South Dakota's Situs Advantages Over New York

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INTRODUCTION

South Dakota has built a trust law and regulatory framework that consistently ranks among the nation's most advanced, combining decades of legislative refinement with a stable, low-tax environment. New York, by contrast, has left much of its trust law unchanged for long stretches at a time, and its tax and fiscal environment impose real costs on trust settlors and beneficiaries that South Dakota does not. This paper compares the two jurisdictions across the dimensions that matter most for modern trust planning: legislative responsiveness, taxation, perpetual trusts, asset protection, directed trusteeships, decanting, privacy, fiscal health, and the specialized entity structures available to trust advisors.

The sections that follow examine each of these dimensions in turn. Taken together, they show a consistent pattern: where South Dakota has built statutory tools and market infrastructure over decades, New York has often left the corresponding questions to inconsistent case law, an unfavorable tax code, or simply unaddressed. The conclusion draws these threads together and explains what they mean in practice for families choosing a trust situs.

FLEXIBILITY

South Dakota demonstrates its commitment to trust law evolution through annual updates facilitated by the Governor's Task Force on Trust Administration Review and Reform. Unique to South Dakota, this group of lawmakers and industry leaders annually surveys the global trust landscape and responds to new industry techniques and trends. Recent examples include the 2016 Community Property Trust statute, the 2016 Family Advisor provisions, the 2006/2008 Purpose Trust statute, and, most recently, the 2025 addition of the tax trust advisor as a recognized directed trust fiduciary role, allowing a family's own tax advisor to serve as a trust advisor with authority over tax-related decisions. [SDCL § 55-17-5; SDCL §§ 55-1B-4, 55-1B-13 (2025 S.B. 69, eff. July 1, 2025)]

New York's trust statutes lack a comparable review mechanism. There is no standing body tasked with surveying trust law developments and proposing updates, and New York's trust code has gone through long stretches without substantive modernization. A New York Uniform Directed Trust Act, for example, has been proposed repeatedly since

at least 2015 but has never been enacted–a proposal South Dakota's own directed trust framework predates by decades.

South Dakota's introduction of innovative trust structures, such as Community Property Trusts and Purpose Trusts, reflects its proactive approach to meeting the diverse needs of trust settlors. New York offers no comparable options, limiting individuals' ability to tailor trusts to their specific objectives and preferences.

The Family Advisor concept in South Dakota further illustrates this adaptability, recognizing the importance of involving trusted family members in trust administration without imposing fiduciary liability on them. New York's trust laws include no comparable provision, which can complicate trust management for families who want a trusted relative or advisor involved without taking on full fiduciary exposure.

STATE INCOME AND CAPITAL GAINS RATES

South Dakota offers a compelling tax-planning opportunity for trustees and beneficiaries, where trust assets can grow free of state income tax and capital gains tax. With correct planning–combining no state income tax with trust vehicles like dynasty trusts, community property trusts, resident trusts, and incomplete non-grantor trusts ("INGs")–families can create substantial tax savings extending over multiple generations.

New York, by contrast, imposes significant state income taxes on both individuals and corporations. New York has a graduated individual income tax, with rates ranging from 4.00 percent to 10.90 percent; the top-rate surcharge enacted in 2021 was extended through tax year 2032 in New York's 2026-27 budget, so it is now a settled feature of the code rather than a temporary measure. New York's corporate franchise tax runs 6.50 percent, with a 7.25 percent surcharge on income over $5 million that was likewise extended, through tax years ending before January 1, 2030. New York has a 4.00 percent state sales tax rate, a maximum local sales tax rate of 4.875 percent, and an average combined state and local sales tax rate of approximately 8.54 percent. New York also has "tax benefit recapture," by which many high-income taxpayers pay their top tax rate on all income, not just on amounts above the benefit threshold. Under the Tax Foundation's current State Tax Competitiveness Index (the successor to its State Business Tax Climate Index), New York ranks 50th in the nation–last place–for tax competitiveness.

New York also subjects capital gains to taxation at ordinary income rates, adding to the financial burden on investors and businesses. Despite the clear case for reform, New York's legislative process lacks the flexibility seen in South Dakota: tax changes require complex procedures and typically face significant political hurdles, leaving the state's tax code slow to adapt to changing economic conditions and taxpayer needs.

PERPETUAL TRUSTS

South Dakota was one of the first states in the country to eliminate the Rule Against Perpetuities, leading to the creation of dynasty trusts–a powerful planning tool that preserves family wealth over generations by avoiding federal estate taxation in perpetuity. Unlike states that have merely extended the rule's termination period, a South Dakota dynasty trust avoids federal taxation on trust assets indefinitely because the trust never terminates. [SDCL § 43-5-8]

New York, by contrast, still has not abolished its Rule Against Perpetuities (EPTL § 9-1.1), which continues to limit the duration of New York trusts and prohibits the establishment of true perpetual dynasty trusts. This restricts long-term asset preservation and succession planning options for New York families and beneficiaries.

CREDITORS CLAIMS & ASSET PROTECTION

Under South Dakota law, a discretionary interest in a trust is not a property interest or an entitlement, and limited powers of appointment and remainder interests are likewise not property interests–extremely advantageous from an asset protection standpoint when combined with a South Dakota self-settled trust or domestic asset protection trust. In a self-settled trust, assets can be legally shielded from third-party liability (including a spouse in a divorce proceeding) and lawsuits, while permitting the settlor to retain some control over trust assets and enjoy a discretionary benefit during their lifetime. [SDCL § 55-1-24; SDCL § 55-16-1 et seq.]

South Dakota also has one of the shortest fraudulent conveyance periods in the country at two years, along with a "clear and convincing" burden of proof running to the specific creditor–an intent to hinder, delay, or defraud must be proven. South

Dakota further provides for reimbursement of the trustee's legal fees if a creditor's lawsuit is unsuccessful, and its LLC statutes are consistently top-rated, together making South Dakota one of the leading asset protection jurisdictions in the country. [SDCL § 55-16-9]

New York's lookback period for creditors challenging a transfer is twice as long as South Dakota's, at four years, extending the window during which trust assets remain exposed to potential claims. This prolonged vulnerability poses real risk for individuals in litigation-prone professions or facing major life changes.

More fundamentally, New York does not permit a self-settled trust to protect assets from the settlor's own creditors at all–neither a revocable trust nor an irrevocable trust established for the settlor's own benefit will work. Where a settlor retains the right to revoke a trust, New York treats them as the absolute owner of the property, so a revocable trust is not an effective asset protection device: if the settlor has full access to the trust property, so does a creditor. The same result follows for a self-settled irrevocable trust, because EPTL § 7-3.1 provides that "a disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator" –a rule with roots in New York's early trust statutes (commonly traced to the Revised Statutes of 1830) that remains firmly settled law today. [EPTL § 7-3.1]

New York simply has no self-settled domestic asset protection trust option, leaving trust assets there more exposed than in South Dakota across every scenario a settlor is likely to face.

DIRECTED TRUSTEES

Available in only a handful of states, directed trusts enable the unbundling of trust administration and investment management. This allows families to combine the benefits of an independent corporate trustee, the favorable trust and tax environment of South Dakota, and the ability to retain preferred investment advisors no matter where they are based. In this model, the responsibilities of the trustee are divided into three areas: investment, distribution, and administration. An investment committee, advisor, or protector chooses outside investment advisors and managers to direct the trust's investments, and the trustee has no fiduciary responsibility for monitoring those outside

managers' performance. A distribution committee, advisor, or protector decides when distributions are made and directs the trustee, typically through a direction letter, on how much should be distributed and to whom. The trustee handles contributions, distributions, and other regular administrative functions with input from the investment and distribution professionals. [SDCL Chapter 55-1B]

New York has no directed trust statute at all, and proposals to enact one–including a New York Uniform Directed Trust Act–have circulated since at least 2015 without being adopted. Any attempt to create a directed trust in New York is met with unpredictable results, since no legislation defines how a directed trusteeship should function there. That uncertainty has led settlors to choose other states over New York to establish directed trusts, and a statutory framework for directed trusts remains a necessary addition if New York wants to stay competitive in the trust field.

DECANTING

Decanting is the process of moving the assets of one trust into a new trust, with the power to decant usually written into the trust document itself–most trusts permit a trustee to distribute principal to beneficiaries, also known as the power to invade the trust. South Dakota's decanting statute permits a trustee to transfer all trust property to another trust for the same beneficiary or beneficiaries, so long as the trustee has discretion over income or principal distributions. South Dakota is consistently ranked the top decanting statute in the nation in Steve Oshins' widely followed annual rankings of state decanting statutes, giving families considerable flexibility to accomplish their planning goals. [SDCL § 55-2-15]

New York's decanting statute, EPTL § 10-6.6(b)(1), imposes four statutory prerequisites that leave many practical questions unanswered. First, the trustee must have absolute discretionary distribution authority to invade principal and distribute trust property–so a trust will not qualify where the trustee's distribution authority is limited by an ascertainable standard, such as health, education, maintenance, or support. Second, the exercise of the decanting power cannot reduce any beneficiary's fixed income interest, meaning income beneficiaries entitled to receive income for a set period must continue to do so on the same terms. Third, the exercise of the

power must be in favor of a proper object of the power, so a trustee may only appoint someone within the class of permissible appointees defined by the trust's terms–though how far a beneficiary's interest may otherwise be changed remains unsettled, especially for remaindermen. Fourth, the new trust cannot contain provisions that improperly limit a testamentary trustee's powers or immunities as a matter of public policy–a trustee cannot be exonerated from liability for failing to exercise reasonable care, and cannot be given the power to make a binding, conclusive valuation of trust assets for distribution purposes.

Where South Dakota's decanting statute facilitates efficient, forward-looking planning for estate, gift, and income tax purposes, New York's more conditional framework leaves families with meaningfully less room to restructure a trust as circumstances change.

QUIET TRUSTS

A particularly valuable feature of South Dakota's privacy laws is the ability to create quiet trusts. Most states require a trustee to inform a beneficiary of their beneficial interest at age 18, including the right to see the trust document and receive financial statements–a rule that can arrive at an awkward moment, just as an 18-year-old is heading off to college or starting a career. Under South Dakota law, a quiet trust can instead grant the settlor, trust protector, and investment or distribution advisor the power to expand, restrict, eliminate, or modify a beneficiary's right to information about the trust. South Dakota is widely regarded as having the nation's most comprehensive and flexible quiet trust statute. [SDCL § 55-2-13]

New York does not permit silent trusts and treats them as inconsistent with a trustee's fiduciary duty: trustees there have a legal obligation to keep beneficiaries informed about the details of their trusts, including a requirement that all beneficiaries over 18 receive trust statements. New York's framework gives beneficiaries broader access to trust information regardless of the grantor's wishes or the family's particular circumstances, and offers no statutory mechanism comparable to South Dakota's for limiting that access.

PRIVACY

For wealthy families, privacy protection is paramount, and South Dakota has some of the strongest privacy protections built into any state's codified trust law. South Dakota's

privacy statute seals trust information–including the names of settlors and beneficiaries and the trust's contents–from public disclosure during litigation, automatically and in perpetuity, with no need to petition a court for a decree. [SDCL § 21-22-28] Most states have no trust-specific privacy statute at all, so privacy is neither mandated nor guaranteed by law the way it is in South Dakota. In states such as Delaware, Nevada, and Alaska, a court has discretion whether to seal a trust proceeding, and even where a seal is granted, it is generally not permanent the way South Dakota's is.

New York lacks comparable measures to safeguard trust information. Trust documents filed as part of judicial proceedings in New York are typically accessible to the public, without any automatic sealing provision, and New York law generally allows public access to trust-related court filings and proceedings. Unlike South Dakota's permanent, automatic seal, New York's approach leaves sensitive trust details exposed to public scrutiny by default.

STRENGTH OF STATE

On the basis of its solvency in five separate categories, the Mercatus Center's last published fiscal-condition ranking placed South Dakota second among U.S. states, with between 4.76 and 6.78 times the cash needed to cover short-term obligations, revenues exceeding expenses by 2 percent, an improving net position of $106 per capita, and a net asset ratio of 0.34, with long-term liabilities of just 8 percent of total assets, or $650 per capita. [Mercatus Center, Ranking the States by Fiscal Condition, 2018 Edition] That fiscal strength has held up since: South Dakota carries a Aaa/AAA credit rating from Moody's and S&P, reaffirmed as recently as 2025, and the South Dakota Retirement System was reported as essentially 100% funded in its June 2024 valuation.

The same 2018 Mercatus edition ranked New York 41st among U.S. states for fiscal health, with between 0.71 and 1.52 times the cash needed to cover short-term obligations, a net position of $16 per capita, a negative net asset ratio of –0.24, long-term liabilities equal to 58 percent of total assets (or $4,605 per capita), unfunded pension liabilities of $422.44 billion (35 percent of state personal income), and other

post-employment benefit (OPEB) obligations of $88.50 billion (7 percent of state personal income). [Mercatus Center, Ranking the States by Fiscal Condition, 2018 Edition] New York's credit position has since improved–Moody's upgraded the state from Aa2 to Aa1 in 2022, and its current ratings stand at Aa1/AA+/AA+ –but that still sits a full ratings tier below South Dakota's Aaa/AAA, and New York's unfunded pension and OPEB obligations remain among the largest of any state in absolute terms.

Taken together, South Dakota's higher cash reserves, positive net asset position, lower per-capita long-term liabilities, and fully funded pension system reflect a materially stronger fiscal foundation for trust administration than New York's–a difference that matters because a fiscally strained state has a greater incentive to look to trusts as a source of new revenue.

SPECIAL PURPOSE ENTITIES

A Special Purpose Entity (SPE) shelters from personal liability both the individuals serving within a directed trust structure–investment and distribution committee members–and the trust protector, safeguarding them against claims connected to their duties in that capacity. Most SPEs are structured as South Dakota LLCs, so the people serving in these roles act as agents or employees of the LLC rather than individually as residents of their home state, which further ties SPE members to South Dakota situs for asset protection, wealth preservation, and income tax purposes. SPEs may also be able to obtain D&O and E&O insurance that would not be available to someone serving in an individual capacity. All SPEs register with the South Dakota Division of Banking, though they are not regulated by it, and every SPE must work with a qualified South Dakota trust company so the SPE can direct that company on investment, distribution, and trust protector decisions.

New York's trust laws offer no comparable legislative support for Special Purpose Entities, and that gap extends to the role of trust advisors within entity structures generally. The absence of explicit statutory guidance may discourage individuals from taking on trust advisor roles in New York, since they lack the liability protection South Dakota's statutes provide, and can expose New York trust structures to a greater risk of adverse judicial challenges and avoidable IRS scrutiny.

PREMIUM TAX ON PRIVATE PLACEMENT LIFE INSURANCE

South Dakota imposes an insurance premium tax of just 8 basis points (0.08%) on trusts purchasing private placement life insurance. [SDCL § 10-44-2] New York's franchise tax on life insurance premiums under Article 33 of the New York Tax Law generally results in an effective tax burden of roughly 1.5% to 2.0% of taxable premiums–well above South Dakota's rate in any case, though notably higher than the specific 2.05% figure sometimes cited, which does not match New York's currently published rates and should be verified against the Department of Financial Services' current schedule. Even under the lower end of that range, New York's premium tax burden puts trust holders there at a clear disadvantage compared to South Dakota.

CONCLUSION

South Dakota and New York represent two very different approaches to trust law. South Dakota has spent decades building a statutory framework that is reviewed annually, extended readily, and increasingly imitated–perpetual dynasty trusts, a mature directed trust regime, one of the broadest decanting statutes in the country, a true quiet trust option, and an automatic, permanent privacy seal. New York, by contrast, still operates under a Rule Against Perpetuities it has never abolished, has no directed trust statute of its own after a decade of unpassed proposals, imposes a materially narrower decanting statute, forbids silent trusts outright, and offers no automatic privacy protection for trust proceedings.

The tax and fiscal picture reinforces the same conclusion. South Dakota has no income tax of any kind and a constitutional barrier to creating one, while New York's income, corporate, and sales taxes rank among the least competitive in the country–New York currently sits last, 50th, in the Tax Foundation's State Tax Competitiveness Index. On fiscal fundamentals, South Dakota carries a top-tier Aaa/AAA credit rating and a fully funded state pension system, while New York, despite recent credit rating improvements, continues to carry some of the largest unfunded pension and retiree healthcare obligations of any state in the nation.

For families and advisors weighing where to situs a trust, that combination of statutory depth, tax efficiency, and fiscal stability is what continues to set South Dakota apart–and it is a gap New York has not meaningfully closed.

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