

Taking Charge:

PLAN NOW FOR FUTURE FINANCIAL CONTROL



A Guide for Vermonters

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Center Inserts:

- Information Concerning Joint Fiduciary Accounts
- Declaration of Intent for Joint Fiduciary Accounts
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INTRODUCTION

You are in charge. Each of us needs to plan for our future but most of us find it difficult to start—we're busy, we're fine, we don't want to think about it. However, if you plan now, you will be in charge of how your affairs will be handled in the future, even if you no longer are able to handle those matters yourself.

This booklet helps explain the many alternatives you have in planning for how your financial affairs will be handled in the future. In the companion booklet *Taking Steps to Plan for Critical Health Care Decisions*, published by the Vermont Ethics Network, you will find information to help you plan for your future medical needs. We encourage you to use both booklets.

In order to decide how you want your money and assets to be handled now and in the future, you will have to answer many questions, including some basic ones:

- ♦ What tasks do I want to continue to do myself
- ♦ What do I want someone else to take care of?
- ♦ Who do I want to handle my money?
- ♦ When do I want that person to start?
- ♦ What kind of oversight do I want?

You will have many more questions before you find the best solutions for you. We hope this booklet will help you find the answers. Before you begin, here are some tips for good planning.

Do not try to answer all these questions alone. Talk to your family. Talk to your friends. Find out what their experiences have been. What has worked well? What has not? Talk to a lawyer or financial counselor, especially if you need to plan for how your assets (your money, house, car, and other property) will last through your life or how to leave some to family or friends.

Start now to plan for your financial future. If possible, do not wait until you are facing serious illness or having difficulty thinking clearly. Some of the alternatives discussed in this booklet can be put in place now while still giving you the option of postponing the date they will go into effect. Planning now gives you peace of mind and leaves you in charge for as long as you want or think is appropriate.

Take your time in deciding how you want your financial affairs to be handled. Unless you are in an emergency situation, take plenty of time to decide which combination of alternatives suits you and your situation the best. Whether

or not you are in an emergency situation, you probably should not rely on this booklet alone; seek professional advice from a lawyer who knows about planning options. It is difficult to make any decision in an emergency, and a professional can help you reach a thoughtful decision quickly.

Feel free to reconsider your decisions. You may reconsider most of the alternatives discussed in this booklet as long as you are legally competent. The law presumes that you are competent to change the plans for your financial future until it has been proven that you are not competent.

In order for you to use several of the alternatives described in this booklet, you will need witnesses who will declare that you appear to be of sound mind and free from duress at the time of signing the documents. You may reconsider and change your decisions regarding how your financial affairs will be handled as long as you continue to be of sound mind. The only way you would lose your right to make or reconsider decisions is if a court has found you are no longer capable of making your own financial decisions (see section on Involuntary Guardianships) or if a court finds you were not of sound mind or were under duress when you made a particular decision.

REMEMBER: If you plan, you are in charge.

I. JOINT FIDUCIARY ACCOUNTS

Many people put another person's name on a financial account in order to allow a relative or friend to help with handling finances. However, this may not be the best way to reach this goal. In order to keep the control you want and yet plan for the help you may need, it is important to consider carefully which kind of financial account is best for you.

What is a joint fiduciary account?

A joint fiduciary account is an account owned by one person with instructions on how a second person on the account is to use the money. You are the owner and the person getting the instructions is the fiduciary. A "fiduciary" is someone who has the responsibility of acting in the best interest of someone else, not in the best interest of him or herself.

Why would I want a joint fiduciary account?

There are three good reasons to use a joint fiduciary account rather than a joint account: control, clarity and protection.

Esther's Story:

A Good Use of a Joint Fiduciary Account Can Protect You

Esther, who is 66 years old, was planning to be in Florida for three months. Esther received a monthly social security payment that was automatically deposited into her savings account. She transferred some of her funds into her checking account on a regular



basis to cover her monthly expenses. Esther was afraid that her mail would not be forwarded to Florida in time to pay her bills by the due dates. She also did not want to add her niece as a co-owner on the accounts because her niece was in the beginning stages of a divorce.

Esther decided to change her checking and savings accounts to joint fiduciary accounts, naming her niece as her agent so that she could manage the finances while Esther was away. When she completed the instructions for the joint fiduciary account, she gave her niece power to pay her monthly bills and to make the necessary transfers from the savings account to the checking account.

Esther also signed a durable power of attorney appointing her niece as her agent in case there were any financial emergencies. She had the durable power of attorney prepared so that the document was effective only while she was away. The documents automatically terminated when she returned to Vermont.

1. **CONTROL.** A joint fiduciary account helps you to maintain control over the account. You can use the funds however you wish, while the fiduciary is required to use the funds only according to your instructions. You can change both the instructions and the fiduciary as long as you are of sound mind.

2. **CLARITY.** A joint fiduciary account helps clarify for everyone how you want your money to be spent. When you open a joint fiduciary account, you give instructions to the fiduciary on how your money may be spent. For example, you can instruct the fiduciary to use the account only for your regular living expenses. You can instruct the fiduciary to make gifts under specific circumstances or for certain amounts. If you like, you can authorize the fiduciary to pay him or herself for the time it takes to handle your affairs, and you can limit any such authority by providing a maximum amount or rate of payment.

Don't be shy about leaving specific instructions. It is your money and you have a right to have it spent as you choose.

Clear instructions on how money can be spent are often helpful for your family. Sometimes different family members have different ideas of how money should be spent for a person who is no longer capable of providing direction. Clear instructions eliminate the guesswork for your family.

3. **PROTECTION.** A joint fiduciary account provides you with more protection than a joint account. A joint account is what most people used in the past when they wanted to

have their bills paid by a family member or trusted friend. With a joint account, the second person on the account can take some or all of the money in the account without the owner's knowledge or permission. Even though everyone knows the money does not really belong to the second person, it is difficult for law enforcement, banks, or families to do anything about misuse of the money because legally both people on a joint account have full access to the money in the account.

A joint fiduciary account is safer than a joint account.

A joint fiduciary account will help protect you from intentional and unintentional misuse of your money. No one adds family or friends to financial accounts thinking that their money will be stolen. However, too many Vermonters have lost life savings or sorely needed monthly income to people they put on their accounts. Usually the people taking the money do not start off planning to steal it. It just becomes too easy to “borrow” it or to think that the owner “would have wanted to spend it this way.” Sometimes they just need a little money to get them through a financially difficult period; then they get used to dipping into the account. You can make it less likely that this will happen to you by using a joint fiduciary account.

Which account is better for me? A joint fiduciary account or a joint account?

Unless you intend to transfer the money in your account to another person right away, a joint fiduciary account is probably a better option for you than a joint account.

With a joint fiduciary account:

- ♦ it is clear who owns the money and who is helping the owner
- ♦ everyone knows how the money is supposed to be spent
- ♦ the financial institution keeps a copy of the instructions
- ♦ the person handling the money, the fiduciary, knows that he or she could be in trouble with the law if the money is misused

If you don't need help now and your goal is to transfer any remaining money in the account to someone at your death, consider a Totten trust or payable-on-death account, described in Section IV of this booklet.

Can I change an existing joint account into a joint fiduciary account?

Yes. If you and a spouse or partner already have a joint bank account and now want to have a relative or friend handle financial affairs for both of you, you can have your joint account designated a joint fiduciary account. Some banks ask that you close your old account and open a new one, sometimes at no cost to you. Then you and your spouse or partner would both be the owners, and your relative or friend would be the fiduciary.

What happens to the account if I become incapacitated?

Both a joint fiduciary account and a joint account remain valid even if you become incapacitated — indeed, one of

the main reasons for having either one is to prepare for the time when you can no longer, or prefer not to, take care of all your financial affairs yourself.

How do you create a joint fiduciary account?

In the center of this booklet you will find two documents on joint fiduciary accounts. The first is entitled “Information Concerning Joint Fiduciary Accounts.” This information sheet explains more about joint fiduciary accounts and some of the things you need to think about. The second is entitled “Declaration of Intent for Joint Fiduciary Accounts.” This will contain your instructions to the fiduciary. A copy of the instructions stays with the financial institution holding the account. Not all financial institutions offer joint fiduciary accounts, so shop around to find one that does.

There are three steps to opening a joint fiduciary account.

STEP ONE: Decide whether a joint fiduciary account is the right account for you and determine your specific instructions for the account. Take your time going through this step. Talk to your friends and family. Consider and reconsider your ideas.

- ♦ Read “Information Concerning Joint Fiduciary Accounts.”
- ♦ Decide what specific instructions you want to give to your fiduciary. You can be as specific or as general as you want. Remember, this is your document. You are in charge.
- ♦ Think about who would be the best person (or persons) to be your fiduciary. Talk to that person. Is he or she willing to take on this responsibility?

STEP TWO: Complete the forms. This can be done at the bank, at your home, or in the community. It does not matter where the document is filled out, but it will not be effective until you take the forms to the financial institution.

- ♦ Fill out the “Declaration of Intent for Joint Fiduciary Accounts” but do not sign it yet. The Declaration of Intent does not have to be the form in the center of this book. You can use a copy of that form. Alternatively, you can make up a new form, particularly if you want more space for the instructions, as long as it has all of the same elements.
- ♦ Sign the form in front of two witnesses (not including the fiduciary). The witnesses also sign the form. The witnesses do not have to be people that know you. They just have to declare that you appear to be of sound mind and free from duress at the time that you sign the “Declaration of Intent.” You also must affirm that you understand the nature of the document and that you are signing it freely and voluntarily.
- ♦ Give the fiduciary (or fiduciaries) a copy of the “Declaration of Intent.”
- ♦ Have the fiduciary (or fiduciaries) sign your copy of the form. This does not have to be done at the same time as your witnesses sign.

STEP THREE: Take your “Declaration of Intent” to the financial institution. If you need help finding a bank or other financial institution in your area that offers joint fiduciary accounts, contact your Area Agency on Aging (see the *Resources* sec-

tion of this brochure) or use the yellow pages of your phone book to call local financial institutions. Keep a copy of your “Declaration of Intent.” The bank will keep one too.

What do I do if I want to change my instructions?

You can always change your instructions. For example, maybe your fiduciary moves away. Maybe you decide you or someone else should get regular accountings of how your money is spent. Maybe you want to change some other aspect of your instructions. Just go through steps one through three again and give the financial institution your new “Declaration of Intent” to replace your old one.

II. POWERS OF ATTORNEY

A common method of planning for incapacity is to use “powers of attorney.” This is popular for several reasons. Powers of attorney can be drafted well ahead of when they are needed. People who execute powers of attorney can feel confident that they have planned for the future.

Powers of attorney are convenient and inexpensive because they can be done without going to court.

Powers of attorney are an alternative to involuntary guardianship. Powers of attorney allow you to choose how you will handle your financial affairs and give specific instructions about what you want done for you. If an involuntary guardian is appointed for you, the Court selects who the guardian is and decides how much authority the guardian should have.

There are disadvantages to powers of attorney as well. When you execute a power of attorney, you give tremendous power to another person. Particularly if you become incapable of monitoring your affairs, the power of attorney

can be misused. Typically, powers of attorney are entirely private transactions between you and the person you name in the power of attorney to handle your affairs. Unlike guardianships, courts do not monitor powers of attorney. This makes it easy for an unscrupulous person to misuse a power of attorney to steal money.

Despite the disadvantages, powers of attorney are an effective method of planning. Changes to Vermont law, effective July 1, 2002, were made to decrease the risk of financial exploitation using powers of attorney. But, because there is still some risk, you should consider all options before executing a power of attorney. If you choose to execute a power of attorney, you should be careful that it is written to fit your circumstances.

What is a power of attorney?

A power of attorney is a legal document that allows one person to give another person the authority to handle financial and personal decisions. The person who appoints the agent is called the “principal.” The person given the authority to act is known as the “agent” or “attorney-in-fact.” Powers of attorney can authorize an agent to perform a single act or to perform a variety of acts for a long period of time or indefinitely.

The power of attorney document defines the extent of the agent’s authority. For example, you could write your power of attorney to allow your agent only to sign papers for you at a real estate closing. If you did that your agent would not have authority to act for you in any other matter. But, if you wanted your agent’s authority to be more extensive you

could include other authority in your power of attorney, such as to pay your bills or to handle your taxes.

When an agent acts within the authority specified by a power of attorney, his or her actions are legally binding on the principal just as if the principal took the same action.

Powers of attorney can be effective immediately when they are signed or they can specify when they will become effective. A power of attorney that becomes effective at a future date or event is called a “springing” power of attorney.

What is a “durable” power of attorney?

A “durable” power of attorney is a type of power of attorney that remains valid even if the principal has become incapacitated. If a power of attorney is not durable, the authority of the agent automatically ends when a principal becomes incapacitated and is no longer capable of handling his or her own affairs.

If you are executing a power of attorney to allow the agent to handle your financial affairs or personal decisions for when you are unable to do so yourself, you need to be sure to create a “durable” power of attorney. Under Vermont law, to create a durable power of attorney your power of attorney document must contain the following or similar words: “This power of attorney shall not be affected by the subsequent disability or incapacity of the principal.”

Who can be my agent?

Any person at least 18 years old can be named as agent. You can also name more than one person as agent or

specify who should become agent if your first agent later becomes unable or unwilling to continue as agent. If you name more than one person as agent, you should specify when each agent can act and, if they can act at the same time, what should happen if they disagree about what actions to take.

What powers would my agent have?

Your agent's authority will be limited to what you specify in your power of attorney document. For this reason, you will want to be careful to consider exactly what you want your agent to be able to do for you.

Examples of authority granted to an agent are to:

- ♦ **pay bills, such as rent, mortgage, and utility bills**
- ♦ **conduct financial transactions**
- ♦ **invest your money**
- ♦ **apply for public benefits**
- ♦ **hire caregivers for you**
- ♦ **arrange housing for you**
- ♦ **make legal claims and conduct lawsuits**

Often people want to give their agents complete authority, so that their agents can do anything on behalf of the principal that the principal could do for him or herself. However, there are some types of authority that cannot be granted by general language and there are some types of authority that can never be given with a power of attorney.

What powers can I give only by specific language in the power of attorney?

- ♦ to transfer or mortgage any real property you own
- ♦ to pay him or herself from your money for duties performed as agent
- ♦ to make gifts of your property to other persons (including gifts to your spouse or children)
- ♦ to make gifts of your property to him or herself
- ♦ to name a successor or alternate agent to take over duties as agent

What are examples of powers I cannot give my agent?

- ♦ to execute, revoke, or modify a will for you
- ♦ to execute, revoke, or modify a living will for you
- ♦ to make health care decisions for you

If you want someone to be able to make health care decisions for you, you will need to execute a separate document, known as a Durable Power of Attorney for Health Care. (See *Taking Steps To Plan For Critical Health Care Decisions*, published by the Vermont Ethics Network)

For copies of *Taking Steps*, contact:

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What legal duties will my agent have?

The law makes clear that all agents have certain duties. Most importantly, agents have what is known as a “fiduciary” duty to their principals. This means that an agent must act only for the benefit of the principal. Specifically, your agent must:

- ♦ take no action beyond the authority given by the power of attorney document
- ♦ act in good faith
- ♦ refrain from doing things that benefit the agent rather than you
- ♦ avoid any conflicts of interest which impair his or her ability to act as your agent
- ♦ keep your money and property separate from his or her money and property
- ♦ keep records of all transactions and give you an accounting when you request one
- ♦ follow any specific instructions from you, including an instruction forbidding an action, even if that action is authorized by the power of attorney document
- ♦ stop acting as agent immediately if you revoke the power of attorney or if something else happens which terminates the power of attorney
- ♦ exercise the degree of care that would be observed by a “reasonably prudent person”

These are duties imposed on agents by Vermont law. The law gives principals the option of adding several other duties,

including: to require regular accountings or accountings to other persons; to specify that an agent has a duty to act; and to specify that an agent has a duty to use special skills.

Why would I want regular accountings or require that accountings be given to other persons?

You may specify in your power of attorney document that your agent give you accountings at regularly specified times, such as every six months. Accountings are important because they require your agent to show how he or she has spent your money.

You can choose to require that your agent give accountings to certain specified persons in addition to you. You could specify that accountings be given to an adult child or to your lawyer. This would give added oversight of what the agent does, which would give you more protection, particularly if you become unable to monitor what your agent is doing.

Can my power of attorney require that my agent act?

Yes. You may wish to specify that your agent not only has authority to act for you, but also has a duty to act. Under the law, powers of attorney give agents the authority to act (as described in the power of attorney document) but do not require agents to act.

For example, if your power of attorney gives your agent the power to pay your rent each month, your agent would be able to use the power of attorney to pay the rent. But if your agent failed to pay your rent, the agent would be doing nothing wrong, since the law does not require the agent to act.

Vermont law now gives principals the option of specifying in powers of attorney that their agents are required to act. If you choose this option and your agent fails to act, your agent will be considered to have failed to live up to his or her responsibilities. If you choose this option, your agent must understand and accept this added responsibility.

Can I require my agent to use “special skills”?

Yes. Another option allows you to specify that your agent use special skills. Instead of being required to act as a

Justina’s Story:

Failing to Plan Effectively Can Lead to Financial Exploitation

Justina is an 86 year old woman who lives in her own home in a small, rural community in central Vermont. In addition to the house and land, Justina and her husband had saved more than \$225,000 over the years. Justina had significant visual and physical impairments and some mild short-term memory loss but was still capable of making many decisions, including financial decisions.

A year or so after Justina’s husband died, her daughter and her husband moved in with her. Shortly after moving in the daughter convinced Justina to revoke an estate plan that had been developed to help provide for Justina’s medical needs in the event she needed long term care. The daughter talked her mother into adding her name to her savings pass book account as a joint owner.

The daughter wrote out all the checks for Justina to sign. Unable to see well, Justina signed checks her daughter told her were for her medications or her share of the household

“reasonably prudent person” would, you can select an agent with the expectation that the agent will use special skills, such as the skills of an accountant, financial planner, or lawyer. If you do this, your agent must agree to accept this higher duty of care.

If I execute a power of attorney, will I still be able to handle my own transactions and make my own decisions?

Yes. Principals can always act for themselves. Powers of attorney do not limit the authority we all have to handle our

bills. In fact, Justina was paying for all of the household expenditures as well for other things such as a cell phone, her son-in-law’s computer



charges, credit-card purchases made by the daughter and son-in-law, and taxes on a home they owned out of state. In addition, the daughter withdrew almost \$200,000 from Justina’s life savings without her knowledge. A large portion of this money was used to pay the expenses of the daughter and her husband. Over \$100,000 was transferred to an account solely in the daughter’s name. Justina discovered she had very little of her life savings left to meet her needs in her declining years.

own affairs and make our own decisions in any way. The only way you can lose your authority to handle your own affairs is if a probate court appoints an involuntary guardian for you. (The involuntary guardianship process is explained later in this booklet.)

Though principals always retain the legal right to act for themselves, as a practical matter it is important for your agent to know what actions you intend to continue to make yourself. Otherwise, your agent might do something that conflicts with what you do. For example, if you execute a power of attorney that is effective immediately, but you intend to keep handling your affairs as long as you are able, you should let your agent know under what circumstances you expect him or her to start acting on your behalf.

What should I consider before executing a power of attorney?

Most importantly, you should be sure you trust the person you select as your agent. If you are not sure you trust that person, you should select a different person or consider other methods of planning for incapacity. The law in Vermont concerning powers of attorney changed on July 1, 2002. Be sure you follow current law.

You are not required to hire a lawyer to execute a power of attorney, but it is often wise to do so. A power of attorney is an important document and there are many decisions to be made. A lawyer will help you tailor your power of attorney to what you need and will advise you how to minimize the risk of your agent misusing his or her authority. In particular, you should carefully consider the powers that must be specifically stated. Do you want your agent to be paid for

what he or she does? Do you want your agent to be able to give away your money or property? Sometimes the ability to give away property is important. For example, you may have an estate plan that contemplates making annual gifts. But, in other circumstances, the power to make gifts can be used by your agent to steal your money. Remember that you are in charge. What powers you give your agent is up to you.

What must I do to create a power of attorney?

All documents to create a power of attorney must:

- ♦ be in writing
- ♦ name one or more persons as agent
 - The person(s) named as agent cannot serve as witness or notary.
- ♦ be signed by the principal in the presence of one or more witnesses
 - Witnesses must affirm that the principal appeared to be of sound mind and free from duress at the time the power of attorney was signed and that the principal affirmed that he or she was aware of the nature of the document and signed it freely and voluntarily.
- ♦ be acknowledged by the principal before a notary, who must also sign the document.
 - The notary cannot also be a witness.
- ♦ be signed by the witness(es)
- ♦ be signed by the agent
 - The agent does not need to sign at the same time as the principal, but the agent must sign the power of

attorney before it is used for the first time.

When the agent signs, the agent must affirm that he or she accepts appointment as agent and understands the duties under the power of attorney and under the law. If the power of attorney states that the agent is expected to use special skills in performing duties as agent, the agent must affirm that he or she accepts that responsibility. If the power of attorney specifies that the agent is required to act, rather than merely given the authority to act, the agent must affirm that he or she understands that the performance of specified duties is mandatory.

Am I required to use a particular form to create my power of attorney?

No. Vermont does not have a required power of attorney form. As long as your power of attorney meets the requirements of Vermont law, it will be valid. A form has been included in this booklet for your convenience. You may choose to use it, but you are free to create your own power of attorney or to use a different form. Whether you use a form or not, what is most important is that your power of attorney fits your situation and reflects your preferences.

CAUTION: There are many forms available on the Internet and in form books. Many of these forms do not comply with current Vermont law and will not create a valid power of attorney in Vermont.

You are not required to hire a lawyer to create a power of attorney, but a lawyer can make sure your power of attorney will be properly executed. An improperly executed power of

attorney will not be effective, and by the time you find out about the defect, it could be too late to fix it.

Once I have executed a power of attorney, what steps should I take?

Make sure your agent has a copy of the power of attorney. You or your agent should make copies to give to anyone or any institution, such as your bank, that the agent will be doing business with on your behalf. Be sure to keep a copy for yourself. You might also want to let other family members and friends know that you have executed a power of attorney so that they will know whom you have selected as agent.

Do I need to file my power of attorney in a government office?

No, not unless your power of attorney will be used to transfer real property. Powers of attorney to be used in real estate transactions must be recorded with the deed in town land records.

Also, the Internal Revenue Service may require a separate power of attorney on IRS Form 2848 for all federal tax matters. If your agent will be handling federal tax matters for you, it is advisable to complete the IRS Form 2848.

Can I be sure my power of attorney will be accepted?

Vermont law prohibits third parties, such as banks, from requiring you to use their form. So long as your power of attorney is valid under Vermont law, it should be honored. The only circumstance in which your power of attorney should not be honored is if your agent attempts to use it for

a transaction not authorized by the power of attorney. The law specifically states that a photocopy or a fax of a properly executed original is as effective as the original.

If I moved here from another state and already have a power of attorney, do I need a new one?

No. A power of attorney executed in another state and valid under the law in that state should be honored in Vermont. Similarly, valid Vermont powers of attorney should be honored in other states.

If I executed a power of attorney before July 1, 2002, do I need a new one to comply with the new law?

No. Powers of attorney executed before changes in the law mentioned in this booklet became effective remain valid. However, all powers of attorney created after July 1, 2002 must follow the new law.

Is there court supervision of what my agent does?

No, ordinarily there is not. The law allows you to go to court to force your agent to give you an accounting or to follow your instructions or to honor your revocation. If you are no longer able to bring the court action yourself, Vermont law empowers the State, through its Adult Protective Services program, to go to court to protect you if your agent is not living up to his or her responsibilities.

Can I cancel my power of attorney?

Yes. Unless you have had an involuntary guardian appointed for you, you always have the right to revoke the power of attorney. You can revoke a power of attorney orally or in writing. Your agent must stop acting as soon as he or she

knows you have revoked the power of attorney. Though the law allows powers of attorney to be revoked orally, it is better to revoke powers of attorney in writing. If you revoke your power of attorney you should send a copy of a written revocation to anyone or any place that might have your power of attorney on file.

Are there other ways powers of attorney end?

Yes, certain events automatically terminate powers of attorney. For instance, if you specify in your power of attorney document that the power of attorney ends on a certain date, the authority of the agent will end on that date. Powers of attorney also end when you die or if your agent resigns or dies, unless the document names a successor agent. If you named your spouse as agent, your power of attorney will end automatically if you later divorce. If you have a guardian named for you, the probate court can (but is not required to) terminate your power of attorney.

How can I change a power of attorney?

If you want to give different powers or name a new agent you will need to execute a new power of attorney. Be sure to revoke your existing power of attorney when you create a new one.

What do I do if something goes wrong?

You can ask your agent to give you an accounting at any time. You always can revoke the power of attorney and execute a new one. If you feel you have been financially exploited by your agent you can make a complaint to Adult Protective Services, the State agency which investigates allegations of abuse, neglect, or exploitation of senior citizens and people

with disabilities. (See *Resources* section at the end of this booklet.) In addition, as explained above, if your agent is not following your instructions, including your request for an accounting, you can go to court to get an order requiring your agent to comply. If your agent has violated the terms of your power of attorney or duties required by law, you can sue your agent for damages. If you prove that the agent acted improperly, Vermont law allows you to recover from your agent the cost of your attorneys' fees, in addition to your actual damages.

REMEMBER: If you choose to use a power of attorney, you are in charge. You decide what your power of attorney document says, including which powers you give to your agent. Once the power of attorney is in place, you can decide to end the power of attorney or to give specific instructions to your agent.

III. GUARDIANSHIP

What is guardianship?

A guardian is someone who has the power and responsibility to help you with your personal, medical, and financial affairs. There are two different ways to initiate a guardianship. You can ask the probate court to appoint someone to help you manage your affairs. This is called a voluntary guardianship. Or, someone who is concerned about your welfare can ask the probate court to appoint a guardian to make decisions for you. This is called an involuntary guardianship. In either case, the guardian can have either total power to make all decisions for you or limited power to make decisions about specific aspects of your life. For example, a limited guardian may have the power only to handle your finances or to sell your property.

What is a voluntary guardianship?

A voluntary guardianship is similar to a durable power of attorney because it lets you decide who will handle your affairs and what powers he or she will have. It is important to keep in mind that the court will let you have a voluntary

guardian only if it thinks you can understand the nature, extent, and consequences of having a guardian.

A voluntary guardianship gives you additional protections that you do not get with a durable power of attorney. Unlike powers of attorney, which do not ordinarily require any monitoring by the court, the probate court judge is required to oversee the actions of your guardian. Each year, the guardian must send the judge a financial accounting and a personal status report with information about your health, finances, and living situation.

The Browns' Story:

Planning Ahead Can Avoid Guardianship

Mrs. Brown had just died after a long illness. The Brown's daughter, Pam, wanted her father to execute a durable power of attorney. Mr. Brown said that it was unnecessary, because unlike Mrs. Brown, he was in excellent health. He assured his daughter that he planned on being around for a while. He was only 62, he still played tennis every week, managed his small catalogue business, and had "passed" his last physical with flying colors. He told his daughter not to worry. He would execute a durable power of attorney when he turned 65.

Several months later, Mr. Brown was in a serious automobile accident. He needed surgery to repair a badly shattered arm. He developed a blood clot during the surgery and he had a stroke. He was unable to talk and he did not respond to written notes. He did not recognize Pam.

Pam realized that she would have to start managing her father's affairs. Although she could take care of some things, she had no way to cash his pension check, manage his cata-

There is another important distinction. You can revoke a durable power of attorney at any time. This is not always true with a voluntary guardianship. If the court thinks you still need help managing your affairs, it could require you to have a guardian even if you no longer want one. This would be called an involuntarily guardianship.

What is an involuntary guardianship?

Anyone concerned about your welfare can ask the probate court to appoint an involuntary guardian to handle your affairs

logue business or sell the car that he had listed in the paper.

She decided to petition for guardianship. She was discouraged to learn it could take months before the guardianship was in place. She was uncomfortable including specific information about her father's condition in the petition. He had always been a very private person, and the probate court register knew her father because he often played tennis with her brother. She also was very upset to learn that her father would have to undergo an evaluation and the court would have to find him mentally disabled before it could appoint a guardian.

Pam wished that her father had executed a durable power of attorney. She was sure that he would have if he had understood the alternative.



on your behalf. This may happen if you have not planned for the future and you reach the point where you can no longer make your own decisions.

These concerned friends or relatives begin the guardianship process by filing an involuntary guardianship petition with the court. In the petition, they recommend a specific guardian and suggest which powers the guardian should have. Although the court should take your preferences into account, it will decide whether or not you need a guardian, who will serve as your guardian, and what decisions the guardian can make for you. An involuntary guardianship can be ordered over your objection, and it may be contrary to what you want. Like a voluntary guardianship, the judge is required to oversee the actions of your guardian, and each year the guardian must report to the judge about your health, finances, and living situation.

The court can appoint an involuntary guardian only if it determines that you are mentally disabled. The court may require you to have an examination to help it make this decision. The court also must appoint a lawyer to represent you in the guardianship proceeding to protect your rights and to make your preferences known to the court. You may ask the court to terminate the involuntary guardianship at any time, but the court will do that only if it thinks you can make your own decisions and handle your own affairs.

IV. WILLS AND TRUSTS

As you are thinking about financial powers of attorney and joint fiduciary accounts, it also may be a great time to consider other estate planning issues. Wills and trusts are not just for people who have a lot of money. Wills, in particular, are important documents to have under any circumstances.

Do I need a will?

Many people wonder whether they need a will. A will is a document that provides for the distribution of your personal belongings, bank accounts, investments, real estate, and all other assets you might own on the date of your death. You can make specific gifts in your will to individuals, organizations, institutions, or charities, such as “\$500 to my former high school to establish a college scholarship.” You can also make general gifts to a category of individuals, such as “all of my personal belongings equally to my grandchildren.”

A will also appoints the person you want to be in charge of distributing your belongings. This person is called the “executor.” Upon your death, the person you have appoint-

ed as the executor will file a petition with the probate court to open the estate and to have the will allowed. The person you have appointed in your will does not have the legal authority to take action until the court formally allows the will and formally appoints your executor.

If you have minor or adult dependents, you can appoint a guardian in your will to ensure the continuity of financial and health care decisions for those dependents. Similar to the executor, the person that you appoint as the guardian will file a petition to establish the guardianship and will request that he or she be formally appointed by the probate court.

If you do not have a will, Vermont has a law that states how your belongings will be distributed. If you are married or you are in a civil union, and you have children, your belongings and property will not all go to your surviving spouse or partner. Your surviving spouse or partner will get a portion and your children (even if they are minors) will get a portion. Having a will may be very important for your situation. You may want to consider discussing this with an attorney.

Do I need a trust?

A trust allows you to place restrictions on who gets your property, when the distributions are made, and how the property or funds can be used. You can either create a trust as part of your will, which becomes effective after your death (called a testamentary trust), or you can create a trust

that is separate from your will that takes effect during your lifetime (called an inter vivos trust or a “living trust”).

Trusts can be revocable or irrevocable. They can be created for specific purposes or for general use. Trusts can be set up so that funds are available immediately or they can be set up so that funds are distributed only under certain circumstances.

There are also special types of trust. A supplemental needs trust is used for an individual who is receiving public benefits so that any money set aside for that person will not jeopardize his or her ability to receive those benefits. In order for a supplemental needs trust to be effective, there are very specific guidelines that must be met.

A trust is often used if there are minor children involved. Money (or any other type of property) can remain in a trust until a child reaches a certain age or needs the money for certain reasons. For example, you can decide if the money is to be used only for educational purposes. You also can choose to distribute a portion of the funds at different ages, such as 25% at the age of 18, 50% at the age of 25, and the rest at the age of 30.

Grantor revocable trusts are often used to transfer ownership of assets out of an individual’s name into a trust to avoid the necessity of going through the probate court process.

Trusts can also be established with certain types of bank or financial accounts, such as Totten trust accounts or payable-on-death accounts.

What is a Totten trust or a payable-on-death account?

A Totten trust or a payable-on-death account allows the owner of the account to designate a person or persons to receive the money remaining in the account upon the death of the owner. The difference between the two accounts is that any money left in a Totten trust account is immediately transferred upon the death of the last owner. With a payable-on-death account, the financial institution holds the money for 90 days, pays the debts and expenses of the deceased owners, and then transfers any remaining money out of the account. Banks and other financial institutions may offer either or both accounts.

The persons designated to receive the money are called the beneficiaries (technically the “payable-on-death payees” for those accounts). You can designate a beneficiary even when an account is owned by two persons. The money then transfers to the beneficiary upon the death of the last living owner.

Either kind of account is a good way to transfer money to your family or others without going through probate. You can use instructions on a Totten trust or a payable-on-death account that are similar to what you might include in a will. For example: “I want all of my money to be distributed equally to my children.” You can give money to a non-profit organization. Thus, your instructions could read: “Twenty-five percent of the money in the account to each of my three children (or to their children if any of them have died) and to [name of your favorite charity].” The more complicated the instructions, the more likely the bank will ask you to put your instructions on a separate piece of paper which will be incorporated by reference into their forms.

Most financial accounts can be designated a Totten trust or payable-on-death account. For example, you can have a joint fiduciary account that is also a Totten trust. If you had your adult child as your fiduciary and a grandchild as a Totten trust beneficiary, your child would handle your money for you while you were alive, and your grandchild would receive a gift of the remaining money upon your death.

With Totten trusts or payable-on-death accounts you are in charge of where your money goes after you die. Again, as long as you are not incompetent, you can change the beneficiaries or payable-on-death payees. If you want further information on either of these accounts, contact your financial institution.

There are many issues to think about. If you can plan ahead, you can make a few decisions at a time. Remember, however, that it is never too late to plan. Even in an emergency, you can still take charge. There are many resources to help you make decisions quickly.

V. RESOURCES

Adult Protective Services

Department of Aging and Disabilities 1-800-564-1612

Division of Licensing and Protection 1-802-241-2345

103 South Main Street

Waterbury, Vermont 05671-2306

Area Agencies on Aging

Senior Helpline 1-800-642-5119

Toll-Free Information and Referral

Champlain Valley Agency on Aging 1-802-865-0360

P.O. Box 158

Winooski, VT 05404

Central Vermont Council on Aging 1-802-479-0531

30 Washington Street

Barre, VT 05641-04241

Northeastern Vermont AAA 1-802-751-0440

1161 Portland Street

St. Johnsbury, VT 05819

Southwestern Vermont Council on Aging 1-802-786-5991

1085 U.S. Rte. 4 East, Unit 2B

Rutland, VT 05701-9309

Council on Aging for Southeastern Vermont 1-802-885-2655

56 Main Street, Suite 304

Springfield, VT 05156

Vermont Bar Association Lawyer Referral Service

1-800-639-7036

Vermont Legal Aid, Inc. 1-800-889-2047

Long-Term Care Ombudsman Project

Senior Citizens Law Project

Disability Law Project

Offices: Burlington, Montpelier, Rutland, St. Johnsbury,

Springfield, Waterbury

Administrative office:

P.O. Box 1367

Burlington, VT 05402-1367

<http://www.vtlawhelp.org/>

Vermont Protection & Advocacy, Inc. 1-802-229-1355

21 East State Street

Montpelier, Vermont 05602

Vermont Center for Independent Living 1-800-639-1522

11 East State Street

Montpelier, Vermont 05602

VI. DEFINITIONS OF TERMS

ACCOUNTING: A written statement by an agent itemizing transactions taken by the agent or guardian pursuant to the power of attorney or the terms of the guardianship.

ACKNOWLEDGEMENT: A statement by a principal to a notary or other person authorized to administer oaths that the principal signed the document freely and voluntarily.

ADULT PROTECTIVE SERVICES: The unit in the Vermont Department of Aging and Disabilities that is responsible for protecting vulnerable adults whose health and welfare may be adversely affected by abuse, neglect, or exploitation. The unit investigates reports of abuse, neglect, or exploitation and provides protective services if necessary.

AFFIRM: To declare or state formally that something is true, as one would take an oath or swear.

AGENT: An individual who has been given authority in a power of attorney to handle financial and personal decisions for another person, known as the principal. The agent is also called an “attorney-in-fact.” The same term is used for

an individual who is given authority to make medical decisions under a durable power of attorney for health care.

ASSET: Any item of value owned by an individual, including real estate, houses, cars or other vehicles, personal property, money, certificates of deposit, pensions, bonds, etc.

BANK: See the definition for financial institution. Generally, the terms are used interchangeably throughout this booklet.

BENEFICIARY: An individual (or individuals), organization, or trust, etc., selected prior to death to receive the assets of the donor.

DECLARATION OF INTENT: The statement that accompanies the joint fiduciary account paperwork, in which the owner sets forth the terms of the account, such as how and when the money will be spent by the fiduciary.

DURABLE POWER OF ATTORNEY: A type of power of attorney that remains valid even if the principal has become incapacitated. To be durable, the power of attorney document must include specific words set forth in the statute.

DURESS: The use of constraint or coercion such that an act is done because of the influence of the coercion or constraint.

EXECUTOR: The person who is appointed to carry out or fulfill the requirements of a will.

FIDUCIARY: A fiduciary is someone who has the responsibility of acting in the best interests of another person, rather than in his or her own interest.

FINANCIAL EXPLOITATION: The act of willfully using, withholding, transferring or disposing of funds or property without or in excess of legal authority for the wrongful profit or advantage of another; acquiring possession or control of or an interest in funds or property through the use of undue influence; or forcing or compelling the performance of services for the profit or advantage of another.

FINANCIAL INSTITUTION: Any financial entity, such as a bank, credit union, investment firm, brokerage house, etc.

GUARDIAN: An individual appointed by a probate court (or, in some limited cases, a family court) to handle specific, enumerated matters for another person (known as the ward). A guardianship may be voluntary or involuntary.

INCAPACITATED: Permanently unable to understand information or make decisions and understand the consequences of those decisions.

INCOMPETENT: Having been found by a probate court to be unable to make personal and financial decisions, based on a psychological evaluation. See the discussion in section III regarding guardianships.

JOINT FIDUCIARY ACCOUNT: A financial account in the owner's name with instructions on how a second person (or persons) is to use the money in the account.

LIVING WILL: A written document, also called a terminal care document, that says that a person does not want extraordinary measures used to prolong life if that person becomes terminally ill.

MENTALLY DISABLED: Having a disorder, like mental illness, mental retardation or Alzheimer's disease, that effects judgment, behavior, or the ability to recognize reality and, as a result, unable to handle personal care or financial affairs.

PAYABLE-ON-DEATH (P.O.D.) ACCOUNT: A financial account in which the owner has designated a person or persons to receive the money left in the account when the owner has died.

PRINCIPAL: A person who gives another person, known as the agent or attorney in fact, the authority to handle financial and personal decisions.

PROBATE: A probate court is the court that administers wills and handles guardianships. As a verb, it means to establish the legal authority of a will.

REVOCATION: The cancellation by a principal of the authority of the power of attorney previously given by the principal to an agent.

SELF-DEALING: Any transaction, including transfer of property of a principal to an agent, that directly or indirectly benefits the agent or the immediate family of the agent, regardless of whether the agent has provided consideration for the transaction.

SOUND MIND: The ability to understand information and make decisions, and to understand the consequences of those decisions.

SPRINGING POWER OF ATTORNEY: A power of attorney that becomes effective at a future date or event, rather than at the time at which it is written.

TERMINATION: Any occurrence or event, including revocation, which causes the authority previously given by a principal to an agent to cease.

THIRD-PARTY: Any person or entity that acts on a request from, contracts with, or otherwise deals with an agent pursuant to authority granted by a principal in a power of attorney.

TOTTEN TRUST: An account that allows the owner of the account to designate a person or persons to receive the money left in the account immediately upon the death of the owner.

UNDUE INFLUENCE: Improper or excessive pressure or persuasion used to convince another person to do something he or she would not ordinarily have done.

WILL: A legal document that identifies the beneficiaries to whom an individual wants his or her property distributed. The document appoints an executor, the person selected by the individual to ensure that his or her will is administered properly.

WITNESS: A person who signs a document or signature attesting to the genuineness of its execution. As a verb, it means to see or know by personal presence and perception.

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AARP Vermont — www.aarp.org

American Bar Association — www.abanet.org

Community National Bank — www.communitynationalbank.com

Key Bank — www.key.com

Merchants Bank — www.mbvt.com

Northfield Savings Bank — www.nsbvt.com

Office of the Attorney General of Vermont — www.state.vt.us/atg

*Paul, Frank & Collins, A Professional Corporation —
www.pfclaw.com*

*Vermont Department of Aging and Disabilities —
www.dad.state.vt.us*

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