
# THE POWER OF MODERN US TRUST LAW AND THE IMPORTANCE OF PROPER TRUST JURISDICTION SELECTION

**David A. Warren, JD**
Co-Founder,
Chairman of the Board
Bridgeford Trust Company

It has been said that the decision as to where to place a trust is as important as the decision to create one. As we come through the economic uncertainty created by the pandemic and brace for tax changes – both at the federal and state levels – choosing the proper trust jurisdiction with the most progressive and flexible trust laws is more important now than ever.



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It can be argued that "modern trust law" was born in 1983 when South Dakota – the first state in the US to do so – abolished the rule against perpetuity, creating the dynasty trust, a powerful trust planning tool allowing assets to remain in trust over multiple generations, conceivably avoiding federal estate tax forever. South Dakota's move to "modernise" US trust law prompted a race among certain states to ascend as a "top tier" trust jurisdiction, resulting in a proliferation of progressive modern trust laws around asset protection, privacy, sophisticated tax planning strategies, and planning tools to deliver far more direction and control to families with regard to important aspects of trust administration over generations through the directed trust and trust protector concepts.

## The Directed Trust

Academics and advisers agree that, in many ways, the directed trust revolutionised the US trust industry by unbundling fiduciary functions, particularly asset management and trust administration, allowing settlors of trusts, their families, and advisers far more control over investment and distribution decisions, while removing clear conflicts of interest that exist in the traditional model.

Only a handful of states have directed trust statutes that essentially bifurcate fiduciary roles, allowing settlors of trusts, family members, and trusted advisers to serve as the Investment Committee, directing investment decisions including asset manager selection. The structure also allows the settlor to select a Distribution Committee which can be comprised of disinterested family members and trust advisers. These two committees essentially direct the trustee as to both investment and distribution decisions, allowing families to exercise a great deal of control and direction over important aspects of trust administration.

## The Trust Protector

The trust protector – often used in conjunction with the directed trust and referred to as a super trustee – delivers great control to settlors of trusts, beneficiaries, and their advisers. The inclusion of a trust protector allows the settlor, beneficiaries, and their advisers to modify and control many important aspects of the trust and provide direction to the trustee with respect to investment management, jurisdiction, and trust distributions. The trust protector concept enhances the control aspects of the directed trust because it provides for direction or restraint of powers of the trustee.

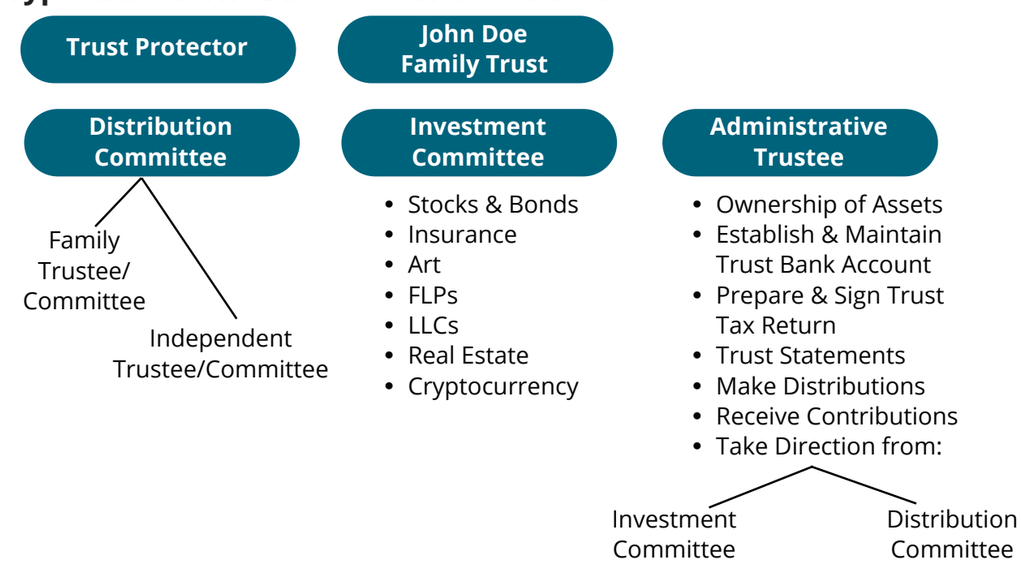
Some of the reasons why a settlor may wish to appoint a trust protector include:

- The inclusion of a trust protector provides a great degree of flexibility when dealing with changes in circumstances, including both factual circumstances (death, premature divorce, previously unknown children) and legal changes (any legal changes, but most frequently changes to applicable revenue laws);
- Settlor may be concerned that the trustee may not pay sufficient attention to his wishes;
- Settlor wishes certain powers to be withheld from the trustees; or
- Settlor wishes a third party to act as a main point of contact between the beneficiaries and the trustees.

## Domestic Asset Protection

Domestic asset protection trusts – available only in a small number of

### Typical Modern "Directed" Trust Structure



states – are a formidable planning strategy that legally shields assets from third-party liability (including spouses in a divorce proceeding) and lawsuits while permitting settlors to retain some control over the trust assets and enjoy a discretionary benefit during their lifetime.

A domestic asset protection trust is fully discretionary, meaning settlors can receive financial benefit from the trust (income and discretionary principal distributions) and protect trust assets from creditor claims and lawsuits while maintaining control over the investment management function through the directed trust structure. With its two-year "look back" fraudulent conveyance statute, South Dakota's domestic asset protection statute is considered among the best in the nation.

### Privacy (Not Secrecy)

Privacy has always been of paramount concern to wealthy families and is one of the primary reasons billions of dollars have been and are being moved into the US – and to South Dakota in particular – for trust administration from around the globe. South Dakota is considered to have the best trust privacy and quiet trust statutes in the US, as noted in a recent article appearing in Trusts & Estates Magazine, the January 2020 edition, wherein the authors, Daniel G. Worthington, Mark Merric, John E. Sullivan, and Ryan Thomas note: "Of the top tier trust jurisdictions, South Dakota has the best trust privacy laws."

### Privacy and South Dakota's Total Seal

South Dakota's privacy statute provides for a total seal forbidding the release of trust information including names of settlors, beneficiaries, and the contents of a trust to the public during litigation.

### Quiet Trusts

South Dakota is universally considered by advisers and academics to have the most comprehensive and flexible quiet trust statute in the US, granting the settlor, trust protector, and the investment/distribution adviser the power to expand, restrict, eliminate, or modify the rights of the beneficiaries to discover information about a trust.

### Fiscal Soundness

When selecting the proper trust jurisdiction, an often overlooked, but extremely important factor coming through the pandemic is a state's fiscal soundness and economic stability. Currently, top tier trust jurisdictions like South Dakota have no state income tax



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which is one of the factors that renders the state so attractive to planners. However, there is no guarantee this will always be the case which is why evaluating the fiscal strength of a state when selecting a trust jurisdiction is essential. An objective evaluation, considering multiple factors, reveals that South Dakota is unequivocally the most fiscally sound of all the top tier trust jurisdictions.

### Top Tier Trust Jurisdictions Compared

With regard to top tier trust jurisdiction comparisons, it is imperative that families and their advisers carefully consider analytic nuances of each state's trust laws. "The devil is in the details" and this objective and well-researched chart comparing top tier US trust jurisdictions provides a clear comparison of modern trust law concepts.

As we continue to move through and out of the pandemic crisis and prepare for changes in the tax landscape, selecting proper trust jurisdiction has never been more important with respect to compelling tax planning opportunities, asset protection, privacy, fiscal soundness, and powerful modern trust laws, all delivering more direction and control to settlors of trusts, beneficiaries, and their advisers than ever before.

Bridgeford Trust Company is an independent trust company providing trust and fiduciary services to domestic and international families across the country and around the world.

*To learn more, visit their website at* **www.bridgefordtrust.com** *or contact their team at* **info@bridgefordtrust.com.**

**David A. Warren, JD:**
P: (605) 224-9189
E: dwarren@bridgefordtrust.com
W: www.bridgefordtrust.com

## **Choosing the Correct Jurisdiction:** An Objective Comparison

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* Denotes superior distinction among jurisdictions.

[1] Attorney Steve Oshins' "9th Annual Dynasty Trust State Rankings Chart"
[2] Worthington, Daniel G.; Merric, Mark; Sullivan, John E.; and Thomas, Ryan "Which Situs is Best in 2020?" Trusts & Estates January 2020
[3] South Dakota Special Spousal Trusts, House Bill 1039 (2016) (Sections 29-42)
[4] Attorney Steve Oshins' "11th Annual Domestic Asset Protection Trust State Rankings Chart"
[5] Attorney Steve Oshins' "8th Annual Trust Decanting State Rankings Chart"
[6] Murphy, Mary; Iyengar, Akshay; and Zhang, Alexandria"Tax Revenue Volatility Varies Across States, Revenue Streams" PEW August 2018

| | South Dakota | Nevada | Wyoming | Alaska | Delaware |
|---|---|---|---|---|---|
| Dynasty Trusts | Yes<br>Ranked as #1 [1] | Yes<br>Ranked as #2 [1]<br>State constitution prohibits modification to RAP [2] | Yes<br>Ranked as #5 [1]<br>State constitution prohibits modification to RAP [2] | Yes<br>Ranked as #4 [1] | Yes<br>Ranked as #7 [1] |
| State Income Taxation | No | No | No | No<br>Future uncertain | No<br>Only for non-residents |
| Community Property Trusts | Yes [3] | No | No | Yes<br>Future uncertain | No |
| Domestic Asset Protection Statute | Yes [4]<br>2 year statute of limitations<br>Exception for child support | Yes [4]<br>2 year statute of limitations<br>No exceptions for child and spousal support | Yes [4]<br>4 year statute of limitations<br>Exception for child support | Yes [4]<br>4 year statute of limitations<br>Exception for divorcing spouse | Yes [4]<br>4 year statute of limitations<br>Exceptions for child and spousal support |
| Trust Protector | Yes | Yes | Yes | Yes | Yes |
| Directed Trusts | Yes | Yes | Yes | Yes | Yes |
| Decanting Statute | Yes<br>Ranked as #1 [5] | Yes<br>Ranked as #2 [5] | Yes<br>Ranked as #14 [5] | Yes<br>Ranked as #9 [5] | Yes<br>Ranked as #3 [5] |
| Trust Privacy Provision | Yes - Total Privacy Seal Forever<br>Automatically attaches | No Total Privacy Seal [2]<br>Subject to judge discretion | No Total Privacy Seal [2]<br>Subject to judge discretion | No Total Privacy Seal [2]<br>Subject to judge discretion | Yes - Three Year Privacy Seal [2]<br>Subject to judge discretion |
| Special Purpose Entity | Yes [2]<br>Codified by statute | No | No | No | No |
| Family Adviser | Yes | No | No | No | No |
| State Fiscal Health | Ranked as #1 [6] | Ranked as #29 [6] | Ranked as #48 [6] | Ranked as #50 [6] | Ranked as #38 [6] |