


# South Dakota's Situs Advantages Over Nevada

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Which state is more advantageous for clients looking to set up a trust, South Dakota or Nevada? Both have strong trust laws and tax benefits that favor the high net worth client, but there are intricacies surrounding state statutes and provisions that prove South Dakota is the better choice in terms of privacy, asset protection, and overall control.

The difference is found in the details and a comprehensive comparison of the states' trust laws show material contrasts that are rather significant. These legalities constitute how trusts are established and able to operate in each state. It is essential when ascertaining trust situs that all factors be carefully considered in crafting a long-term legacy plan.

South Dakota's legislature has historically instituted the most progressive trust laws in the country. Each year, the governor assigns a trust task force who works with state legislators to proactively monitor industry trends and adjust state laws accordingly. This collaboration is unique to South Dakota and allows trust industry leaders to be directly involved with the governor and state lawmakers in the oversight, regulation, and development of trust laws.

This high-level cooperation and industry support from the state government continually strengthens South Dakota's position as the top destination for trust situs year after year.

Grantors, beneficiaries, and their trusted advisors will ultimately be better served establishing trust situs in South Dakota thanks to these subtle but key distinctions.

## SOUTH DAKOTA



## NEVADA



### FIRST TO BE TRUST FRIENDLY/ PERPETUAL TRUSTS

Of the top United States trust jurisdictions, South Dakota was the first by statute in 1983 to recognize the 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) and a third party discretionary trust statute in 2007 (providing enhanced creditor protections).  
[SDCL § 55-1B-6] [SDCL § 55-1-24 through 43]

Nevada maintains its statutory rule against perpetuities and invalidates any nonvested property interest not vested or terminated within 365 years of creation, barring the creation of dynasty trust structures.

[NRS § 111.1031 B]

Nevada's constitution expressly prohibits perpetuities, and voters have defeated a ballot initiative to repeal the constitutional prohibition, indicating a lack of appetite for a constitutional amendment abrogating Nevada's RAP.

### STRENGTH OF STATE

Recent independent studies by PEW Research and Mercatus Publications rank South Dakota as the top 1 or 2 state in the country in fiscal health, stability and responsibility. Factors included in these studies are cash solvency, balanced budgets, fiscal slack, pension and healthcare liabilities, and other debt. Currently, its pension liability is 103% funded, its unemployment rate is 3.1% and its credit rating is AAA.

Similar studies from Mercatus Publications ranked Nevada tenth in the country in terms of fiscal health. Currently, its pension liability is 74.4% funded, its unemployment rate is 4% and its credit rating is AA+.

### STATE INCOME AND CAPITAL GAINS RATES

There have been no state income taxes, personal or corporate, in South Dakota since 1942. The South Dakota Constitution prohibits any new taxes or increases in taxes without a voter initiative or two-thirds approval of both state legislative branches.  
[SD Constitution Article XI, 14]

Nevada does not have a state income tax. However, in 2015, Nevada enacted a "commerce tax" which taxes each "business entity" engaged and situated in the state of Nevada whose annual gross revenues exceed \$4 million. If a business entity's Nevada gross revenue exceeds \$4 million, the excess is subject to tax at various rates that depend on the industry in which the entity is "primarily engaged."  
[NRS § 375A]

### PRIVACY

There is a permanent seal of privacy in South Dakota for trust documents that would otherwise be part of the record in any judicial proceeding. This seal attaches automatically.  
[SDCL § 21-22-28]

Nevada law expressly prohibits permanent record seals. A seal may be granted but is limited in scope and duration based on judicial discretion. In order to seal a record, the court must find that the sealing petition is justified by compelling privacy or safety concerns that "outweigh the public's interest."  
[SCR § VII]

### 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 window of six months from discovery of the transfer is provided for existing claims, if longer. For self-settled trusts (for the benefit of the settlor) that are "qualified dispositions", there are exceptions for debts of spousal/child support and the 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]

Trust assets in Nevada are also secured from creditors in the same two years from the point of transfer to the trust and six months from the discovery of the transfer for existing claims. Nevada statutes establish "zero-exception creditors", including divorcing spouses.  
[NRS § 166.170]

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### ASSET PROTECTION

South Dakota has a thorough statute with respect to the protection of trust assets and avoidance of 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. [\[SDCL § 55-1-25, 32, 33, 38, 39\]](#)

The Nevada statute addressing asset protection for such trusts doesn't provide nearly the same degree of specificity and is written in more generic, subjective language. [\[NRS § 166.170\]](#)

### QUIET TRUSTS

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

The terms of a trust instrument may expand, restrict, eliminate or otherwise vary the rights and interests of beneficiaries in any manner that is not illegal or against public policy, including, without limitation, the right to be informed of the beneficiary's interest for a period of time. [\[NRS § 163.004-1-A\]](#)

### SPECIAL PURPOSE ENTITIES

South Dakota has the only state statute in the country that 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 in serving and taking on these trust advisor roles. [\[SDCL § 51A-6A-66\]](#)

Nevada does not have a special purpose entity statute, and only acknowledges them indirectly. [\[NRS 163.5553\]](#)

### 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 the distributions and investment decisions of the trust assets. Per the South Dakota Department of Banking, approximately 68% of South Dakota trust business is through a directed trustee out of a total of 1.7M trust accounts.

Nevada's directed trusts statutes provide a level of protection for the directed fiduciary, but there is no specific language regarding family advisors. [\[NRS § 163.553 to 163.556\]](#)

### RELIABILITY

The most favorable and recent creditor protection case, In re Cameron Trust, 2019 S.D. 35, came out of South Dakota, where the South Dakota Supreme Court held for the trustees who stopped paying support claims to the ex-husband of a trust beneficiary which were awarded when the trust was previously situated in California.

In 2017 a Nevada District Court held that a "pierce the veil" argument could be applied against a Nevada trust. In Transfirst Group, Inc., et al v. Dominic J Magliarditi, et al, a blatant disregard of trustee formalities resulted in creditors' ability to reach trust assets. Although this particular case demonstrated "an egregious violation of fiduciary principles," it nevertheless opened the door for future cases in which creditors may avail themselves to the Nevada court in an attempt to leverage trust assets.

[\[TransFirst Grp., Inc. v. Magliarditi, Case No. 2:17-cv-00487-APG-VCF \(D. Nev. Aug. 29, 2017\)\]](#)

## SOUTH DAKOTA



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### FORETHOUGHT

South Dakota updates its trust law statutes annually through its 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 (allowing nonresidents to get a full step-up in income tax basis of assets at the death of one spouse), the Family Advisor (allowing for trusted family advisors to participate on the trust advisor team without taking on the fiduciary responsibility), and Purpose Trusts of unlimited duration (trusts for pets, vacation homes, or any noncharitable purpose without a beneficiary).

[\[SDCL § 55-17-5\]](#)

Nevada has consistently followed South Dakota and other progressive jurisdictions by enacting favorable laws for trust grantors and beneficiaries but disadvantages to the Nevada sitused trust remain.

The implementation of a "commerce tax" in 2015

[\[NRS 363C.200\]](#);

dynasty trusts expressly forbidden

[\[NRS 111.1031B\]](#);

and the privacy provided by sealing court proceedings is subject to judicial discretion and limited to the shortest possible duration

[\[SCR VII\]](#)

all represent limits on trust creation and administration.

### DECANTING

For existing trusts, South Dakota has the most flexible and highly ranked trust decanting statute, allowing for the expansion of 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 future planning for estate/ gift tax and income tax purposes for a family.

[\[SDCL § 55-2-15\]](#)

Nevada provides flexible decanting statutes. There is no requirement that the trustee provide notice to beneficiaries in most cases. The trustee has decanting power over income interests, as well as principal, and can expand the interest of beneficiaries.

[\[NRS § 163.556-1\]](#)

### 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 an limited liability company (LLC) owned by the trust. A premium tax of 250 bps applies to the first \$100,000 of premiums.

[\[SDCL § 10-44-2\]](#)

Nevada's private place tax is 350 bps (3.5%) on net direct premiums written and net direct considerations written. Nevada Qualified Risk Retention Groups pay a premium tax of 2%.

[\[NRS §680B\]](#)

The premium tax issue becomes important when considering entities like LLCs in private placement life insurance programs. Properly sitused LLC's avail clients to lower premium taxes and allow clients to be classified as "qualified purchasers" for purposes of security and exchange laws.

## About the authors



Antony Joffe is President of Sterling Trustees, a South Dakota chartered trust company with over \$5 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 trust 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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