

Trust Connection

A Monthly Report of Trust News and Information

April 2022

Smith Salley

PRIVATE TRUST

ABOUT US

Smith Salley Private Trust provides trust solutions for clients who want the peace of mind that their estate will be protected and distributed according to their wishes. Our clients don't need to change their investment philosophy, asset management style, or portfolio holdings, because our trust services integrate seamlessly with the same comprehensive financial planning approach they already enjoy.

South Dakota vs. Delaware Situs – Which is Best?

The topic of South Dakota as a favorable trust situs often leads to a discussion comparing the virtues of South Dakota versus Delaware. Which jurisdiction is best? Why South Dakota? Since abolishing the rule against perpetuities in 1983, South Dakota has worked diligently to become the most trust friendly situs in the nation. The following simple table compares South Dakota and Delaware with several of the most important situs considerations. This table is not intended to be a legal guide or definitive chart; however, it is provided as a conversational reference. Several aspects of the table are explored afterward in further detail.

Description	South Dakota	Delaware
Directed Trust.....	Yes.....	Yes
Decanting.....	Yes.....	Yes
Privacy.....	Yes – automatic, perpetual.....	Yes- discretionary, 3 years
Quiet Trust.....	Yes.....	Yes
Domestic Asset Protection....	Yes – two-year lookback.....	Yes – four-year lookback
Dynasty – Perpetual.....	Yes.....	Yes
Special Purpose Entity.....	Yes.....	No
Special Spousal Trust.....	Yes.....	No

Directed Trusts

The South Dakota directed trust statutes (SDCL 55-1B) allow a clear separation of trustee duties that not only aligns with the National Advisors Trust bifurcated trust model, but also provides guidance for reducing potential liability for other fiduciaries acting on behalf of the trust. This includes not only investment advisors, trust protectors and trustees, but also distribution advisors and other special trustees.

Privacy is important to me

South Dakota privacy statutes allow for an automatic and perpetual seal on all court litigation and modification. In comparison, Delaware has the discretion to grant a seal, but it will only remain private for three years.

What about privacy from family?

Often grantors struggle with providing too much financial information to grandchildren or others. They fear that the beneficiaries may not have the maturity, financial skill or emotional capacity to handle the information. In some cases, the information may even prove detrimen-

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A Local Trust Solution

Call us today at
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about working with Smith Salley
Private Trust.

For information and assistance,
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tal to the beneficiary. The South Dakota statute allows the grantor or a trust protector, either by the terms of the governing document or a writing delivered to the trustee, to expand, restrict, eliminate, or otherwise modify the rights of beneficiaries to information relating to the trust (SDCL-55-2-13).

My trust is Irrevocable; can it be changed?

For the last nine years, South Dakota has been ranked as the top state for decanting¹. The statutes provide clear guidance for use in decanting or modifying Irrevocable Trusts. While there are certain requirements that must be met, with the tools provided in the statutes, it may be possible to “fix” an Irrevocable Trust that has encountered unforeseen circumstances. Should court intervention be required to modify a trust, South Dakota courts are both expedient and cost effective when compared with other jurisdictions including Delaware.

Asset Protection

While Domestic Asset Protection Trusts are now available in many states, South Dakota has consistently been rated as one of the best jurisdictions². The South Dakota statute is very robust and provides strong creditor protection. The South Dakota statute provides for a two-year lookback period while states such as Delaware have a four-year lookback.

South Dakota’s statute specifically allows transfer of marital property to a domestic asset protection trust. Even if created during marriage and properly established, claims for alimony are barred.

Delaware has a state fiduciary income tax on income accumulated in a non-grantor trust where the trust itself, and not the grantor, is taxed on income earned by the trust. However, there is a full exemption from this tax if the income is accumulated for beneficiaries who are not current Delaware residents.

Dynasty – Perpetuity

Although the tax environment has changed in the past few years resulting in less need for perpetual trusts, situations still exist where a long-term solution is desirable. The South Dakota dynasty statutes allow the trust to last in perpetuity.

Special Purpose Entity

The South Dakota Special Purpose Entity statute helps to shield investment and distribution committee members, trust protectors and family advisors from potential individual liability. By utilizing the LLC corporate structure, the individuals are protected from personal claims connected to their capacity in serving the trust.

Summary

South Dakota also has statutes outlining powers for trust protectors or family advisors providing solutions such as the Special Spousal Trust. The lack of a state income tax, along with an extensive list of trust-friendly laws, makes South Dakota situs a favorable jurisdiction.

Talk with your financial advisor soon to determine which situs is appropriate for your trust.

¹Steve Oshins https://docs.wixstatic.com/ugd/b211fb_56e2ff9b82534460aebf2a221f4e955b.pdf

²Steve Oshins - https://docs.wixstatic.com/ugd/b211fb_fc5bce98b8d84985900295a749574ed4.pdf

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