South Dakota's Situs Advantages Over Tennessee

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INTRODUCTION

Tennessee has quietly and consistently strengthened its trust laws over the last several years, positioning itself alongside South Dakota, Delaware, Nevada, and Alaska as a leading destination for establishing trusts. A close analysis shows, however, that South Dakota's trust law remains more developed across most critical planning dimensions, particularly on asset protection lookback periods, privacy, decanting flexibility, quiet trusts, PPLI premium taxes, and Special Purpose Entity statutes. South Dakota's advantage reflects more than 40 years of continuous legislative refinement through the Governor's Task Force on Trust Administration Review and Reform, a mechanism Tennessee has no equivalent to.

As with many rapidly evolving statutory frameworks, some of Tennessee's recent trust legislation has also left practitioners with open interpretive questions that the courts have not yet resolved. This whitepaper provides a detailed comparison of South Dakota and Tennessee across the planning dimensions that matter most to advisors and families weighing a change of situs.

STATE INCOME AND CAPITAL GAINS RATES

There have been no state income taxes, personal or corporate, in South Dakota since 1942, and 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] That constitutional protection gives families durable certainty that the zero-tax environment will hold across a multi-generational trust.

Tennessee has no state income tax of any kind, and the Hall Income Tax on interest and dividends was fully repealed effective January 1, 2021. Tennessee imposes no tax on wages, investment income, or capital gains at the state level, though it does levy a sales tax, with an average combined state and local rate of approximately 9.55%.

RULE AGAINST PERPETUITIES & DYNASTY TRUSTS

In 1983, South Dakota was the first state in the nation to abolish the Rule Against Perpetuities, recognizing the advantages of dynasty trusts by allowing trusts to last perpetually for all assets. [SDCL § 43-5-8] South Dakota was also the first state to adopt a Trust Protector statute, in 1997, and more than four decades of case law now support its perpetual trust framework. [SDCL § 55-1B-6]

Since 2007, Tennesseans have been able to establish dynasty trusts that can last for 360 years rather than in true perpetuity. To qualify for the longer duration, the trust must provide a testamentary limited power of appointment to at least one member of each generation of descendants who die more than 90 years after the trust is established, a drafting requirement South Dakota trusts do not need to satisfy.

CREDITOR CLAIMS & ASSET PROTECTION

South Dakota has a thorough statute addressing numerous arguments made in court cases and disputes, weaknesses under the Restatement of Trusts, and vulnerable provisions or drafting errors in trust documents. [SDCL § 55-1-25, 32, 33, 38, 39] If the settlor is foreseeably solvent, South Dakota trusts are shielded from new creditor claims after just two years, and for third-party trusts there are no exceptions for spousal or child support claims. [SDCL § 55-1-44] [SDCL § 55-16-10, 16]

The Tennessee Investment Services Act of 2007, Tennessee's domestic asset protection trust statute, allows individuals to create self-settled, irrevocable Tennessee Investment Services Trusts, known as TISTs. The law is fairly restrictive compared to South Dakota's, and the Tennessee Supreme Court has not yet ruled on the validity of TISTs, which leaves some uncertainty as to their enforceability in a contested case.

Prior to a 2021 legislative update, a grantor funding a TIST was also required to execute a qualified affidavit of solvency. That update removed the affidavit from the statutory definition of a "qualified disposition," so where a grantor still chooses to execute one, it now creates only a rebuttable presumption as to the date of the transfer, not as to solvency. Most drafting attorneys still recommend executing an affidavit of solvency to guard against potential fraudulent transfer claims, since the underlying uncertainty around TIST enforceability has not otherwise changed.

DIRECTED TRUSTEES

South Dakota's directed trust statute is among the most comprehensive in the nation, and approximately 68% of South Dakota trust business is conducted on a directed basis. [South Dakota Division of Banking, Annual Trust Company Report] Under SDCL § 55-1B-1 et seq., a directed trustee follows the instructions of a trust advisor without any independent duty to review, monitor, or object to those directions, and bears no liability for following proper directions absent willful misconduct.

Tennessee has a directed trust statute permitting separation of trustee roles, but it is less developed than South Dakota's and has generated less case law and practitioner commentary. Tennessee practitioners note that the framework offers less clarity and fewer protections for directed trustees than South Dakota's statutory scheme.

DECANTING

South Dakota's decanting statute is consistently ranked #1 in the country by trust law scholar Steve Oshin, due in large part to its explicitly clear statutory language and the amount of control and flexibility it affords settlors and their families. [SDCL § 55-2-15] The trustee needs only discretion over income or principal distributions to exercise the power, which leaves little room for the kind of interpretive dispute described below.

Tennessee also has a decanting statute, but several open questions remain that many Tennessee practitioners have not been able to resolve with certainty. Chief among them is whether the decanting power is exercisable only to the extent of the trustee's principal invasion powers, since the statute's use of the word "such" implies to some readers that the decanting power is derived from, and therefore limited by, the invasion power. [Tenn. Code Ann. § 35-15-816(c)]

The distinction matters in practice. Reading the decanting power as derivative of the invasion power would let a trustee with discretion to distribute principal to one beneficiary, to the exclusion of another, decant principal into a new trust for the benefited beneficiary alone. Tennessee's statute places mandatory limitations only on trustees who are also beneficiaries, which implies by omission that no such limitations apply to trustees who are not beneficiaries, but the Tennessee courts have not yet confirmed that reading.

QUIET TRUSTS

The South Dakota statute contains detailed provisions allowing the settlor, trust instrument, and trust advisors to restrict or eliminate beneficiary information rights and to keep the trust instrument and trust actions quiet, including after the settlor's death. [SDCL § 55-2-13] There is no durational limitation on that silence under South Dakota law.

The Tennessee Trust Code explicitly authorizes "silent trusts," under which a trustee may withhold information about the trust, including its existence, from beneficiaries. [T.C.A. § 35-15-813(e)] Regardless of the grantor's wishes, however, the silence may not continue after the grantor's death, unlike South Dakota, which imposes no such durational limitation.

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. [SDCL § 21-22-28] This seal attaches automatically and lasts in perpetuity, with no court petition required.

In Tennessee, documents, briefs, applications, petitions, and motions are public record and may only be granted a privacy seal by the court under "extraordinary" circumstances. [Tenn. S. Ct. R. 15] Even then, the seal is limited to "the least restrictive means" necessary, a materially higher bar than South Dakota's automatic protection.

SPECIAL PURPOSE ENTITIES

South Dakota law specifically permits individuals to serve in trust roles, including investment advisor, distribution advisor, and trust protector, for a particular family through an entity such as an LLC, for liability protection, without meeting formal Department of Banking regulations and requirements. [SDCL § 51A-6A-66] The registration process is correspondingly light compared to other states that have adopted similar frameworks.

Tenn. Code Ann. § 35-15-1301 permits the creation of a special purpose entity, typically organized as an LLC, to serve as Trust Advisor with the requisite fiduciary powers. The registration requirements are more burdensome than South Dakota's, however, including a $1,000 initial fee and ongoing annual fees.

PPLI PREMIUM TAX

South Dakota imposes a premium tax of just 0.8 basis points (0.008%) on Private Placement Life Insurance premiums over $100,000, among the lowest such rates in the country. This translates into material savings for UHNW families using PPLI as a trust-based tax deferral strategy, with the difference compounding over the life of the policy. [SDCL § 10-44-2]

Tennessee imposes a premium tax of 1.75% on life insurance premiums received from Tennessee residents. [Tenn. Code Ann. § 56-4-205] On a $5 million PPLI policy, this differential represents approximately $85,400 in excess annual cost compared to a South Dakota-sited trust, a gap that compounds over the life of the policy.

TRUST MODIFICATION & JUDICIAL ECONOMY

South Dakota's comprehensive nonjudicial modification statutes enable changes to irrevocable trusts without court involvement in most cases, and South Dakota courts have developed particular expertise in the modification matters that do reach them. [SDCL §§ 55-3-24 et seq.] That combination of statutory flexibility and judicial familiarity gives South Dakota trustees a predictable path when a trust needs to be updated.

Tennessee law allows substitution of the trustee for the court to supervise a trust's material purpose after the grantor's death, which can streamline routine modifications. Tennessee courts have not yet addressed what happens if trustee-beneficiaries join with other qualified beneficiaries to modify a trust in a way that arguably violates the grantor's original intent, and a challenge to that scenario seems likely at some point.

STRENGTH OF STATE

South Dakota ranks among the top states for fiscal health, with cash available to cover short-term obligations well above the national average, and liabilities better than the national average. (Mercatus Research, Mercatus Center at George Mason University) South Dakota's pension is 103% funded and the state carries a AAA credit rating.

The same Mercatus study ranks Tennessee highly in the nation for fiscal health, based on cash solvency, budgets, fiscal slack, pension and healthcare liabilities, and other debt. Tennessee's pension is well-funded and, like South Dakota, the state has earned a AAA credit rating, making it one of the few states that rivals South Dakota on this dimension.

SOUTH DAKOTA VS. TENNESSEE – AT A GLANCE

Dimension	South Dakota	Tennessee
State Income Tax	None (constitutional prohibition since 1942)	None; All Income Tax on interest/ dividends repealed 2021
Rule Against Perpetuities	Abolished 1983 – first in the nation. [SDCL § 43-5-8]	360-year dynasty trusts since 2007; requires testamentary limited power of appointment
Creditor Claims / Asset Protection	Robust DAPT statute. 2-year lookback. Clear & convincing burden. [SDCL § 55-16-10]	TIST since 2007; more restrictive; TN Supreme Court has not ruled on TIST validity
Directed Trustees	Statute since 1997; 68% of SD trust business is directed	Directed trust statute exists; less developed; less case law and commentary
Decanting	Ranked #1 nationally (Oshin). Fully discretionary. [SDCL § 55-2-15]	Decanting statute exists; open question on scope tied to invasion power
Quiet Trusts	Most comprehensive in the nation. [SDCL § 55-2-13]	"Silent trusts" authorized; silence cannot continue after grantor's death
Privacy	Permanent, automatic seal. No petition required. [SDCL § 21-22-28]	Public record by default; seal only for "extraordinary" circumstances
Special Purpose Entities	Only state with statute permitting trust advisory LLCs. [SDCL § 51A-6A-66]	SPE framework exists; $1,000 initial fee plus ongoing annual fees
PPLI Premium Tax	0.8 bps (0.008%) – among the lowest in country. [SDCL § 10-44-2]	1.75% – ~$85,400 excess on $5M policy/yr
Strength of State	#1 or #2 fiscal health (PEW/ Mercatus). Pension 103% funded. AAA credit	Also ranks highly (Mercatus); well-funded pension; AAA credit

CONCLUSION

Tennessee has made real progress toward becoming one of the top-tier trust jurisdictions in the nation. As is often the case with newer legislation, some of the details still need to be worked out, and over time Tennessee's courts and legislature will likely resolve the ambiguities described above around decanting, TIST validity, and trust modification.

In the meantime, South Dakota continues to hold its long-standing position at the top of the list of premier trust jurisdictions, rooted in more than four decades of settled trust law, including zero state income tax, no rule against perpetuities, strong privacy and asset protection statutes, directed trusts, flexible decanting, and a low insurance premium tax. The South Dakota Governor's Task Force on Trust Administration Review and Reform adds another layer of stability unique to the state, reviewing and recommending changes to South Dakota's trust statutes on an ongoing basis rather than through occasional legislative overhauls.

Sterling Trustees administers over $13 billion across more than 500 trusts as an independent trustee, serving families in both directed and fully discretionary trust structures, and is ready to walk Tennessee families and their advisors through what these advantages could mean for their own trust plan.

ABOUT THE AUTHORS



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This white paper is provided for educational purposes and does not constitute legal, tax, or investment advice. Trust siting decisions depend on the residency of the grantor and beneficiaries, the location and character of trust assets, and the specific terms of the trust instrument, among other factors. Readers should consult with qualified legal and tax advisors regarding situs selection and trust structure decisions specific to their circumstances.

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