

# A Guide to South Dakota Trusts

## Introduction

Trusts are integral to the financial, estate and asset protection planning of many high net worth families. With a use extending over centuries, trusts have demonstrated their viability and adaptability to respond to changing cultural, political and economic circumstances.

In recent decades the use of trusts has expanded to include families from non-common law societies (Latin America, Asia, Europe and the Middle East). This expansion reflects the recognition by professional advisors that the near universal need for multi-generational estate, tax and asset protection planning frequently can be achieved through the use of trusts. In an age of expanding digitization of information and enhanced personal and financial transparency, trusts also can provide families legitimate privacy protection.

South Dakota, repeatedly ranked as one of the top trust domiciles in the United States, offers domestic and international professional advisors a modern trust regime that is continually monitored and updated in response to legal and fiscal developments which impact the use of trusts. Since 1997, the state has had a standing trust task force comprising representatives from the state government and private sector. The recommendations of the task force have resulted in amendments to the state's trust laws that have been well-received by trust professionals.

This guide is intended to explain for the benefit of professional advisors, institutions and their clients, some of the unique features of the South Dakota trust regime. The guide also includes a section on the use of South Dakota trusts in the international context. Links to the complete text of the South Dakota trust law and other related provisions are also provided in an appendix to the guide.

Trident Trust Company (South Dakota) Inc., with offices in Sioux Falls, is a public trust company licensed and regulated by the South Dakota Division of Banking. We invite you to contact us or any Trident Trust Group office for information on how we can assist you in South Dakota.

Trident Trust Company (South Dakota) Inc. does not provide legal advice. This guide is a general overview.

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This guide provides general information related to South Dakota trust law and practice, and the US Internal Revenue Code ("the Code") as it relates to the treatment of certain types of trusts established under South Dakota law. This guide does not provide legal advice. Although we have attempted to ensure that the information contained in this guide is accurate, readers should consult a qualified professional in regard to the application of South Dakota trust law or, where applicable, the application of the Code to specific situations.

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## The South Dakota Advantage – Executive Summary

South Dakota has been rated by Trust and Estates magazine in numerous comparative surveys as a top-tier US trust jurisdiction. Its high ranking is based on the inclusion in its trust code of provisions that trust professionals regard as necessary for a modern trust regime to include. Also contributing to the jurisdiction's high ranking are its favorable tax treatment of trusts and the state's commitment to ensuring, through a standing task force, that its trust laws reflect the present day needs of trust professionals. Significant features of the trust code are summarized below followed by a fuller discussion of the relevant code provisions.

### Unlimited Duration (Dynasty) Trusts

South Dakota first gained attention as a trust domicile in 1983 when it abolished the Rule Against Perpetuities (RAP). Previously, states following the general rule required trusts to terminate at the end of 90-110 years. By abolishing the RAP, assets held in trust can be permanently insulated from the federal transfer tax system – the gift, estate, and generation skipping taxes – allowing the value of the trust's assets to grow more rapidly.

A number of other states followed South Dakota in modifying or abolishing RAP in their local trust laws. Some states also have chosen to extend the trust duration from the general period to 360 to 1,000 years, while other states still have the rule but carve out exceptions for certain types of trusts. South Dakota remains one of the few states that have eliminated the rule entirely.

### Asset Protection Trusts

South Dakota was the first state to enact a discretionary trust statute designed to protect trust assets from creditors. This statutory protection also applies to self-settled trusts, these being trusts settled by a transferor of which the transferor is a beneficiary. The protection is afforded to assets with a two-year look-back period.

South Dakota also continues to be ranked as a top rated state for asset protection for Limited Liability Companies (LLCs) and Limited Partnerships (LPs) with the sole remedy for creditors being a charging order on the ownership interest held in the entity and not the assets held by the entity itself.

### Privacy Protections

South Dakota's privacy statutes are regarded as among the most protective in the US. While many states require trusts to be registered with the courts, South Dakota has no such requirement. In instances where there is a court filing, a trustee or beneficiary can petition the court to request that the file be sealed. Sealing can be in perpetuity in contrast to certain other states, which only allow sealing of records for a limited time period.

### Controlling Information to Beneficiaries

There may be times or situations where a settlor does not want beneficiaries to know of the existence or the value of the assets in the trust for fear that such knowledge may impair their desire to become self-sufficient. Unlike the majority of states, South Dakota statutes give the settlor the right to elect what notice is given to beneficiaries and to specify when and what information will be provided. The trustee's duty of confidentiality may also be extended to beneficiaries.

### Flexible Modification Provisions

South Dakota's modification, reformation or decanting rules afford trustees a broad range of options when changed circumstances require amendments to be made to trust documents or new trusts to be established. In practice, these provisions are relied upon when a trust needs to reflect changes in family and business circumstances, changes in tax rules; or, in the case of a trust transferring its situs to South Dakota, it needs to change its governing law or be restated in its entirety.

### Non-Charitable Purpose Trusts

South Dakota has expanded the use of purpose trusts – traditionally limited to trusts with charitable purposes – to allow such trusts to be employed where there may be pragmatic reasons for assets to be held in a fiduciary capacity until a purpose for which the trust was established has been satisfied; for example, the ownership of shares in a private trust company.

### No State Income Taxes

South Dakota eliminated state income taxes in 1983. The state continues to distinguish itself from the majority of other states by being a "pure" no income tax state. This means that a South Dakota trust is exempt from any state

income tax on assets held in trust, is not required to file a state income tax return or meet certain requirements to qualify for exemption from state taxes. The state imposes some of the lowest insurance premium taxes in the US. South Dakota has an 8 basis point structure versus the national average of 200 basis points.

### Private Trust Companies (PTC)

The use of Private Trust Companies (PTCs) has an extended history both within and outside the US. Their most frequent use is by families who wish to maintain a high degree of family involvement in the operation of the trust company, which may not be possible where a third party institutional trustee acts as trustee. South Dakota's PTC regime has been widely used for this purpose by US families because of South Dakota's highly regarded PTC regulatory regime and low capital requirements. Local public trust companies, such as Trident Trust Company (South Dakota) Inc, provide and service the local presence and administration requirements of PTCs.

### Unlimited Duration (Dynasty) Trusts

Most settlors who have considered the question struggle with the decision as to how long they want the trust to which they are transferring assets to last. For this reason, the ability to have the trust last as long as it still addresses the goals and desires of the settlor seems to be more preferable than letting the state set an arbitrary limit on the number of years a trust can last.

In addition, settlors who understand that the trust can last perpetually without the imposition of additional federal taxes at the end of each generation, are more willing to consider how a trust of unlimited duration may fit within their estate plan.

Most states still have a rule against perpetuities (RAP) which provides that the trust can last for lives in being plus 21 years. This often restricts the maximum duration of a trust to 90-110 years. While there is a trend toward abolishing the RAP, some states have responded to the desire for longer term trusts by enacting a longer timeframe. For example, Florida and Tennessee allow a trust to continue for 360 years and Nevada uses a 365 year term. While Utah, Alaska, Colorado and Wyoming all allow trusts to last for 1,000 years, Washington takes a more restrictive approach and permits a trust to last for a period of 150 years.

Before 1995, Delaware's RAP applied to trusts created by the exercise of a power of appointment as of the time of the exercise rather than at the time of the trust's creation. Thus, a perpetual trust was possible in that state by simply creating and exercising successive powers of appointment. In response to the Delaware law, Congress enacted I.R.C. Secs. 2041(a)(3) and 2514(d). These provisions (known collectively as "the Delaware tax trap") generally provide that the exercise of a power of appointment, including a limited power of appointment, will cause the property applicable to the exercise to be included in the decedent's gross estate if the power of appointment can be exercised in such a manner so as to suspend the absolute ownership or power of alienation of the property for a period ascertainable without regard to the date of the creation of the first power.<sup>1</sup>

A settlor who wishes to establish a trust of longer duration under South Dakota law will need to appoint a South Dakota trustee and require that the trust be situated and administered in South Dakota. There is no requirement that the settlor be resident or domiciled in South Dakota to take advantage of this law.

### Asset Protection Trusts

Trusts have long been used for the purpose of protecting assets from creditors of trust beneficiaries. With the implementation of the Uniform Trust Code (UTC) which has now been adopted in some form in over twenty states, there is a rising concern about the ability of a creditor to reach assets held in trust.

The UTC, which was adopted by some states, relies upon the Restatement Third of Trusts. The Restatement blurred the line of protection afforded where there is discretion given to the trustee to make distributions. In comment (e) to Section 60 of the Restatement Third it states that "it is rare that a beneficiary's circumstances, the terms of the discretionary power, and the purposes of the trust leave the beneficiary...powerless to compel distributions". In a

<sup>1</sup>In Estate of Murphy v. Commissioner, the Tax Court held that the exercise of a limited power of appointment which authorized the creation of another limited power of appointment did not spring the Delaware tax trap because, under applicable Wisconsin law, the exercise of a limited power of appointment did not commence a new perpetuities period since that state had abrogated the common law rule against perpetuity and had a specific statute on the suspension of the power of alienation. 1979-2 C.B. 2 (1979). The ruling of this case was relied upon by the South Dakota legislature when the decision was made to abolish the existing rule against perpetuities in 1983.

situation where it is held that a beneficiary could force the trustee to make a payment, then a creditor can make the same argument because the creditor gets to “step into the shoes” of the beneficiary when trying to disgorge payments from the trust.

South Dakota was the first state to codify and thus delineate the differences between a mandatory, support and discretionary distribution interests. SDCL § 55-1-38. This is an important distinction since creditors are only able to attach or levy upon a “property” interest. If a beneficiary’s interest in the assets of the trust is not considered a “property right”, then they are safe from creditors. Regardless of whether a beneficiary has any outstanding creditor, a trustee of a spendthrift trust may directly pay any expense on behalf of such beneficiary and may exhaust the income and principal of the trust for the benefit of such beneficiary. SDCL § 55-1-35.

An additional concern is a state’s interpretation of a “spendthrift clause”. Under the laws in the states that have adopted the UTC, there is a belief that a spendthrift clause is “boilerplate” language and was not intended to give true spendthrift protection to the beneficiary. In fact, South Dakota law specifically rejects certain provisions of the UTC and Restatement Third of Trusts and directs courts not consult them. SDCL § 55-1-25. Thus, unless there is additional language in the trust to signify that the settlor intended the spendthrift clause to be a material provision of the trust, it can be ignored.

South Dakota clarified the spendthrift issue in SDCL § 55-1-37 by providing that spendthrift provisions are material provisions and that the spendthrift clause applied to both income and remainder interests.

South Dakota law also provides additional protection from creditors seeking to enforce a claim against a trust by defining “reach”. Under SDCL § 55-1-24(6) a creditor is precluded from trying to gain access to the trust assets by means of a judgment, decree, garnishment, attachment, execution, levy, creditor’s bill or other legal, equitable, or administrative process, relief, or control of any court, tribunal, agency, or other entity as provided by law. Courts may not order a trustee to distribute past due distributions or compel a trustee to exercise its discretion to make a distribution. SDCL §§ 55-1-41 through 55-1-43.

### Self-Settled Asset Protection Trusts

The general rule is that a person who creates a trust cannot evade his/her creditors by transferring assets to a trust. This is the reason many wealthy clients traditionally created trusts in so-called foreign asset protection trust jurisdictions in order to avoid claims of their creditors. These foreign trust domiciles provided express and broad statutory protections against a grantor’s creditors.

In 1997, Alaska became the first state in the nation to enact a law that was designed to allow the grantor to become a beneficiary of his own trust and still obtain creditor protections if the trust was not created for fraudulent purposes. Delaware enacted its version of the self-settled trust laws (sometimes referred to as a DAPT) soon after. South Dakota enacted its version of this law called Qualified Dispositions in Trust in 2005.

Under the South Dakota statute, a transferor (settlor) who establishes a trust meeting all the statutory criteria can protect the assets within the trust from creditor claims and still have discretionary access to distributions from the trust. In addition, the transferor can act as the investment advisor of the assets in the trust.

In order to obtain the protections available under the Qualified Dispositions in Trust statute:

- the trust must be irrevocable
- it must reference that South Dakota law is applicable for the administration of the trust
- all or part of the trust administration must be performed in South Dakota
- at least a part of the trust property must be located in South Dakota
- at least one of the trustees must be a resident of South Dakota or an institution in South Dakota
- the trust must have the appropriate spendthrift clause
- the assets transferred to the trust must not be conveyed for fraudulent purposes

Today, South Dakota's self-settled asset protection statutes are generally recognized as among the best in the US. Among the features of the South Dakota statute that create significant hurdles for creditors to overcome are:

- a two year look-back (or a six month look-back after discovery), which is more protective than that afforded in other DAPT jurisdictions
- the exception creditors who can avoid the typical creditor bar are limited to existing and former spouses and children who have an agreement or court order for support and to existing or former spouses with an agreement or court order for a distribution of property
- South Dakota is the exclusive jurisdiction over DAPT actions
- any attempt to enforce a foreign judgment will act as an automatic discharge of any non-South Dakota trustee unless the foreign court follows the DAPT laws of South Dakota
- no judgment of a foreign court can be enforced unless a South Dakota court determines that the time, manner and mechanism for enforcing the judgment is consistent with the limitations of the South Dakota asset protection laws, SDCL § 55-3-49

In practice, the assets transferred to the trust are usually held inside an entity (such as an LLC) that is created under South Dakota corporate law. Importantly, South Dakota statutes provide that the sole and exclusive remedy available to a creditor of a member or partner of an LLC or LP is a charging order against the member's interest. This means that a creditor only obtains the right to collect any distributions made to the member or partner and cannot force a distribution. Moreover, the creditor does not have the ability to exercise any voting rights, management rights, rights to examine the company's books and records or exercise any of the other rights that the member or partner has available.

The inability of a creditor to step into the shoes of a partner or member of an entity is important and is not always found under the laws of other states. Without the sole remedy charging order, a creditor in an attempt to satisfy the judgment debt could seek assistance from a court to obtain an order for a judicial foreclosure sale of the entity itself.

### **Privacy Protections**

A general rule applicable in both state and federal courts is that matters of litigation are open to the public for inspection. The ability of people not connected with a suit to review the court filings is unacceptable to most grantors of multi-generational trusts.

While not every trust ends up in litigation, it is often important to families who are thinking about creating a trust to seek privacy in their trust affairs commensurate with their overall privacy needs. South Dakota court privacy laws apply to all court proceedings regarding trusts, including those in litigation.

South Dakota has the most robust privacy statute in the nation because the court automatically seals the trust records upon filing. The order will seal the records forever, as opposed to Delaware's three-year rule.

Court filings are still accessible to those who have a genuine need to know, such as the trustee, a beneficiary and attorneys for the parties. However, they are not available for inspection by creditors or other third parties. Anyone not amongst the statutory enumerated list of persons with access to court records must apply to the court and demonstrate a true need to know before they will be granted access to any court filings.

### **Controlling Information to Beneficiaries**

As trusts that last multiple generations become more popular or where the grantor is the only income beneficiary during life, it is often discomfoting to a grantor to learn that at the time the trust becomes irrevocable, either during life or at death, certain information regarding the trust must be sent to all beneficiaries. In the states that have adopted the UTC, a grantor cannot prevent disclosure of such information.

By contrast, the South Dakota legislature understood there may be situations where a settlor does not want the disclosure of trust information to be provided to certain beneficiaries or the settlor may want to restrict the type of information that is disclosed. SDCL § 55-2-13 states in part that:

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*“The settlor, trust advisor, or trust protector, may, by the terms of the governing instrument, or by providing written directions to the trustee, expand, restrict, eliminate, or otherwise modify the rights of beneficiaries to information relating to a trust. ... The terms of an irrevocable trust or written directions provided pursuant to this section may expand, restrict, eliminate, or otherwise vary the right of a beneficiary to be informed of the beneficiary’s interest in a trust for a period of time.”*

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The law further protects a trustee from liability for disclosure of information by allowing the trustee to obtain documentation restricting disclosure prior to the delivery of the information. For example, assume the settlor has one child who is a spend-thrift and the grantor desires this child to have little or no knowledge of the value of the assets held in the trust. In this situation, the trustee can obtain an undertaking from the other trust beneficiaries not to divulge the financial information to the spendthrift. Also, a governing instrument or written directions may authorize the settlor, trust advisor or trust protector to appoint a virtual representative to receive the information on behalf of the beneficiary.

South Dakota also has eliminated the requirement of giving notice to minor children by providing that, unless otherwise required by the trust agreement, a beneficiary is not entitled to information about the trust until they attain the age of 21.

### **Flexible Modification Provisions**

Problems associated with an irrevocable trust typically arise from three situations:

- Poor drafting that failed to include necessary tax provisions or failed to clarify or depict what the grantor intended;
- Changes in the criteria upon which the trust originally was established. This is often the case in the area of tax law but also happens when other laws, such as the Prudent Investor Act or Uniform Principal and Income Act, are changed; or
- Unanticipated problems or changes in family dynamics that occur after the trust’s creation and which result in the trust agreement becoming outdated.

These problems can arise during the lifetime of the grantor or after the grantor passes away. To address these types of situations, the relevant South Dakota statute provides:

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*“An irrevocable trust may be modified or terminated by judicial action or by written agreement entered into by all beneficiaries, if continuance of the trust on its existing terms is not necessary to carry out a material purpose. Whether or not continuance of the trust on its existing terms is necessary to carry out a material purpose, an irrevocable trust may be modified or terminated by judicial action or by written agreement by the trustor and all beneficiaries. Upon termination of a trust under this section, the trustee shall distribute the trust property in accordance with the trustor’s probable intention or in any other manner as agreed by all the beneficiaries. No person is required to seek court affirmation of a nonjudicial settlement agreement made pursuant to this section. The provisions of chapter 55-18 apply to this section.*

*Thirty days prior to the effective date of a modification or termination of a trust under this section, the trustor or beneficiaries shall provide notice in writing of the modification or termination, including a copy of the modification or termination, to all fiduciaries as defined in subdivision 21-22-1(3) serving as of the date of the notice. The modification or termination shall be effective no earlier than thirty days after the notice is given, unless the notice is waived.” SDCL § 55-3-24.*

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These modifications can be effected without court involvement. The law further provides a mechanism to modify or terminate a trust when there is less than unanimous consent by the beneficiaries. In this instance a court can still grant the modification or terminate the trust if the rights or interests of the nonconsenting beneficiaries are not significantly impaired or adversely affected. SDCL § 55-3-25. Notice, service of process and consent are not required from unborn individuals. SDCL § 55-18-5.



Unlike a modification, a reformation is needed when there was a mistake of fact or law upon which the grantor drafted the trust. In this instance, upon a filing of a petition, the court can reform the trust in order to carry out the terms of the settlor's original intent or to achieve the settlor's original objectives. SDCL § 55-3-28.

### Change of Situs

A change in situs or the jurisdiction where the trust is administered may be desirable for a wide variety of reasons including:

- a move to a state which does not tax the income of the trust
- the desire to convert an income trust to a total return unitrust
- to extend the trust duration (subject to GST considerations)
- to eliminate the requirement of a court approved accounting

Because there is wide variation in trust laws and trust administration across states, it is increasingly important to be able to change the location of administration. This change of situs, as it is referred to, often involves a modification of the trust. Modifications may be sought when there is:

- a desire to change the governance structure;
- a need to change the distribution provisions;
- to allow for the bifurcation of trustee duties; or
- a need to make changes in a trust's administrative provisions.

If a trust does not include an express provision for changing the situs of a trust, South Dakota has an efficient and inexpensive process for changing the situs of an existing trust and naming a South Dakota trustee.

After the situs of the trust is changed, the trust can be further modified using South Dakota's trust administration statutes because South Dakota law provides that its laws will apply to the administration of a trust located in South Dakota state unless the trust instrument or a court order otherwise directs. SDCL § 55-3-48.

### Decanting

Decanting is different than a modification or a reformation as it involves the creation of a new trust and pouring the assets from the first trust into the second trust. South Dakota allows for a pouring of assets from the first trust into the second trust, but also allows for a modification by decant where the second trust is a modified first trust. Some states restrict the trustee's ability to decant to the terms of the trust agreement while other states only allow a trustee with sole discretionary distribution authority over principal to modify the terms of the trust.

Decanting statutes may also specify who may be an included beneficiary of the new trust. For example, some states require that the new trust have as its beneficiaries only persons who are proper objects of the exercise of the trustee's power. In addition, some states' decanting statutes do not provide the flexibility needed to permit the new trust to have as a current beneficiary a contingent beneficiary of the old trust, and do not permit changes to the contingent beneficiaries (e.g., to remove one of them).

South Dakota's decanting statute provides that where a trustee has discretionary distribution authority over principal or income, then the trustee can decant. The beneficiaries of the new trust must be either:

- proper objects of the current exercise of the distribution power under the old trust, or
- beneficiaries to, or for whom, a distribution of income or principal may have been made in the future under the old trust at the time or upon the happening of a specified event.

This second category provides that the new trust's beneficiaries, even primary beneficiaries, need not be proper objects of the current exercise of the discretionary power. They can instead be persons who are contingent beneficiaries of the old trust. Further, the statute permits the new trust to have beneficial interests that are

different from the old trust. Beneficiaries who only had a contingent interest under the first trust can now become current beneficiaries and share equally – or pursuant to a different allocation – with the persons who were current beneficiaries in the initial trust.

Before undertaking to decant a trust, a trustee is charged with the following considerations:

- whether the appointment is necessary or desirable after taking into account the purposes of the first trust;
- the terms and conditions of the new trust; and
- the consequences of the distribution.

South Dakota's statute uses the term 'purposes' without a modifier, such as 'material purposes' or 'primary purposes' which again allows greater flexibility and latitude in decanting. SDCL § 55-2-15.

### **Non-Charitable Purpose Trusts**

A basic precept of trust law is that a trust must have a defined beneficiary. Thus, a trust created without reference to a specific beneficiary and not having a charitable purpose was invalid because there was no one who could enforce the trust.

South Dakota, in responding to the increase in the use of trusts established for particular situations where there are no charitable purposes present, expanded the use of non-charitable purpose trusts. SDCL § 55-1-20 authorizes the creation of such trusts which can be of unlimited duration.

South Dakota law also allows hybrid purpose trusts, both with a purpose and beneficiaries in the same trust. SDCL § 55-1-22.

The purpose trust legislation is an alternative for wealthy clients who may want to use a trust structure rather than a foundation to carry out a designated goal, such as the ownership of a private trust company. The settlor has room for creativity and flexibility in drafting the trust agreement to carry out purposes that are broader than can be written in a charitable trust.

## **Taxes**

### **No State Taxation of Trusts**

An important aspect in deciding where a trust should be situated is the tax impact of its location. South Dakota was the first state to allow perpetual trusts without the imposition of a state income tax (1983). Since then, other states have followed suit. Today, seven states do not tax trust income in any form and are considered "pure no-income" tax states: Alaska, Florida, Nevada, South Dakota, Texas, Washington and Wyoming. Other states may only tax certain types of income.

For a wealth planning professional who wants to minimize the tax impact of a trust, there is an additional hurdle in resident trust states like Nebraska and Minnesota where income is taxed based upon the residency of the grantor at the creation of trust. Resident trust tax states tax on all worldwide income and tax non-resident trusts only on the income generated from real property, tangible personal property or business interests within the state ('source-income') in these states. Normally, in these states accumulated income and capital gains are not considered "source income". Other states, like California look to whether there is a current beneficiary or a fiduciary in California. California will not tax undistributed income; however, the beneficiary will be subject to the amount of tax that would have accrued during the time period (not to exceed five years) that the trust accumulated income for the beneficiary. There is an allocation of income derived from outside sources so the California resident only pays the tax based upon his/her pro rata portion. Other states, like Missouri will tax the entire trust even if only one beneficiary resides in that state.

In addition to the trust's exemption from state income taxes, the following state taxes also do not apply in South Dakota: intangibles tax, estate tax, inheritance tax, gift tax, personal property tax, corporations tax, generation-skipping tax.

### Low State Insurance Premium Taxes

Each state has the authority to levy an insurance premium tax upon insurers and companies offering annuities, both domestic and foreign, for the privilege of engaging in the business of providing insurance or annuities in the state.

The rate of tax for various types of insurance is set by each state and varies widely. South Dakota has one of the lowest insurance premium tax in the US. Generally, there are several types of insurance premium tax applied, according to the type of insurance company and the type of insurance written. The tax is assessed on premiums collected by insurance companies on policies written in the state during the preceding calendar year and is based on each \$100 in premiums paid. Thus, the additional cost for a company to offer a \$10 million dollar life insurance policy may be significant. Because the tax is paid by the insurance company and not the purchaser, it is often a hidden cost but is invariably passed on to the consumer.

For insurance coverage above \$100,000, South Dakota's insurance premium tax is 8 bps (0.08%) compared to national average of 200 bps.

### Trust Administration

Under the modern trust rules it is likely that the duties of a trustee will be carved out and specifically designated to different persons who may or may not have a fiduciary role with respect to the trust. This new way of thinking about the role of the trustee is discomfoting to some trust institutions that have traditionally held all of the duties or perhaps shared them with a co-trustee.

Many wealthy persons today want to retain a measure of control over the investment of assets. Additionally, many who create long term trusts still want a level of personal involvement over trust distributions. This desire to have be more actively involved in the typical duties of trust administration has led some state legislatures to address this expressed desire by passing directed trust or delegated trust statutes. These new laws permit an open architecture for trust administration and allows the grantor much more flexibility in choosing who will carry out the fiduciary duties of the trust.

Trident Trust Company (South Dakota) Inc is capable of serving as an all-inclusive traditional trustee if that is what the client desires. In many instances, however, we will accept the role as the administrative or directed trustee and allow other professionals to manage and direct the investments and have the dominant role in determining distributions. We work with the client's existing financial professionals to provide only those trustee services which are required. This flexible, service-oriented model suits our client's trust administration needs.

### Directed Trusts

South Dakota enacted its directed trust statute (SDCL § 55-1B) in 1997. As a result, a settlor can unbundle the duties of a trustee and direct that certain activities be carried out by an investment advisor or distribution advisor. Although many states have directed trust statutes and some attorneys draft provisions for directed trusts in states that do not have directed trust statutes, South Dakota is recognized as having very flexible statutes which will enable the settlor to design a trust structure that meets that specific client circumstance. For instance, SDCL § 55-1B-1.1 provides that:

any governing instrument providing for a trust advisor or trust protector may also provide such trust advisor or trust protector with some, none, or all of the rights, powers, privileges, benefits, immunities, or authorities available to a trustee under South Dakota law or under the governing instrument.

The above provision means that the trust can continue to evolve, if necessary to achieve the purposes and goals of the grantor.

A typical directed trust contains provisions for an administrative structure which separates the investment management, distribution and administrative functions. Each function can be written to be the sole responsibility of a single individual or entity or it might be created with a committee structure.

Very few owners of closely held businesses are willing to give up control over the direction and management of the family business and prefer to have that function handled by a family member or family business advisor.

Accordingly, even within the area of the investment authority, there may be a division of responsibility for the various asset categories such as might exist if the settlor puts closely held business assets as well as liquid funds in the trust.

The duties and responsibilities for a trustee when making or considering trust distributions are often the most troublesome aspect of trust administration. This is even more difficult when multiple generations are to benefit from the trust. The duty of impartiality and loyalty requires the trustee to consider all levels of beneficial interests and at times institutional trustees tend to be far more conservative in their approach as compared to family members. It has long been a critique of beneficiaries that the institutional trustee has no "heart".

Under SDCL § 55-5-8, a trustee does not have to diversify the assets of the trust if authorized in the trust instrument. Furthermore, if the trust instrument or a court order directs a trustee to retain assets forming part of the trust estate, then the trustee cannot be liable to a beneficiary to the extent the trustee acted in reliance on the provisions of the trust instrument or court order. This is ideal for an individual who wishes to transfer a family owned business or family farmland into a trust and keep such assets retained in the trust.

A directed trust may include a provision for a family trust committee to make decisions with regard to distributions. If there is a concern that a family person or committee may be too liberal in distributing trust assets, a requirement can be incorporated in the trust agreement to authorize an independent trustee or committee to make final decisions. This is often sought where if a family member is given full distribution powers, they might be confronted by undesirable tax consequences. The combination of a corporate trustee and a competent person or group of advisors often produces the best result for client families because it combines the strength of the corporate trust department and the personal touch that humans demand and expect.

### Delegated Trusts

A delegated trust is different than a directed trust. Under a delegated trust, the trustee has the power to delegate certain functions but retains an advisory or over-sight position. Clients will choose to have professional oversight of delegated fiduciary duties because they do not have the management experience or expertise that may be required to ensure compliance. This may be true in situations where the grantor did not participate in the creation of the wealth and has little or no wealth management experience or has no desire to put forth the time and effort to do so. South Dakota law provides that if delegation of fiduciary authority is authorized in writing by the settlor, a trust protector, a majority of the current income or principal beneficiaries, or the court, that the trustee is not liable for the acts of the delegatee except in the case of willful misconduct or gross negligence.

### Protectors

A trust protector is a disinterested third party that is given special powers under the terms of the trust. The purpose of using a trust protector is to add flexibility to the trust and to provide protection against trustee abuse. The use of the trust protector is especially attractive when the trust is expected to be of long duration or where a grantor cannot hold these powers without an adverse income, estate tax or asset protection consequence.<sup>2</sup>

In practice, grantors may often be more comfortable creating an irrevocable trust during their lifetime if they know that modifications or amendments can be made to the trust instrument if circumstances change while still ensuring that the original intentions of the grantor will be carried out.

The role of the trust protector is well established in the statutes of offshore jurisdictions offering trusts, but until recently has not been as prevalent in trust practice in the United States where only a handful of states statutorily recognize the role of the trust protector.

The role of the trust protector is described in the trust agreement. Since the power of the protector is derived from the trust agreement, it is important to give specific direction regarding this role. Although states that have adopted the UTC may have provisions in their trust law that allow for the appointment of an individual who performs the role of trust protector, the duties are often not specifically enumerated. Furthermore, under the laws of these states, a trust protector is not automatically granted every power enumerated in the statute unless it is incorporated in the trust document.

<sup>2</sup>Although technically anyone who is an adult can be a Trust Protector, the preferred choice is to have someone who is not a beneficiary of the trust, a family member, or anyone defined as a person "interested" in the trust according to IRS rules. Typically the Trust Protector is someone who is familiar with the grantor, the particular assets of the trust, or has an existing relationship with the grantor such as an attorney or accountant.

One of the powers most often included is the power to remove and replace others who have a fiduciary role with regard to the trust. A grantor may not be comfortable and may prefer to have the trust protector make changes in fiduciary nominations where the trustee is a bank, trust company, or a family member. The trust protector can be entrusted with a removal power that authorizes it to make changes in investment management or to change a fiduciary that is unresponsive or not performing in accordance with the Trust Agreement.

Another power commonly granted to a trust protector is one that gives the trust maximum flexibility. The power to change the situs of the trust or to change governing law is sometimes vital to the best interests of the trusts and the beneficiaries. For example, the trust protector can direct the situs of the trust to be changed to a state that has low or zero taxes. This may be the case where the initial trust is in New York or California and there is a desire to change to a state like South Dakota.

A particularly attractive power a grantor can elect to give the trust protector is the ability to terminate the trust. A trust termination may be desirable for a variety of reasons such as an increased cost of administration that reduces the benefit to the trust; or perhaps, the value of the assets in the trust have declined and it is no longer reasonable or economical to continue the trust.

South Dakota's trust protector statute, SDCL § 55-1B-6, provides that the following powers and discretions can be granted to a trust protector:

- Modify or amend the trust instrument to achieve favorable tax status or respond to changes in the Internal Revenue Code, state law, or the rulings and regulations thereunder;
- Increase or decrease the interests of any beneficiaries to the trust;
- Modify the terms of any power of appointment granted by the trust. However, a modification or amendment may not grant a beneficial interest to any individual or class of individuals not specifically provided for under the trust instrument;
- Remove and appoint a trustee, a fiduciary provided for in the governing trust instrument, trust advisor, investment committee member, or distribution committee member;
- Terminate the trust;
- Veto or direct trust distributions;
- Change situs or governing law of the trust, or both;
- Appoint a successor trust protector;
- Interpret terms of the trust instrument at the request of the trustee;
- Advise the trustee on matters concerning a beneficiary;
- Amend or modify the trust instrument to take advantage of laws governing restraints on alienation, distribution of trust property, or the administration of the trust;
- Reserved;
- Add to the trust an individual beneficiary or beneficiaries from a class of individuals identified in the governing instrument;
- Add to the trust a charitable beneficiary or beneficiaries from a class of charities identified in the trust instrument;
- Provide other powers and discretions in the governing instrument;
- Remove a representative as provided in subdivision SDCL § 55-18-4(3);
- Appoint a representative as provided in subdivision SDCL § 55-18-9(12); and
- Act as a representative as provided in subdivision SDCL § 55-18-9(11).

In addition to the powers and discretions granted to the trust protector in the governing instrument, the trust protector may also exercise any of the powers and discretions granted to a trust protector under SDCL § 55-2-13 to the extent such exercise is not prohibited under the terms of the governing instrument.

Like the powers and limits placed on the scope of the power, the trust instrument can reflect the standard of care and the limits of a trust protector's liability. If the trust is silent on the topic, many states infer that the trust protector is a fiduciary. This may mean that the trust protector is reluctant to accept the position because he may be held liable for actions or non-actions. South Dakota law provides that by default, a trust protector is a non-fiduciary, except to the extent that the person exercises the authority of an investment trust advisor or distribution trust advisor. SDCL § 55-1B-1(2).

### **Trusts for International Families**

In increasing numbers foreign families and their professional advisors are including US trusts in their international tax, asset protection and estate planning.

Changes in compliance and regulatory regimes in traditional offshore trust domiciles and the adoption of modern trust law innovations by various US states are among the reasons for the current focus on the US as a trust domicile. The existence of tax and administrative benefits that are available through the use of a US trust have also contributed to this trend.

Situations where a US trust might be advantageous for a foreign family include:

- An aging settlor of an existing foreign grantor trust with US beneficiaries
- Property owned by a foreign trust that is used by US beneficiaries
- A desire by US beneficiaries to avoid expanded US foreign trust reporting rules
- Establishment of a new onshore trust by a foreign grantor without exposure to US income or capital gains taxes

Through our offices in Sioux Falls we offer a range of fiduciary and administrative services for international families supported by the resources and experience of the Trident Trust Group. Our services include:

- Acting as trustee of trusts established by a foreign grantor under South Dakota law
- Accepting appointment as successor trustee of foreign trusts redomiciled into South Dakota
- Acting as trustee of stand-by trusts which are either beneficiaries of foreign trusts or objects of powers of appointment
- Acting as trustees of South Dakota irrevocable trusts established by foreign settlors
- Acting as trustees of trusts established under foreign trust laws where the choice of law permits the appointment of a foreign trustee as sole or co-trustee.

At a time of unpredictable political and economic changes in many regions of the world, many families with cross-border ties would like to base their multi-generation planning in jurisdictions that offer the security of a stable political and legal environment, adherence to the rule of law, low or minimal taxes and access to an advanced and transparent financial system. For many international families, South Dakota as a trust domicile and the US as a country - which together offer these benefits - may satisfy their long term planning requirements.

### **Trusts Task Force**

South Dakota's trust law Task Force was established in 1997. The primary goals of the Task Force are to provide the most efficient and effective environment for the administration of trusts and to provide a timely response to ongoing innovation and evolution in fiduciary services. Since then, at the recommendation of the task force, the legislature has enacted numerous statutes which have had a significant impact on how South Dakota trusts are administered. Some of the provisions recommended by the task force and later enacted include:

- Provisions permitting modification or termination of irrevocable trusts in certain circumstances with the consent of all the beneficiaries, or in some cases with the consent of the grantor and all the beneficiaries. (SDCL 55-3-24 and 25.)
- Provisions giving a court jurisdiction to modify the administrative or dispositive terms of an irrevocable trust if necessary to further the grantor's purposes. (SDCL 55-3-26.)

- Provisions permitting the trustee to terminate an uneconomical trust. (SDCL 55-3-27.)
- Provisions permitting a court to reform the terms of an irrevocable trust to conform to the grantor's intention if the failure to conform was due to a mistake of fact or law and the grantor's intent can be established. (SDCL 55-3-28.)
- Provisions permitting a trustee to combine two or more trusts into a single trust or divide a trust into two or more separate trusts. (SDCL 55-3-29.)
- A modern virtual representation statute. (SDCL § 55-18.)
- Provisions specifying the actions that should be taken to create situs of a trust in South Dakota. (SDCL 55-3-39 through 44.)
- Provisions specifying that if South Dakota law applies, the following items are to be determined under South Dakota law:
  - capacity of a trustee;
  - powers, obligations, liabilities and rights of the trustees and the appointment and removal of trustees;
  - the existence and extent of powers conferred or retained, including a trustee's discretionary powers and the validity of the exercise of a power. (SDCL 55-3-40.)
- Provisions requiring beneficiaries to object within 180 days after an accounting is rendered by a trustee. In the absence of an objection in such time, if the beneficiary was notified of this statute, the beneficiary shall be deemed to have approved. (SDCL 55-3-45.)
- Provisions establishing privacy for those who have established a trust subject to jurisdiction of a South Dakota court. (SDCL 21-22-28.)
- Provisions permitting a transferor to establish an irrevocable trust that provides protections from creditors. SDCL 55-16. Under SDCL 55-16-10 a creditor who had a cause of action or claim for relief against the transferor must initiate a claim within the later of two years after the assets were transferred to the trust or six months after the creditor reasonably could have discovered the transfer of assets to the trust. For creditors whose claim arises after the creation of the trust, a claim must be initiated within two years after the transfer is made. Only creditors who can prove, by clear and convincing evidence, that the transfer was made with the intent to defraud that specific creditor are given additional time to bring the claim. SDCL 55-16-9. The bar against creditor claims does not apply to certain creditors known as exception creditors. Under South Dakota law, a person to whom the transferor is indebted at the time of the transfer on account of an agreement or order of court for the payment of support or alimony in favor of the spouse, former spouse or children, or for a distribution of property in favor of the spouse or former spouse is not covered by the statute. After July 1, 2014, a spouse is barred if the transferor makes a transfer of separate property, or at the time marital property is transferred, the spouse is given written notice of the intent to transfer property to the trust and fails to object within the stated time period. (SDCL 55-16-16.)
- Provisions automatically making South Dakota's statutory trust powers applicable to trusts governed by South Dakota law, no matter when created, unless the instrument specifically excludes any or all of the powers provided by statute. (SDCL 55-1A-1.)
- Provisions permitting a trustee to change the name of an irrevocable trust if the change is in the best interests of the trust and its beneficiaries. (SDCL 55-1A-40.)
- Provisions permitting a trustee, in delegating fiduciary authority, to seek the prior approval for the delegation from all known beneficiaries or from a court. If approval is given, the trustee shall not be liable for the acts of the person to whom the authority is delegated except in the cases of gross misconduct or gross negligence by the delegating trustee. (SDCL 55-5-16.)
- Provisions clarifying that an accounting by a trustee of a court supervised trust and approval by a court is conclusive against all persons in any way interested in the trust and discharges the trustee from liability for matters set forth in the accounting. Previously, the law had been clear that such an accounting of a non-court supervised trust operated to release the trustee. (SDCL 21-22-30.)



- Provisions limiting the trustee's authority to act in making distributions to himself to an ascertainable standard (health, education, maintenance and support) and prohibiting the trustee from making distributions to others in discharge of his or her own legal obligations. (SDCL 55-4-38.)
- Provisions which permit a trustee to furnish a certificate of trust containing less than all of the provisions of the trust and a form for the certificate which may be submitted by the trustee in lieu of furnishing a copy of the trust instrument. (SDCL 55-4-51 through 55.)
- Provisions regarding notice have been revised numerous times. SDCL 55-2-13 requires the trustee of an irrevocable trust to notify "qualified beneficiaries" (who must be 21 years of age or older) of the existence of the trust and the right of the beneficiary to request a copy of the trust instrument. In addition, the trustee is required to promptly respond to a qualified beneficiary's reasonable request for information related to the administration of the trust. The notification must be made no later than 60 days after the date the trustee of an irrevocable trust acquires knowledge of the creation of an irrevocable trust. However, this law is only applicable to trusts created after July 1, 2002 and there is a provision which permits the settlor, trust advisor or trust protector to waive this requirement in the terms of the trust or by a written directive. The beneficiary can also waive the right to notice or information.
- Provisions permitting a trustee to disclaim when it is in the best interest of the trust estate. (SDCL 29A-2-801.)
- Special Spousal Trusts allow spouses to elect assets held in this type of trust as community property under IRC Section 1014(b)(6). (SDCL 55-17.)
- Revised Uniform Fiduciary Digital Assets Act is in effect in South Dakota. (SDCL 55-19.)

## **Appendix A - Links to South Dakota Trust Statutes and the Division of Banking**

- [sdlegislature.gov/Statutes/Codified\\_Laws](http://sdlegislature.gov/Statutes/Codified_Laws)
- [dlr.sd.gov/banking/trusts/default.aspx](http://dlr.sd.gov/banking/trusts/default.aspx)



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