



# South Dakota's Situs Advantages Over Florida

**STERLING | TRUSTEES**

THE POWER OF INDEPENDENT THINKING<sup>SM</sup>

Trusts play a pivotal role in estate planning and asset protection, serving as indispensable tools for individuals and families that secure their financial legacies. In the United States, every state has the authority to establish its own trust laws, leading to significant variations in how trusts are administered and governed. South Dakota and Florida have emerged as prominent players in the realm of trust law, each with its own distinct regulations and advantages. This comprehensive examination of trust laws in South Dakota and Florida highlights why South Dakota often stands out as a superior jurisdiction for trust establishment and administration.

South Dakota's ascendancy as a trust-friendly jurisdiction has garnered widespread attention, attracting both domestic and international trust settlers. The state has successfully crafted a legal framework that prioritizes interests of trust grantors and beneficiaries while offering innovative trust solutions. Florida, while renowned for its favorable tax climate and robust financial industry, presents a unique landscape for trusts, characterized by laws that may not always align with the trust industry's evolving needs.

In this comparative analysis, we delve into key facets of trust laws in South Dakota and Florida, including multi-generational wealth transfer, asset protection, tax considerations, privacy, and flexibility. By examining these critical dimensions, we elucidate why South Dakota's trust laws often outshine those of Florida, shedding light on factors that drive individuals and institutions to choose South Dakota as their preferred jurisdiction for trust planning and administration. In an era marked by increasing complexity in wealth management and estate planning, choosing a trust jurisdiction holds profound implications, making this report a timely and valuable resource to help practitioners, advisors, and individuals navigate the intricate landscape of trust law.

## **PERPETUAL TRUSTS**

In 1983, South Dakota was our first state to abolish the Rule Against Perpetuities, recognizing advantages of dynasty trusts by allowing trusts to last perpetually for all assets. [SDCL § 43-5-8] South Dakota was also the first to adopt a Trust Protector statute in 1997, maximizing flexibility of the trust for generations. [SDCL § 55-1B-6]

Florida's Rule Against Perpetuities limits the duration of non-charitable trusts to 360 years. While this is an extended period, it falls short of qualifying Florida trusts as "dynasty" trusts, which offer perpetual trust benefits. Ultra-high-net-worth individuals (UHNW) seeking to establish trusts that endure indefinitely for future generations must look beyond Florida to jurisdictions with no such statutory limitations, such as South Dakota, where perpetual trusts can be established without a fixed term's constraints.

## STRENGTH OF STATE

Based on its solvency in five separate categories, South Dakota ranks second among the US states for fiscal health. It has between 4.76 and 6.78 times the cash needed to cover short-term obligations, well above the national average. Revenues exceed expenses by 2%, with an improving net position of \$106 per capita. In the long run, South Dakota has a net asset ratio of 0.34. Long-term liabilities are lower than the national average, at 8% of total assets or \$650 per capita. Total unfunded pension liabilities that are guaranteed to be paid are \$13.32 billion, or 32% of state personal income. [[Mercatus Research, Mercatus Center at George Mason University, Arlington, VA](#)]

Florida's per capita state tax burden of \$2,158 is currently the states' fifth lowest. The total for Fiscal Year 2020-2021's budget is \$92.2 billion. The General Revenue portion is \$34.7 billion. Florida's total reserves are \$6.3 billion, more than 6% of the total budget for Fiscal Year 2020-2021. And based on an actuarial liability of \$191.3 billion and an actuarial value of assets of \$161 billion, the Florida Retirement System (FRS) program is 84.2% funded as of June 30, 2019.

Strength of state is particularly important because fiscally insecure states may view taxing trusts as a straightforward means to generate revenue, offsetting operating deficits that cannot be covered by issuing new debt or other funding sources. These metrics help evaluate how favorable a state's fiscal and regulatory environment is for trust administration.

## STATE INCOME AND CAPITAL GAINS RATES

Since 1942, South Dakota has imposed no state income taxes, either personal or corporate. The state's Constitution further protects this favorable tax environment by prohibiting the imposition of new taxes or any increases without direct voter approval or a two-thirds majority in both legislative chambers, as outlined in Article XI, Section 14. This constitutional safeguard reinforces the state's long-standing commitment to maintain a low-tax, business-friendly environment for individuals and corporations alike.

Florida is now the ninth state to implement or adopt a corporate income tax cut in recent years. On September 14, 2024, Florida announced a nearly one percentage point reduction in its corporate income tax rate, the second rate cut since FY 2019. Rate reductions were triggered by House Bills 7093 and 7127 provisions, which automatically lower corporate income tax rates if net income tax revenues exceed projections in a given fiscal year. With the latest reduction, Florida's corporate income tax rate goes to 3.535%, from 5.5% before reductions began. Notwithstanding this recent reduction, if the current net income tax revenues do not exceed projections, the state will revert to the higher rate automatically.

## PRIVACY

In South Dakota, trust documents are permanently shielded from public disclosure in judicial proceedings under SDCL § 21-22-28. This automatic and perpetual privacy seal ensures that trust records remain confidential indefinitely, providing an added layer of protection for settlors and beneficiaries within the state's favorable trust law framework.

Florida trusts can provide privacy by limiting reporting requirements and avoiding probate. However, there are significant exceptions and limitations to trust privacy in Florida. For example, if disputes arise among beneficiaries or if there are legal challenges to the trust, information about the trust, its assets, and its parties may become subject to scrutiny by becoming a public record.

## CREDITORS CLAIMS

If the settlor is foreseeably solvent, South Dakota trusts are shielded from new claims of creditors of the settlor after two years of a transfer to the trust. A six-month window from transfer discovery is provided for existing claims, if longer. For self-settled trusts (for the settlor's benefit) that are "qualified dispositions," there are exceptions for debts of spousal/child support and division of marital property existing before the transfer. For third party trusts (not self-settled), there are no such exceptions. [SDCL § 55-1-44] [SDCL § 55-16-10; 16]

The statute of limitations applicable to fraudulent transfers of specific items of personal property (and not real property) in Florida is unclear. One Florida court held in 2014 that a creditor may challenge a debtor's transfer of personal property any time during the twenty-year life of a civil judgment under Florida's proceedings supplementary laws in Section 56.29(3) of the Florida Statutes. In 2020, a different Florida court held that the general four-year statute of limitations limits fraudulent transfer actions initiated as part of proceedings supplementary. In 2023, another Florida court affirmed that the statute of limitations for fraudulent transfers of personal property is the life of the judgment.

## ASSET PROTECTION

South Dakota has a thorough statute with respect to protecting trust assets and avoiding claims, specifically addressing (i) numerous arguments made in court cases and disputes, (ii) weaknesses caused by the Restatement of Trusts (scholarly positions on legal aspect of trust law), (iii) inadvertent/ill-advised actions of trust settlors and beneficiaries, (iv) withholding otherwise mandatory distributions from the trust to a beneficiary, and (v) vulnerable provisions and drafting errors in trust documents. [SDCL § 55-1-25, 32, 33, 38, 39]

Enacted in 2011, Florida's DAPT law is relatively new compared to other states. The state has a waiting period requirement before a DAPT becomes fully effective, and creditors have a limited time window to challenge transfers to the trust. Florida has a relatively short fraudulent transfer period (around four years) during which transfers to a DAPT can be challenged as fraudulent. State law requires that a

qualified trustee, who is either a Florida resident or a Florida bank or trust company, be appointed to manage the DAPT. South Dakota has no residency requirement for a trustee, allowing individuals to use out-of-state trustees. Florida's DAPT law primarily benefits Florida residents, as it may not provide non-residents the same level of protection. South Dakota's DAPT laws are often used by non-residents, and South Dakota is known for welcoming individuals from other states to establish trusts there.

## **QUIET TRUSTS**

South Dakota's statute details provisions for the trust settlor, trust instrument, and trust advisors (i.e., trust protector) to restrict/eliminate information to trust beneficiaries and to keep the trust instrument/actions quiet. The South Dakota statute directly addresses the ability to restrict a beneficiary's right to receive a copy of the trust instrument and the right of the settlor, trust protector, or trust advisor to retain power to change beneficiaries' rights to trust information. [SDCL § 55-2-13]

Florida silent trusts, also known as quiet trusts, offer a level of confidentiality to grantors seeking to keep the trust's existence and terms confidential from beneficiaries. However, it's important to understand limitations of trusts in Florida. While they are legally recognized and governed by the Florida Trust Code, Florida quiet trusts' duration of silence may have certain conditions and limitations. For instance, the silence can generally continue after a grantor's death, but there may be circumstances where beneficiaries could challenge the silence or seek information about the trust. Additionally, the effectiveness of Florida silent trusts can vary depending on specific trust language.

## **SPECIAL PURPOSE ENTITIES**

South Dakota law specifically permits individuals to serve in trust roles (i.e., investment advisor, distribution advisor, trust protector) for a particular family through an entity (i.e., a limited liability company) for their liability protection without meeting formal Department of Banking regulations and requirements. This feature gives individuals more comfort to serve take on trust advisor roles. South Dakota and New Hampshire are the only two states that expressly permit special purpose entities (SPE) pursuant to codified law.

## DIRECTED TRUSTEES

The directed trustee model is a predominant trust company structure in South Dakota, limiting trustee fees while allowing trusted family advisors to control distributions and investment decisions of the assets. Per South Dakota's Department of Banking, approximately 68% of South Dakota trust business is through a directed trustee out of a total of 1.7M trust accounts.

Although Florida does permit directed trusts, a key limitation of Florida directed trusts is the requirement for certain beneficiaries to consent to appointing a trust advisor. While beneficiary consent may seem like a reasonable safeguard, it can create obstacles and delays in establishing the trust, particularly when beneficiaries are difficult to locate or unwilling to provide their consent. This hurdle can be a significant drawback for those seeking a more efficient trust creation process.

## RELIABILITY

In *re Cleopatra Cameron Gift Trust*, 931 N.W.2d 244 (S.D. 2019), the South Dakota Supreme Court affirmed a circuit court's decision concluding that the validity of a trust's spendthrift provision, prohibiting direct payments of a trust beneficiary's child support obligation to her ex-husband, was indeed recognized by South Dakota law. This ruling effectively sided with the trustees who stopped paying support claims to the ex-husband because those payments had been mandated when the trust was previously situated in California. This case is widely accepted as one of the most favorable creditor protection cases in recent history.

Florida does not provide for establishing domestic asset protection trusts (DAPTs) under its statutory framework. While certain estate planning trusts – such as irrevocable trusts – may offer some protection from future creditors, Florida lacks the comprehensive statutory regime necessary to utilize trusts fully as asset protection vehicles. Consequently, those seeking robust asset protection should consider other jurisdictions that offer specific statutory support for DAPTs as part of their overall estate and wealth preservation strategies.

## FORETHOUGHT

South Dakota updates its trust law statutes annually through the highly effective Governor's Task Force on Trust Administration Review and Reform which is very responsive to the legal and advisor community. Examples of new trust laws in recent years in South Dakota include Community Property Trusts in 2016 (allowing nonresidents to get a full step-up in income tax basis of assets after a spouse's death), the 2016 Family Advisor (allowing for trusted family advisors to participate on the trust advisor team without taking on fiduciary responsibility), and 2006/2008 Purpose Trusts of unlimited duration (trusts for pets, vacation homes, or any non-charitable purpose without a beneficiary). [SDCL § 55-17-5]

This commitment and support from the highest levels of state government continually strengthen South Dakota's position as the top destination for trust situs. Grantors, beneficiaries, and trusted advisors are much better served establishing trust structures in South Dakota – thanks to these subtle but key distinctions.

## DECANTING

For existing trusts, South Dakota has the most flexible and highly ranked trust decanting statute, allowing for expanding a trust to a fully discretionary trust (adding the ability to distribute for any reason or purpose) and allowing for the inclusion/exclusion of any beneficiaries (both current and future can be changed). This provides much more opportunity for a family's future planning for estate/gift tax and income tax purposes. [SDCL § 55-2-15]

Florida's decanting statutes, codified under Chapter 736 of the Florida Statutes, provide trustees with the authority to adjust various trust provisions, such as extending trust duration, changing distribution schemes, or updating administrative terms. Importantly, this can be done without requiring court approval if certain statutory requirements are met. For example, the trustee must have discretionary distribution powers in the original trust and cannot alter a beneficiary's vested interest without their consent, unless the trust explicitly grants such authority to the trustee.



## **PREMIUM TAX ON PRIVATE PLACEMENT LIFE INSURANCE**

For trusts that purchase private placement life insurance, South Dakota has the lowest insurance premium tax at 8 bps (.008%) on premiums in excess of \$100,000 for both policies held by the trust or in a limited liability company (LLC) owned by the trust. [SDCL § 10-44-2]

Under Florida law, life insurance premiums are subject to the state's general insurance premium tax, which imposes a 1.75% rate on gross premium receipts for life insurance policies. This tax applies uniformly, reflecting the state's approach to regulating and taxing insurance products within its jurisdiction.

## **CONCLUSION**

In selecting your trust's optimal jurisdiction, numerous factors warrant careful consideration. Among the prominent options, South Dakota and Florida stand out. However, when evaluating each state's nuances, South Dakota's status as a premier trust jurisdiction is clearly evident. This distinction stems from deliberate legislative action and a long-standing commitment to fostering a favorable legal environment for trust administration. South Dakota offers robust asset protection, privacy, and flexibility in trust management, positioning it as the superior choice to maximize modern trust law benefits.

## About the authors



Antony Joffe is Chairman of Sterling Trustees, a South Dakota chartered trust company with over \$9 billion of assets under administration. Sterling acts solely as an independent trustee and does not manage any investment assets. The company has a particular focus on working with wealthy families that wish to domesticate offshore trusts to the US. Sterling Trustees is a member of STEP.

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As an attorney, Nicole Byrum brings a unique perspective to her position as Chief Fiduciary Officer – partnering with her clients and their advisors to craft strategic trust vehicles which provide asset protection, governance and long-term wealth transfer. After a brief stint practicing law, she transitioned into global trust services before joining the Sterling team at our Sioux Falls, SD, headquarters. Nicole earned a JD from the University of South Dakota School of Law and a BA from the University of Washington. She also earned the Certified Trust and Financial Advisor (CTFA) designation from the ABA.

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