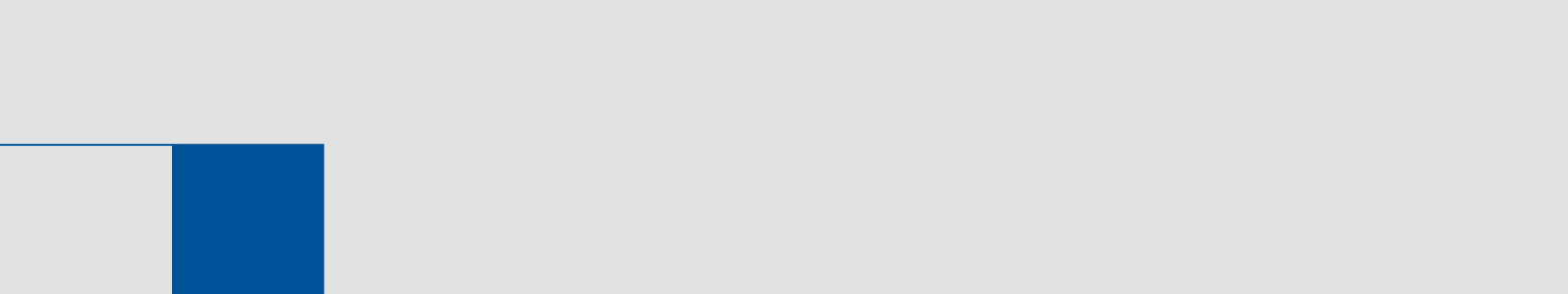


# South Dakota vs. Wyoming: A Current Review of Trust Situs Implications.

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With so many states across the nation vying for top-tier status in the multibillion-dollar trust services industry, experienced professionals and family advisors are all asking the same question: Which state is the most advantageous for clients looking to set up a trust?

Wyoming is a relative newcomer to the trust services industry. In contrast, South Dakota has been a top-tier trust situs and industry pioneer for decades. Both states have trust laws and tax benefits that favor the HNW client, but the context and timeline surrounding state statutes suggest that South Dakota may be the better choice in terms of consistency and predictability. It's never been more important for wealth planning professionals and advisors to understand how different trust laws affect clients and beneficiaries. Trusts established in favorable jurisdictions provide the most effective means of wealth transfer for generations, while eliminating current and future federal or state gift and death taxes and state income taxes.

South Dakota has historically instituted the nation's most progressive trust laws. Each term, the governor appoints a new trust task force that works with state legislators to monitor industry trends proactively and adjust state laws accordingly. This collaboration is exclusive to South Dakota and allows trust industry leaders to be directly involved with the development of trust laws.

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 ultimately better served establishing trust structures in South Dakota, thanks to these subtle but key distinctions.

## SOUTH DAKOTA



## WYOMING



### 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]

Wyoming expressly retains its Rule Against Perpetuities, although the 1,000-year vesting period for trusts created after July 1, 2003, is one of the nation's longest. Wyoming's law provides that interests in real property "shall continue for up to one thousand (1,000) years after the trust's creation, unless some earlier term is expressly set forth in the instrument."  
[WY Stat § 34-1-139 (2019)].

Nevertheless, the strength and reliability of Wyoming's law are not supported by its constitution. Absent a constitutional amendment repealing the Rule Against Perpetuities all together, the door to a constitutional challenge to the law remains open in Wyoming.

### 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 rank Wyoming sixth in the country for fiscal health. Currently, its pension liability is 79% funded, its unemployment rate is 5.3% and its credit rating is AA+. However, these statistics do not accurately reflect the precipice upon which Wyoming's economy may be teetering, an economy built almost entirely on the rapidly declining coal and gas industries.

### 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]

Wyoming does not currently have a state income tax, however, it depends heavily on mining and oil industries as the primary contributors to the budget. With the coal industry's recent collapse and large-scale movement away from fossil fuels, Wyoming lawmakers are now forced to confront their state's fiscal dependency issues. State income tax, the third lowest property tax rate in the nation and the sixth lowest tax rate (4%) may be subject to review and revision in the very near future.

### 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]

Wyoming lawmakers followed South Dakota's progressive privacy laws and now also provide a permanent and automatic sealing of judicial proceedings concerning a trust.  
[WY Stat § 4-10-205 (2017)]

### 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]

Wyoming falls short when it comes to creditors' claims, with a four-year look back period and a pre-existing tort exception for property listed on an application to obtain credit.  
[WY Stat § 4-10-502, 504, 506 9C), 510-523 (2020)]

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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. [\[SDCL § 55-1-25, 32, 33, 38, 39\]](#)

Wyoming also has comprehensive asset protection legislation. Nonetheless, any transfer of assets to a Wyoming qualified spendthrift trust must be accompanied by a qualified transfer affidavit which, among other things, includes a statement that the settlor has up to \$1 million in insurance coverage. [\[W.S. §§ 4-10-510 to -523\]](#)

There is no such requisite condition for a qualified transfer to a South Dakota situated asset protection trust.

### 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. [\[SDCL § 55-2-13\]](#)

Wyoming does not require mandatory trust or beneficial interest registration. A trust instrument can limit or eliminate the duty to keep beneficiaries informed. [\[W.S. § 4-10-105\]](#)

### 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. [\[SDCL § 51A-6A-66\]](#)

While Wyoming permits "trust protector companies," it does not recognize the entities by statute. Wyoming trust protector companies are similar in architecture and function to South Dakota's special purpose entity. However, South Dakota's SPE's are distinguishable as they are expressly supported by statute.

### 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.

Although Wyoming directed trust statutes provide a level of protection for the directed fiduciary, the statute itself is only 6 paragraphs, and lacks specificity when compared to South Dakota Chapter 55-1B. [\[WY Stat § 4-10-718 \(2017\)\]](#)

### 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 2014, the Wyoming Supreme Court held that a pierce the veil argument could be applied against a Wyoming LLC. In *Greenhunter Energy, Inc. v. Western Ecosystems Technology, Inc.*, 2014 WY 144, 337 P.3d 454 (Wyo. 2014) the court held that a Wyoming LLC can be pierced not only where there is actual fraud (misrepresentation of fact, scienter, reliance, damages, etc.) but also where there is constructive fraud – conduct that doesn't rise to the level of (intentional) fraud but is treated the same because of its similar harmful consequences. This case narrows the veil of limited liability and opens the door for future cases in which creditors may avail themselves to the Wyoming court to reach through an LLC to leverage trust assets.

## 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]

Wyoming has consistently followed South Dakota and other progressive trust jurisdictions by enacting favorable laws for trust grantors and beneficiaries, however, disadvantages to the Wyoming situated trust remain. For example, Wyoming's four-year look back period for creditor claims is double South Dakota's two-year window. Also \$1 million-dollar minimum insurance coverage with a qualified transfer affidavit is required to fund a Wyoming spendthrift trust.

### 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]

Wyoming provides flexible decanting powers [WY Stat § 4-10-816 (2017)] but, unlike South Dakota, is silent as to whether or not the pour over trust can remove a mandatory income interest, allow power of appointment in second trust to a non-beneficiary or accelerate remainder beneficiaries interest.

### 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]

In 2020, Wyoming lawmakers passed SB 0071, reducing private placement tax from 75 bps (.75%) to 7.5 bps (.075%) on net direct premiums in an effort increase Wyoming's competitiveness as a premier trust situs. The premium tax issue becomes important when considering entities like LLCs in private placement life insurance programs. Properly situated LLCs avail clients to lower premium taxes and allow clients to be classified as "qualified purchasers" for securities law purposes.

## 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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