trust agreement by making them liable for damages if a court determines they did not act in good faith in making that demand.[35]

Section 1013 seems a good compromise that addresses a third party's need, on one hand, to confirm a trust's existence and the trustee's power to enter into a transaction, and a family's desire, on the other, to keep dispositive provisions of a trust private. In practice, however, section 1013 may not provide the absolute protection individuals seek to protect the sensitive provisions of trusts.

First, the UTC is not enacted law in all states.[36] Second, in the states that adopted the UTC, section 1013's provisions are not uniform. Although the vast majority of states enacted section 1013 as proposed, some states' statutes do not hold third parties expressly liable for demanding the entire trust agreement after being presented a certification of trust.[37] Conversely, some states not only apply liability for damages to such third parties but extend that liability to include costs and attorney fees.[38] Third, regardless of the extent of section 1013's reach, in order to receive any damage award (assuming one is available), a trustee must bring a court action and secure a judgment that the third party defendant did not act in good faith in demanding the entire trust agreement. As noted earlier, financial institutions are subject to federal anti-money laundering rules. It may be difficult to prove bad faith on a financial institution's part for merely taking a conservative position in its interpretation of those regulations. A more practical consideration is that

34 *Id.* § 1013(g).

35 *Id.* § 1013(h).

36 *See Trust Code,* UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=193ff839-7955-4846-8f3c-ce74ac23938d [https://perma.cc/5Y7A-WVES].

37 *See* FLA. STAT. § 736.1017(6) (2021); OR. REV. STAT. § 130.860(9)(a) (2021); TENN. CODE ANN. § 35-15-1013(d) (2021).

38 At least 11 states provide for attorney or legal fees, namely: Arizona, Colorado, Connecticut, Georgia, Iowa, Michigan, Utah, Washington, Wisconsin, and non-UTC states California and Delaware. *See* ARIZ. REV. STAT. ANN. § 14-11013(H) (2021); COLO. REV. STAT. § 15-5-1013(8) (2021); CONN. GEN. STAT. § 45a-499zzz(h) (2021); GA. CODE ANN. § 53-12-280(g) (2021); IOWA CODE § 633A.4604(6) (2021); MICH. COMP. LAWS § 700.7913(8) (2021); UTAH CODE ANN. § 75-7-1013(8) (West 2021); WASH. REV. CODE § 11.98.075(8) (2021); WIS. STAT. § 701.1013(8) (2021); CAL. PROB. CODE § 18100.5(h) (West 2021); DEL. CODE ANN. tit. 12, § 3591(h) (2021).

enforcement could be a costly affair. Therefore, a family should consider the context of the third party's request for the entire document. If it's a financial institution demanding the whole trust, would it be simpler just to engage another financial institution that would accept the trust certification alone? If it's a third-party purchaser of trust assets requesting the entire trust as part of its due diligence and no other buyer is available, perhaps the same protection could be achieved through a non-disclosure agreement that provides the buyer will not retain any copies of the trust reviewed in connection with the transaction and shall keep all provisions strictly confidential. As noted above, the deterrent effect of section 1013 is limited but nonetheless, the authors' experience is that many financial institutions will accept the trust certification for many services, including relating to the opening of accounts. In fact, many of the larger financial institutions that operate in multiple states have their own trust certification forms they will accept in lieu of an entire trust document.

Families' ability to use entities such as LLCs for privacy protection may encounter obstacles similar to those encountered by trusts due to recent changes in law. As part of the federal Anti-Money Laundering Act of 2020 that became law on January 1, 2021, Congress included the Corporate Transparency Act (CTA).[39] The CTA includes new reporting requirements for certain business entities, including LLCs, formed in any state within the United States or that are registered to do business in any such state.[40] Specifically, the CTA requires the beneficial ownership of each domestic entity must be reported to the Financial Crimes Enforcement Network under the U.S. Department of the Treasury (FinCEN).[41] This is the heart of the CTA. FinCEN is directed to maintain the information submitted with respect to each entity for a period of at least five years in a non-public, secure database.[42] FinCEN may only disclose the reported information upon request of certain law enforcement agencies and federal regulators under strict protocols.[43] FinCEN is allowed, however, to disclose the reported information to financial institutions requesting it for due diligence purposes if the re-

[39] The Anti-Money Laundering Act of 2020 is part of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388 ("NDAA"). The CTA is found at sections 6401-6403 of the NDAA, with section 6403 adding section 5336 to Title 31 of the U.S. Code.

[40] *See* Robert W. Downes et al., *The Corporate Transparency Act – Preparing for the Federal Database of Beneficial Ownership of Information*, A.B.A. Bus. L. Section (Apr. 16, 2021), https://businesslawtoday.org/2021/04/corporate-transparency-act-preparing-federal-database-beneficial-ownership-information/ [https://perma.cc/2X7A-94LG].

[41] 31 U.S.C. § 5336(b)(1)(A).

[42] *See id.* § 5336(c)(1).

[43] *Id.* § 5336(c)(2)(B)(i)-(ii).

porting entity consents.[44] The CTA also contains criminal and civil penalties for violations of the disclosure provisions.[45]

The information to be reported for each beneficial owner[46] of an entity includes the full legal name, birthdate, current address, and either a unique identifying number from an acceptable identification document or a special FinCEN issued identification number.[47] The Secretary of the Treasury is required to promulgate regulations implementing the statutory provisions of the CTA within one year of its enactment (i.e., by January 1, 2022) and the provisions of the CTA would take effect on the date such regulations are finalized.[48] Any reporting company formed prior to the effective date of the regulations must submit its reports of information no later than two years after the effective date of the regulations.[49] Reporting companies will also have ongoing reporting requirements to report changes in beneficial ownership information (e.g., after any gifts or sales of LLC interests).[50] As of July 1, 2021, no regulations have been issued. It is, therefore, still unclear which entities must file this information and when reporting companies must start reporting information to FinCEN.

Similarly, it is too early to determine whether the CTA will cause families to rethink using LLCs as privacy protection vehicles to hold assets. It appears the information to be reported to FinCEN for now is basic identifying information. While the CTA takes pains to establish strict confidentiality protocols to safeguard the reported information, and limits the scope of disclosure of such information, some families may now hesitate in using LLCs to avoid a reporting requirement and appearing on a government database. Recent news reports discussing federal tax policy that relied on leaked, confidential taxpayer data[51] il-

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44 *Id.* § 5336(c)(2)(B)(iii).

45 *Id.* § 5336(h)(3).

46 "Beneficial Owner" is defined in 31 U.S.C. § 5336(a)(3) but for purposes herein generally means an individual who owns at least 25% of the entity or exercises substantial control over it (e.g., a manager of an LLC). A minor child, however, is specifically excluded if the parent's information is reported. *See id.* § 5336(a)(3).

47 *Id.* § 5336(b)(2)(A).

48 *See id.* § 5336(b)(5).

49 *See id.* § 5336(b)(1)(B).

50 *See id.* § 5336(b)(1)(D). The report must be filed within one year of the change in beneficial ownership information. *Id.*

51 *See, e.g.*, Jesse Eisinger et al., *The Secret IRS Files: Trove of Never-Before-Seen Records Reveal How the Wealthiest Avoid Income Tax*, ProPublica (June 8, 2021, 5:00 AM), https://www.propublica.org/article/the-secret-irs-files-trove-of-never-before-seen-records-reveal-how-the-wealthiest-avoid-income-tax [https://perma.cc/47KN-BY4S] (stating that tax data records obtained contain some of the nation's wealthiest people); *see also* Justin Elliott et al., *Lord of the Roths: How Tech Mogul Peter Thiel Turned a Retirement Account for the Middle Class Into a $5 Billion Tax-Free Piggy Bank*, ProPublica

lustrate that no confidentiality protocol is completely safe. An unfortunate corollary is that public confidence that government-required information will not be misused is lessened by such reports, with skepticism especially sharp when leaks further a political or ideological end. Finally, this new federal development may inspire the adoption of similar reporting requirements at the state level, where data protection protocols may not be as stringent.

III. What Now?

Given this erosion of privacy due to changes in law and technology, families may think they need to accept that things change and adjust their expectations accordingly. While maintaining privacy is more of a challenge today than only 20 years ago, there are tools available for families willing to use them.

Non-disclosure agreements (NDAs) are one such tool, in addition to LLCs and trust certifications. NDAs are a regular part of many commercial transactions and settlement agreements involving litigation of a commercial or personal nature.[52] High-profile public figures and high-net worth individuals regularly use NDAs for business transactions as well as for employees, household staff, and in premarital and divorce agreements.[53] NDAs typically identify the information to be kept confidential and for how long. Many agreements provide for a return of any confidential information at a specific point in time (e.g., at the termination of the relationship). This return of information provision is important and should include a prohibition from retaining copies of information. An agreement could contain exceptions for retaining information for government investigations or other regulatory matters. Finally, NDAs can contain remedies for breach of the confidentiality provisions, such as monetary damages and/or a specific performance provision. Negotiating an NDA can be expensive; consequently, it may not be cost effective for some situations. Yet, for families with privacy as an utmost concern, an NDA can be a reasonable expense.

NDAs are private contracts that can be tailored to the parties' goals. They are also highly contextual and flow from specific personal and business relationships.[54] In the context of a family trust, both personal and business relationships may be in play. While trustees may seek NDAs with any third party, seeking confidentiality with beneficiaries is

(June 24, 2021, 5:00 AM), https://www.propublica.org/article/lord-of-the-roths-how-tech-mogul-peter-thiel-turned-a-retirement-account-for-the-middle-class-into-a-5-billion-dollar-tax-free-piggy-bank [https://perma.cc/5379-35QL].

52 *See* Jeffrey Steven Gordon, *Silence for Sale*, 71 Ala. L. Rev. 1109, 1118 (2020).

53 *See id.* at 1112.

54 *See id.* at 1118.

more complicated. As discussed above, in some states, UTC sections 813, 105(b)(8) and 105(b)(9) mandate that certain information must be provided to beneficiaries. Trustees may legitimately be concerned with what a beneficiary will do with information once received but (at least in many UTC jurisdictions) it seems unlikely that the trustees could condition receipt of the information on the beneficiary's signing an NDA. This is a situation where family communication and cooperation may achieve a privacy policy — that all agree is in the family's best interest — where a trustee could not.

As an example, consider a family office with a number of member trusts governed under a UTC jurisdiction. The senior generation is deeply concerned with privacy but knows the trustees owe fiduciary duties to the beneficiaries to provide certain information. The senior generation is committed to family meetings and open communication and education with the junior generations. The topic of maintaining family privacy among a defined group of individuals – such as direct descendants and spouses – could be another family mission statement point similar to open communication or commitment to philanthropy. Once agreed to in concept, the mechanics of the policy could be implemented by expecting family member beneficiaries to hold trust information confidentially. Alternatively, the beneficiaries could voluntarily agree to sign NDAs as an indication of their assent to the philosophy. The policy should require beneficiaries to receive consent before further disseminating the information to others for agreed-upon purposes (such as a loan or premarital agreements) and only after that third party signs an NDA. While there are practical complexities with this approach, they should be navigable when approached like any other agreed-to family value.

Taking this approach a step back in time, a trust settlor may consider including a confidentiality requirement in the trust. A beneficiary's interest would be conditioned on the beneficiary keeping trust information private. This approach is novel and raises certain predictable questions. Most fundamentally, is such a provision valid? UTC section 404 provides a trust may be created "only to the extent its provisions are lawful and not contrary to public policy."[55] If a settlor's stated intent is to protect the privacy of trust terms and assets, is that "lawful and not

[55] *See* UNIF. TR. CODE § 404 (UNIF. L. COMM'N, amended 2010). The Restatement (Third) of Trusts similarly provides that a trust provision is invalid "only to the extent [its provisions] are lawful [and] not contrary to public policy." Martin D. Begleiter, *Taming the "Unruly Horse" of Public Policy in Wills and Trusts*, 26 QUINNIPIAC PROB. L. J. 125, 129 (2012). The Restatement is controversial; in particular, "the concept of public policy in the Restatement (Third) of Trusts appears inadequate on numerous grounds." *Id.* at 135.

contrary to public policy?" To the extent public policy is determined by a governing state's laws,[56] we believe the answer is yes. State income tax returns of individuals are not publicly disclosed. States do not routinely require public dissemination of an individual's assets. Even if one enters the public space through litigation, a process for sealing records filed in court is available and increasingly granted for an individual's personal financial data.[57] Recently, some states reversed course and now allow anonymity for their lottery winners because of safety concerns, deeming the "individual privacy rights of a lottery winner outweigh the public's right to know . . . ."[58] The trend seems in favor of privacy for an individual's personal financial data.[59] A settlor-imposed privacy measure seems consistent with this trend.

Moreover, when courts do strike conditions in wills and trusts on public policy grounds, those cases primarily involve marriage and, less frequently, destruction of property or wasteful expenditures.[60] Maintaining a family's privacy involves neither.

A court determining public policy for a trust provision may, however, require an analysis as to its impact on the parties — particularly if the breach involves a forfeiture of a beneficiary's interest as equity abhors forfeitures.[61] Consequently, in crafting a confidentiality provision,

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56 See *In re* Estate of Feinberg, 919 N.E.2d 888, 894 (Ill. 2009), noting that "[w]hen we determine that our answer to a question of law must be based on public policy, it is not our role to make such policy. Rather we must discern the public policy . . . as expressed in the constitution, statutes, and long-standing case law."

57 Dariush Adli, *Sealing Celebrity Confidential Information as a Matter of Public Interest*, L.A. LAW., May 2019, at 18, 18-19, noting that "[o]ver the past two decades, courts across the country have become more sensitive to privacy and reputational and financial harm that indiscriminate public disclosures in court documents and other information may cause . . . the pendulum increasingly has swung toward protecting sensitive and potentially damaging information as courts increasingly recognize the potential danger in making such information public."

58 Conor Porter, *Montana Passes Legislation to Allow Lottery Winners to Remain Anonymous*, LOTTERY DAILY (Apr. 12, 2021), https://www.lotterydaily.com [https://perma.cc/3AGJ-PHV7]; *see also* KY3 Staff, *New Missouri Law Makes it a Crime to Reveal Lottery Winners*, KY3 (June 29, 2021, 4:43 PM), https://www.ky3.com/2021/06/29/new-missouri-law-makes-it-crime-reveal-lottery-winners/#:~:text=the%20new%20law%2C%20which%20takes,of%20as%20much%20as%20%242%2C000 [https://perma.cc/Y7M2-F28P].

59 This is in contrast to calls for more disclosure when the NDAs concern sexual misconduct. David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 214-15 (2019).

60 *See, e.g.*, *In re* Estate of Gerbing, 337 N.E.2d 29, 32 (Ill. 1975); Eyerman v. Mercantile Tr. Co., 524 S.W.2d 210, 217 (Mo. Ct. App. 1975).

61 See Benjamin N. Feder & Rebecca A. Levin, *A Modern Look at the Enforceability of No-Contest Provisions*, TR. & EST., Nov. 2020, at 34, 35-37, discussing alternative no-contest provisions, including litigation hold-back funds, but noting uncertainty of enforceability due to vagaries of public policy.

a modification of the beneficiary's interest upon a breach of confidentiality is preferable to a termination of the interest. The type and scope of the modification, of course, depends on the facts and circumstances. Reduction in an income interest either in time, amount, or percent may be appropriate.

Determining the enforceability of a conditional gift in trust raises issues similar to those of no-contest clauses. Although the lens of testamentary no-contest is tempting, there are two important differences.[62] First, in many testamentary no-contest cases, the underlying issue is the will's validity due to capacity, undue influence or formalities, while in trust no-contest cases, it is often the propriety of the trustee's conduct. Excepting formalities, no-contest cases, therefore, are intent-serving, not intent-defeating as would be the case in striking a privacy provision of a competent settlor. Second, the statutory backdrop differs. The Uniform Probate Code provides a no-contest clause is unenforceable if there was probable cause to contest, while the UTC is deliberately silent on the issue.[63] This indecision suggests a greater role for upholding a gift conditioned by a settlor on family privacy protections.

IV. CONCLUSION

The need to protect a family's personal financial data has grown in line with regulatory disclosure changes in the law and advances in technology. For estate planners, the traditional techniques generally retain validity but are subject to new constraints. Confidentiality provisions, whether voluntarily embraced by a beneficiary through an NDA or involuntarily imposed on such beneficiary through the trust itself, may be an approach that effectively recalibrates the privacy-disclosure continuum.

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[62] Deborah S. Gordon, *Forfeiting Trust*, 57 WM. & MARY L. REV. 455, 505 (2015).
[63] *Id.* at 501.