

STEAM

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Shortly after retrieving her Prius from the dealership after a routine oil change, my wife noticed that the oil light had come on. She pulled over, checked the oil, discovered she had none and called the dealership. Fortunately, she had only travelled several miles and had driven slowly enough so that she was running on the battery rather than the pistons. It turns out that hybrids not only save gas, they can save oil as well.

The tow truck arrived, driven by a nineteen year old, and Judy was wondering to herself if this teenager would know the correct way of towing a hybrid. He certainly did. As they were driving back to the dealer, she explained the circumstances to him. She was beginning to build up a head of steam, likely to be vented at the dealership, due to worry about the car and her need to be back in Brattleboro by a certain time. That is, until she encountered the wisdom of the nineteen-year-old who simply commented, “people are human.” The steam stopped. The day ended well.

People are human. This certainly includes spouses and children. Sometimes their behavior creates enough steam to break a relationship or push a client to revise their Will or Trust. Sometimes we need the wisdom of this nineteen-year-old boy to ultimately do the right thing.

Steam is not necessarily a bad thing. We frequently need it to finish an estate plan. That said, our job as

estate planners is to look into the future and address “what-if” scenarios. When we do, there is a real risk that our clients will run out of steam. The irony is that the steam that seems to have the most lasting energy is the one generated by the negative behavior of our intended beneficiaries.



In estate planning, the challenge is to look at the dark side without the dark side taking over the process. Yes, we

know people are human, and yes, we know that people will change, but do we truly incorporate this knowing into our estate plans?

I recently dealt with a trust beneficiary, now in his fifties, who has to come to us to seek approval for principal invasions because of the provisions of the trust. The trust was created by a relative when the beneficiary was a young man. This beneficiary is now an adult more than able to take care of his financial needs. He does not need us to stand *in loco parentis*, and I suspect that the trust, created by a well-meaning relative, is a continual source of tension if not humiliation. Who knows whether thirty years ago, when the trust was created, if the relative and the attorney spent much time thinking about the long-term impact of restricting the young man’s access to the funds?

Should I bring up the impact of divorce? Statistics on the national divorce rate vary from 40% to 50%.



Researching the matter further, I have discovered more complex statistical phenomena. The divorce rate is much lower if our children are over 30 when they marry. And it is lower in the Northeast, with Massachusetts probably averaging the lowest divorce rate in the country. I also discovered that children with happy childhoods may have a higher divorce rate than the norm, which didn't seem to make much sense, and that divorce rates in Egypt are highest in families where the men are avid soccer fans, which did (and I suspect that if we didn't have the Red Sox and the Patriots, the divorce rate in Massachusetts would be non-existent).

Although there was a recent case in Vermont that startled a few attorneys², for the most part trusts can be designed to protect assets from a divorce, but at a price. The price in part is the cost of maintaining a trust. It may also be the cost of subjecting a child to the “parental” oversight of a third party. Your legacy may be steam that keeps on giving.

If a child's share is to be held in trust for a period of time that may be as long as his or her lifetime, the planning becomes complex. Family members may be appropriate trustees, but the tax implications are complicated and perhaps challenging for the attorney. Corporate trustees, such as our Trust Company, can absorb some of the family tension or shield a family member who is co-trustee from the distasteful task of turning down a request. Corporate trustees can also add to the tension. Our experience tells us there are no hard and fast rules, with perhaps one exception ~ don't make the second spouse trustee of a trust for the children of a previous marriage.

The Trust Protector

One recent development in the estate planning field is the use of a trust protector. We see more attorneys incorporating trust protector powers which would allow a third party to adapt the trust to changing circumstances such as early termination of the trust if a child becomes a responsible adult or the trust is no longer needed to protect assets from the impact of a divorce.

The trust agreement sets forth the dual functions of the Trustee and the Trust Protector. While the Trustee can be a bank or trust company, or other financial institutions, the Trust Protector is usually a person close to the family: a CPA, accountant, or attorney.

We encounter clients who have close relationships with their accountants and attorneys. In some instances, clients would like to use them as trustees, but Vermont law does not permit a lawyer or accountant more than five unsolicited appointments.³ The law, however, does not appear to bar them from being a Trust Protector.⁴

We often associate steam engines with railroads. Historically, the two most important players on a train are the Engineer, who operates the train, and the



Conductor, who is responsible for operational and safety duties that do not involve the actual

operation of the train. You might look at the Trustee as the Engineer for your plan and the Trust Protector as the Conductor. It's the Engineer's role to invest the trust assets, make the invasion decisions, do the tax returns and follow the fiduciary accounting rules. It's

the Conductor's role to control the steam, whether it comes from trust provisions that have outlived their usefulness, trustees who are unresponsive, or responsible adult children who wonder why your plan was so inflexible.

If you are interested in incorporating a Trust Protector in your plan, see our checklist for your use when you next visit with your attorney.

Notes:

1. *Howard - The Amazing Mr. Hughes* by Noah Dietrich
2. *Chilkott v. Chilkott*, 158 Vt. 193, 607 A.2d 883 (1992)
3. 8 V.S.A. § 2402 (11) (B)
4. 8 V.S.A. § 2402(f)



"I'm only a few miles from home. Could I borrow a socket?"

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Trust Protector Checklist

Trust Protectors can be given one or more powers to amend your trust, or control a trustee, or to change the disposition of your property or the handling of your assets, as specifically authorized by statute.

Here's a checklist:

The power to amend the trust to:

- achieve favorable tax status,
- respond to changes in the tax law or take advantage of changes in trust law,
- and to change the governing state law;

Powers over the trustee or a trust protector to:

- approve a trustee's accountings,
- remove a trustee and appoint a successor,
- consent to a trustee's action or inaction in making distributions to beneficiaries,
- perform a specific duty that would normally be required of a trustee,
- advise the trustee concerning any beneficiary,
- appoint a successor trust protector
- to remove and replace a trust protector;

Powers that will affect the disposition of your property:

- increase or decrease any interest of the beneficiaries in the trust,
- grant a power of appointment to one or more trust beneficiaries,
- terminate or amend any power of appointment granted in the trust (subject to certain restrictions);

Powers over trust assets:

- to consent to a trustee's action or inaction relating to investments of trust assets,
- to direct the acquisition, disposition, or retention of any trust investment.

See 14aVSA § 1101 for specific detail