



The Vital Importance of Situs Selection Amid Global Uncertainty

Presented by: David A. Warren, JD – Co-Founder and Chairman

Welcome



David A. Warren, JD

- ▶ Co-Founder & Chairman of Bridgeford Trust Company.
- ▶ Attorney with over 20 years of experience practicing law and working in the financial services industry.
- ▶ Trust and wealth management for high- and ultra-high-net-worth families.
- ▶ Expertise in privacy, asset protection, and tax-efficient trust planning as well as South Dakota's modern trust laws.

Unsettled Times

Global Push for Transparency

- ▶ Regulatory Changes: Increased international efforts for transparency, including the Common Reporting Standard (CRS), FATCA, Corporate Transparency Act (CTA), and beneficial ownership registers.
- ▶ Impact on Trusts: Trusts must adapt to new reporting requirements and disclosure norms to remain compliant.

Tense U.S. Presidential Election and Political/Social Unrest

- ▶ Political Volatility: The U.S. political landscape can influence global markets and regulatory environments, affecting trust strategies.
- ▶ Social Unrest: Heightened social tensions can lead to changes in trust laws and increased scrutiny on wealth protection mechanisms.
- ▶ Uncertainty surrounding policy changes and potential shifts in taxation and regulation affecting wealthy families.

Unsettled Times (cont'd)

Geopolitical Tension and Taxation Uncertainty

- ▶ Global Instability: Fluctuating geopolitical landscapes and uncertain tax environments prompting the need for stable wealth management structures.
- ▶ Tax Reforms: Unpredictable tax policies and reforms in various jurisdictions create uncertainty for tax planning within trusts.

Safety Concerns for Wealthy Families

- ▶ Personal Security: Wealthy families face increased risks of kidnapping, extortion, and other security threats.
- ▶ Asset Protection: Trusts provide a legal structure to protect assets from such risks and ensure long-term security for beneficiaries.

Unsettled Times (cont'd)

Data Leaks

- ▶ Privacy Breaches: High-profile data leaks, such as the Panama Papers and Pandora Papers, highlight the vulnerability of financial information and emphasize the importance of secure and private wealth management solutions.
- ▶ Protective Measures: Implementing stringent data protection and cybersecurity measures is critical for trust administration.

Planning/Advisor Industry Under Attack by Media

- ▶ Media Scrutiny: Increased media focus on the wealth management industry can lead to reputational risks and heightened regulatory scrutiny.
- ▶ Transparency and Ethics: Emphasizing ethical practices and transparent operations to maintain trust and credibility.

Well-Settled Trusts

Huge Need for Well-Settled Trusts, Now More Than Ever

- ▶ Stability and Security: Given the current global challenges, there is an urgent need for well-established trusts to safeguard assets, ensure privacy, and facilitate effective wealth transfer.
- ▶ Long-Term Planning: Trusts offer a reliable structure for intergenerational wealth transfer and asset protection.



*“Don’t worry, it is all going to be alright...
uncertainty can be a guiding light.”*

- Bono

Individual v. Corporate Trustee

- ▶ Importance of Trust Situs Selection
- ▶ Trustee Duty to Use Top-Tier Trust Jurisdictions
- ▶ Professionalism and Expertise
- ▶ Knowledge of the Law
- ▶ Objectivity and Impartiality
- ▶ Continuity and Stability



Trust Situs Selection

- ▶ Trust laws vary significantly from state to state.
- ▶ A few states are “in a race” to establish the most progressive trust laws in an attempt to capture trust business.
- ▶ Tier 1 Trust Jurisdictions*
 - ▶ South Dakota
 - ▶ Delaware
 - ▶ Nevada
 - ▶ Alaska
 - ▶ Wyoming?





“Legal experts contend that there have been more changes in trust law in the last twenty years than have taken place in the prior two centuries. These changes promise to affect every aspect of how trusts are administered for years to come.”

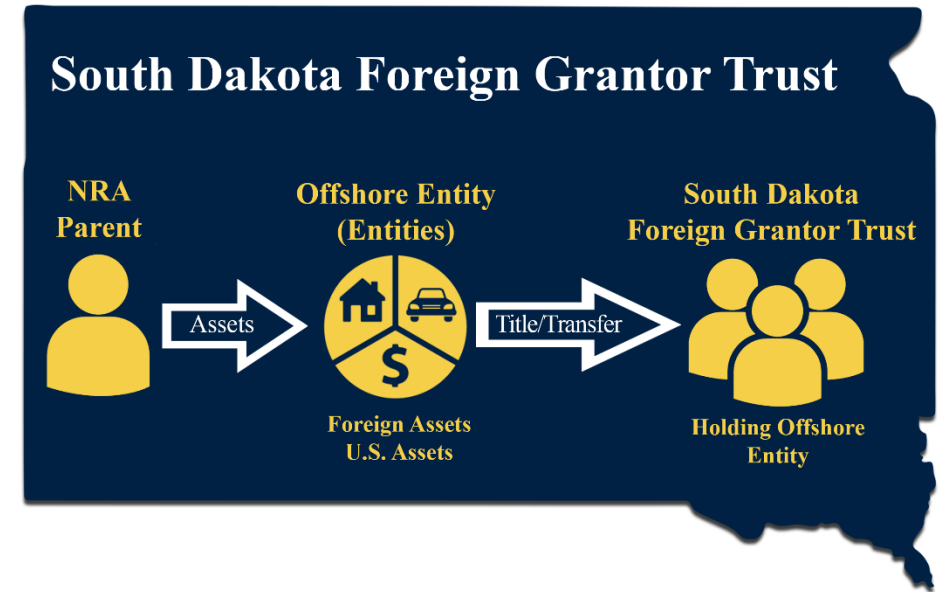
- Joseph F. McDonald, Esq III, Trusts & Estates Magazine

Foreign Grantor Trusts

- ▶ Through appropriate planning and drafting, a South Dakota Foreign Grantor Trust may be established as a “foreign” trust for U.S. tax purposes.
- ▶ It’s treated the same as an offshore trust, while availing itself of powerful U.S. trust laws.
- ▶ Failure of the “Court Test” or “Control Test,” as outlined by the IRS, will result in the trust being treated as a non-U.S. entity and, therefore, not subjecting it to U.S. taxation.

Foreign Grantor Trusts (cont'd)

- ▶ Why a Foreign Trust?
 - ▶ Repatriation to the U.S.
 - ▶ Reporting protocols
 - ▶ Taxation
 - ▶ Foreign born person living in U.S.
 - ▶ Foreign person with U.S. assets
 - ▶ Privacy/political corruption concerns



Modern Trust Laws

- ▶ Domestic Asset Protection Trusts
- ▶ Privacy Trust Laws
- ▶ Directed Trusts
- ▶ Trust Protector
- ▶ Decanting



Domestic Asset Protection Trusts

- ▶ A **self-settled** trust that protects assets from creditors (including future spouse).
- ▶ Strategy that legally shields assets from third party liability (future spouse) while permitting settlors to receive **income**, retain some **control** over trust assets, AND enjoy a **discretionary beneficiary interest** during their lifetime.
- ▶ Most states **DO NOT** have an Asset Protection Trust Statute.

Domestic Asset Protection Trusts (cont'd)

- ▶ Very compelling planning tool for high-risk individuals and pre-marital planning.
- ▶ Not all domestic asset protection statutes are created equally.
- ▶ Fraudulent Conveyance (look-back):
 - ▶ South Dakota – 2 years
 - ▶ Delaware – 4 years
 - ▶ Wyoming – 4 years



Domestic Asset Protection Trusts (cont'd)

- ▶ In Re Cleopatra Cameron:
 - ▶ South Dakota Supreme Court rejected even the specter of an argument that would allow support creditors to reach trust funds protected by a spendthrift provision.
 - ▶ South Dakota declined the enforcement of a California claim in South Dakota, where the legislature has rejected such enforcement.
 - ▶ A South Dakota court is not required to submit to a California judgment to compel payments from a South Dakota trust.

Domestic Asset Protection v. Prenups

- ▶ Prior to marriage, a spouse can establish a Domestic Asset Protection Trust that is fully discretionary, receive financial benefit from the trust, and protect trust assets from a spousal claim in a subsequent divorce proceeding.
- ▶ No disclosure or timing requirements. The trust can be established any time prior to marriage and never has to be revealed to the intended spouse.
- ▶ Greatly reduces the chances of a successful attack resulting in the equitable distribution of property brought to the marriage.

Domestic and Offshore: Best of Both Worlds?

- ▶ South Dakota Statute 55-3-47 provides a mechanism that provides both domestic and offshore asset protection within one trust instrument, with the only power granted to the trust company is to resign and appoint a successor trust company in accordance with the terms of the trust instrument and convey the trust property to the successor trustee.
- ▶ An offshore successor trust company can be properly named in the document, thereby creating a very formidable asset protection strategy utilizing both domestic and offshore asset protection in one trust instrument.
- ▶ By operation of law and under appropriate trust provisions, the trust assets can be transferred offshore only when needed and until then, the trust is administered in South Dakota and assets are held in the U.S. allowing the settlor to enjoy the “best of both worlds.”

“For reference, in planning, “secrecy” has historically meant that no one — not even the government — sees your affairs. “Privacy” has historically meant that the public can’t see your affairs but the government can. The days of secrecy are dead. So, we talk about privacy.”

- The Worlds Best Tax Haven: The United States, Forbes

Privacy Trust Laws

- ▶ Very important issue for high-net-worth families and closely held business owners.
 - ▶ Quiet Trust – no disclosure requirement.
 - ▶ Court Seal – Keeps trust information out of the public domain.
- ▶ South Dakota – Total Seal Forever/Not Discretionary/Quiet Trust
 - ▶ Delaware – Seal for 3 years/discretionary.
 - ▶ Most states – Open to the public.



Privacy vs. Secrecy: The Importance of KYC

- ▶ Strong and thorough KYC (Know Your Customer) is essential.
 - ▶ World checks.
 - ▶ Source of funds.
 - ▶ Verification of good character/tax compliance in home state.
- ▶ Not everyone coming to the U.S. is nefarious.
- ▶ Need for Uniformity of Regulations among trust companies and states.



“The emergence of upstart nondepository public directed trust companies is a disruptive force to be reckoned with.”

- Joseph F. McDonald, Esq III, Trusts & Estates Magazine

Directed Trusts

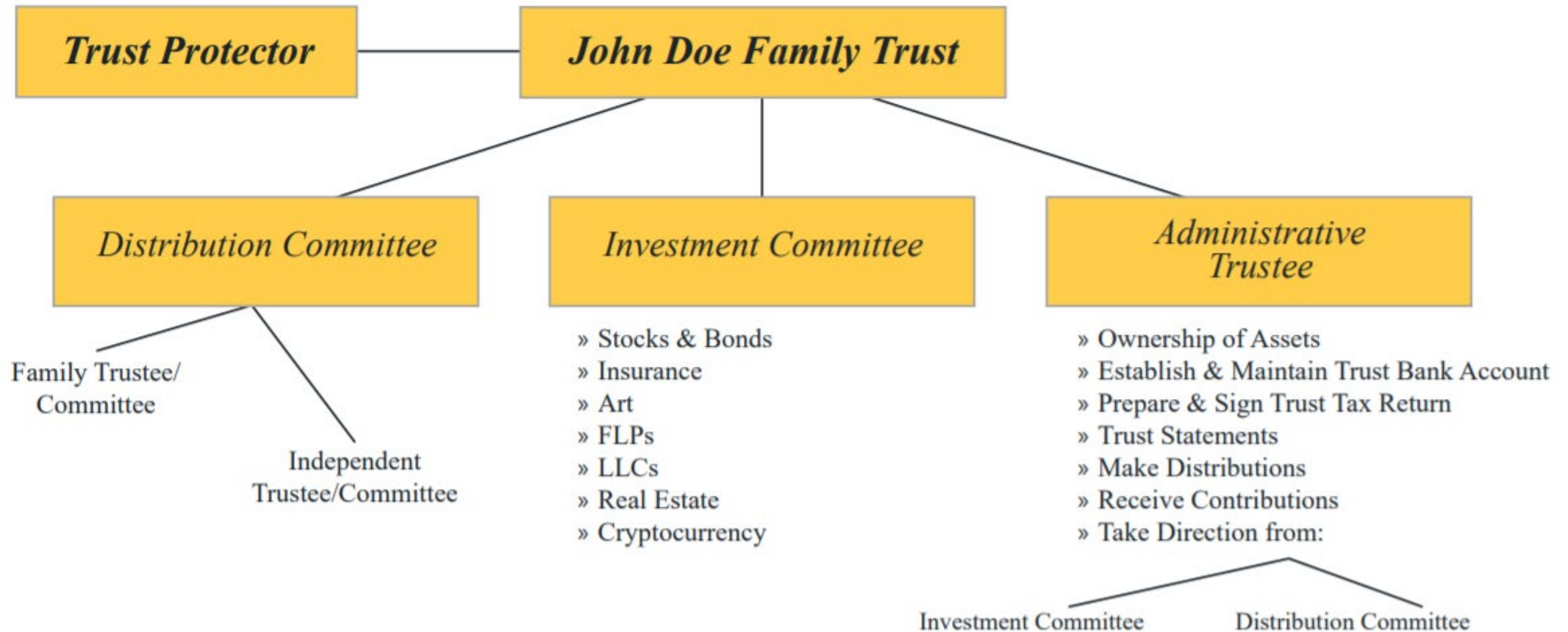
- ▶ Through **bifurcating liability**, the Directed Trust model creates a legal framework allowing trustees and beneficiaries to work with asset managers and independent trust companies of their choosing.
- ▶ Directed Trusts provide a family with maximum **flexibility and control** regarding the trust's asset allocation, diversification, investment management, and distributions.



Directed Trusts (cont'd)

- ▶ A Directed Trust can be used by a settlor who wants to fund an irrevocable trust with a closely held company or a specialized asset, but who also wants to **place control** of such assets in the hands of a particular individual (or group of individuals) familiar with the company's operations or that type of specialized asset.
- ▶ The Directed Trust concept **unbundles** functions (asset management and trust services) that have traditionally been bundled by large bank-based corporate trustees.

Typical Modern “Directed” Trust Structure



The Trust Protector – A Super Trustee

- ▶ The Trust Protector, often used in conjunction with a **Directed Trust**, delivers far more **control** to settlors of trusts, beneficiaries, and their advisors than ever before.
- ▶ The inclusion of a Trust Protector allows the settlor, beneficiaries, and their advisors 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 (cont'd)

Reasons why a settlor may wish to appoint a Trust Protector include:

- ▶ The settlor wishes for a mechanism to easily replace the trustee or change trust situs.
- ▶ Protectors allow for 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).

The Trust Protector (cont'd)

Reasons why a settlor may wish to appoint a Trust Protector include (continued):

- ▶ The settlor may be concerned that the trustee may not pay sufficient attention to his wishes.
- ▶ The settlor wishes certain powers to be withheld from the trustees.
- ▶ The settlor wishes a third party to act as a main point of contact between the beneficiaries and the trustees.

What is Decanting?

- ▶ Decanting is the **distribution of assets** from an **irrevocable trust** into a new trust with different, and presumably more desirable and flexible provisions, leaving the unwanted provisions in the original trust and not binding on the trust assets.
- ▶ Decanting has emerged as a **powerful planning tool for planners** relative to adapting family wealth plans to changes in the wealth planning landscape and family dynamics, **without the need for Court intervention.**



When to Use Decanting

- ▶ Transfer trust situs to a more favorable trust jurisdiction state.
- ▶ Correct drafting errors.
- ▶ Enable trusts to be subdivided among beneficiaries.
- ▶ Switch trust from grantor trust status for tax purposes to non-grantor status.
- ▶ Include asset protection provisions.
- ▶ Change administrative terms of the trust.
- ▶ Change trustees.
- ▶ Expand trustee powers.
- ▶ Create a Directed Trust (Investment & Distribution Committees).

Decanting not Available in Majority States

- ▶ New York was the first state to enact a decanting statute in 1992.
- ▶ Currently 22 states have decanting statutes:
 - ▶ South Dakota, Nevada, New Hampshire, Delaware, Tennessee, Arizona, Ohio, Alaska, Wyoming, Illinois, Virginia, South Carolina, Missouri, Kentucky, North Carolina, Texas, Rhode Island, Wisconsin, New York, Michigan, Florida, and Indiana.

Decanting Statutes are not Created Equally

- ▶ Only South Dakota allows trustees to decant from a trust with an ascertainable standard of distribution into a trust with absolute discretion to distribute and also remove a mandatory income interest.
- ▶ Only 7 states have statutes that **do not require notice** of decanting to beneficiaries.
- ▶ Selecting the proper decanting statute is essential.

Duty to Decant?

Ferri v. Powell-Ferri, SJC-12070 (Massachusetts Supreme Court)

- ▶ No notice given to beneficiary (spouse), who had right to withdraw 75%.
- ▶ Decant used to protect trust from soon-to-be divorce.
- ▶ Trustee had a **“duty to decant if the trustee deemed decanting to be in the beneficiary’s best interest.”**
- ▶ Does a trustee have a fiduciary duty to decant? Malpractice?

Fiduciary Duty

Is There a Fiduciary Duty to Create or Move Trusts to a Top-Tier Trust Jurisdiction?

- ▶ Uniform Probate Code § 7-305 (1969)
- ▶ “A trustee is under a continuing duty to administer the trust at a place appropriate to the purposes of the trust and to its sound, efficient management. If the principal place of administration becomes inappropriate for any reason, the Court may enter any order furthering efficient administration and the interests of beneficiaries, including, if appropriate, release of registration, removal of the trustee and appointment of a trustee in another state.”

Fiduciary Duty (cont'd)

Is There a Fiduciary Duty to Create or Move Trusts to a Top-Tier Trust Jurisdiction? (cont'd)

- ▶ Restatement (Third) of Trusts § 76(2)(c)
- ▶ “In administering the trust, the trustee's responsibilities include performance of the following functions: ... (c) managing the trust estate to provide returns or other benefits from trust property.”
- ▶ See also Scott on Trusts, §§ 613-615

Fiduciary Duty (cont'd)

Is There a Fiduciary Duty to Create or Move Trusts to a Top-Tier Trust Jurisdiction? (cont'd)

- ▶ Comments to Restatement (Third) of Trusts § 76(2)(c)
- ▶ “A trustee's duty to administer a trust includes an initial and continuing duty to administer it at a location that is reasonably suitable to the purposes of the trust, its sound and efficient administration, and the interests of its beneficiaries.”
- ▶ “Under some circumstances the trustee may have a duty to change or to permit (e.g., by resignation) a change in the place of administration. Changes in the place of administration by a trustee, or even the relocation of beneficiaries or other developments, may result in costs or geographic inconvenience serious enough to justify removal of the trustee.”



“The choice of a state in which to establish a trust is as critical as the decision to create one.”

- Elizabeth Mathieu, President of Neuberger & Berman

Choosing the Correct Jurisdiction

	South Dakota	Nevada	Wyoming	Alaska	Delaware
Dynasty Trusts	Yes <i>Ranked as #1 ^[1]</i>	Yes <i>Ranked as #2 ^[1]</i> <i>State constitution prohibits modification to RAP ^[2]</i>	Yes <i>Ranked as #5 ^[1]</i> <i>State constitution prohibits modification to RAP ^[2]</i>	Yes <i>Ranked as #4 ^[1]</i>	Yes <i>Ranked as #7 ^[1]</i>
State Income Taxation	No	No	No	No <i>Future uncertain</i>	No <i>Only for non-residents</i>
Community Property Trusts	Yes ^[3]	No	No	Yes <i>Future uncertain</i>	No
Domestic Asset Protection Statute	Yes ^[4] <i>2 year statute of limitations</i> <i>Exception for child support</i>	Yes ^[4] <i>2 year statute of limitations</i> <i>No exceptions for child and spousal support</i>	Yes ^[4] <i>4 year statute of limitations</i> <i>Exception for child support</i>	Yes ^[4] <i>4 year statute of limitations</i> <i>Exception for divorcing spouse</i>	Yes ^[4] <i>4 year statute of limitations</i> <i>Exceptions for child and spousal support</i>
Trust Protector	Yes	Yes	Yes	Yes	Yes

You can access a copy of the chart at: bridgefordtrust.com/situs

* Denotes superior distinction among jurisdictions.

^[1] Attorney Steve Oshins' "Dynasty Trust State Rankings Chart - Updated January 2025"

^[2] Worthington, Daniel G. and Merric, Mark "Which Trust Situs is Best in 2022?" *Trusts & Estates* December 2021

^[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

Choosing the Correct Jurisdiction (cont'd)

	South Dakota	Nevada	Wyoming	Alaska	Delaware
Directed Trusts	Yes	Yes	Yes	Yes	Yes
Decanting Statute	Yes <i>Ranked as #1 ^[5]</i>	Yes <i>Ranked as #2 ^[5]</i>	Yes <i>Ranked as #14 ^[5]</i>	Yes <i>Ranked as #9 ^[5]</i>	Yes <i>Ranked as #3 ^[5]</i>
Trust Privacy Provision	Yes - Total Privacy Seal Forever <i>Automatically attaches</i>	No Total Privacy Seal ^[2] <i>Subject to judge discretion</i>	No Total Privacy Seal ^[2] <i>Subject to judge discretion</i>	No Total Privacy Seal ^[2] <i>Subject to judge discretion</i>	Yes - Three Year Privacy Seal ^[2] <i>Subject to judge discretion</i>
Special Purpose Entity	Yes ^[2] <i>Codified by statute</i>	No	No	No	No
Family Advisor	Yes	No	No	No	No
State Fiscal Health	Ranked as #1 ^[6]	Ranked as #18 ^[6]	Ranked as #48 ^[6]	Ranked as #50 ^[6]	Ranked as #38 ^[6]

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Contact Us

As a fully independent trust company chartered in South Dakota, Bridgeford Trust Company provides conflict-free and innovative fiduciary services and progressive U.S. modern trust law solutions around asset protection, privacy, and tax planning to domestic and international families across the country and around the world.

Contact David A. Warren, JD, Co-Founder & Chairman of Bridgeford Trust Company at dwarren@bridgefordtrust.com or by calling (605) 224-9189.

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