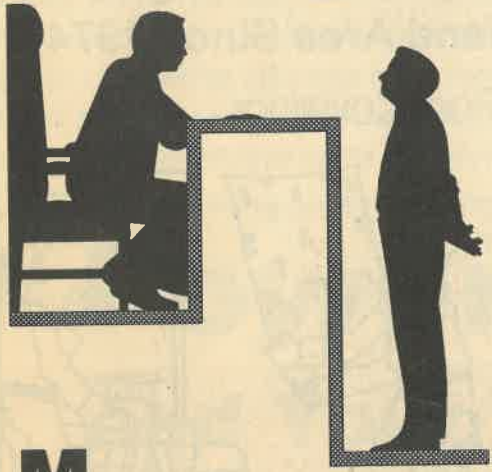


Who Decides For You?



Powers of Attorney and Guardianships in Vermont

by Samuel H. Angell, Esquire

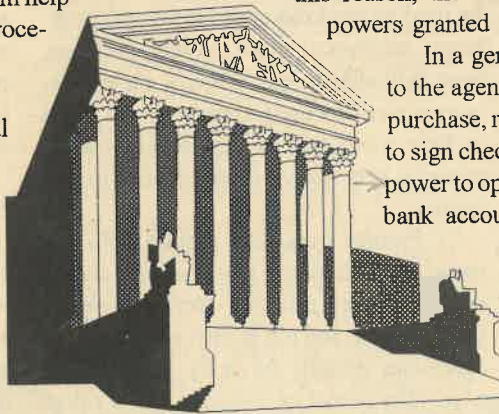
Most people assume they will be able to control what happens to their bodies and their property as long as they live, but this is not the case. Now that you're married, joined in civil union, or have a child, it's a good time to consider issues regarding who will make decisions for you if you are no longer able to do so because of decreased mental or physical capacity. Questions to consider include who will control your assets if you are no longer able to make decisions for yourself? What assets will that person control? What sort of medical care will be administered to you in the event you are incompetent or temporarily unable to make those choices? There are legal documents and procedures available to help you maintain control of your property and person, but you need to know what to ask for. This article will help introduce you to those documents and procedures.

Power of Attorney

A Power of Attorney is a written legal document whereby one person, as principal, appoints another as his or her agent and grants to the agent the authority to perform specified acts on behalf of the principal. The agent is known as an "attorney in fact" (hence the name Power of Attorney). Normally, the agent has authority to act only while the principal is alive and competent. However, under Vermont statute, the agent's authority can continue after incapacity (but not after death) as long as the Power of Attorney expressly says so. This is known as "durable" Power of Attorney. A Power of Attorney may be revoked by the principal as long as he or she is competent to do so. The beauty of a Power of Attorney is that you, the principal, decide who will make decisions for you in case you are unable to do so yourself, or if you are temporarily prevented from doing so. A primary reason for creating a Power of Attorney is to help avoid costly and cumbersome guardianship proceedings, which are discussed below.

Powers of Attorney grant authority over matters relating to

property or health care issues. A Power of Attorney for property can become effective the moment the principal signs the document, or at some later date upon the happening of a specific event (disability, for example). Whether durable or not, the power granted to the agent under a Power of Attorney for property may be either general (full) or special (limited). Although in Vermont all powers granted to the agent must be specified in the document, a general Power of Attorney is much broader and includes far more authority than a special Power of Attorney. Because of the extraordinary powers an agent obtains under a Power of Attorney, courts do not like to give the agent any more authority than that specified in the document, even if such authority was intended by the principal. For this reason, the document itself should list all the individual powers granted to the agent.



In a general Power of Attorney, the powers granted to the agent by the principal might include the power to purchase, rent, mortgage, or sell real property; the power to sign checks or make purchases using a credit card; the power to open, maintain, close or make withdrawals from bank accounts; the power to manage a business; the power to fill out, sign and file tax returns; the power to open and respond to mail; the power to access safe deposit boxes or storage areas; the power to make gifts of property; or the power to hire professionals to perform these and any other services on

behalf of the Principal. The powers granted might also include the power to sign a contract, including a contract with a nursing home, and in this way the powers are of relevance to health care concerns. Often a General Power of Attorney will include a "catch all" provision granting the agent power to do and perform all actions the principal might do if they were present and capable of doing so.

A special or limited Power of Attorney for property is the same as a general Power of Attorney for property except that it grants only limited powers to the agent for a specific, well defined purpose. For example, a person might give another a Power of Attorney for the sole purpose of selling a piece of property or for

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executing a specific document. These limited Powers of Attorney are useful if you are not able physically to be present at a time when something needs to be done, such as at a real estate closing.

Durable Power of Attorney for Health Care

A Durable Power of Attorney for Health Care is a legal document whereby you, the principal, give the person named in the document, the agent, the authority to make any and all health care decisions for you when you are no longer capable of making them yourself. Your agent's authority begins when your doctor certifies that you lack the mental capacity to make your own health care decisions, and ends when you regain your capacity, or upon your death. You can revoke the power at any time by written or verbal notification, or by destroying the document. This Power must be created in accordance with the Vermont statutory form. Most hospitals and doctors' offices have copies of the forms, and they are also available through your attorney.

In the form, you can state any medical treatment you do not desire, or treatment you want to be sure to receive. Your agent

is obligated to follow your instructions when making decisions on your behalf, and similarly, your doctor will be obligated to follow your agent's directions. Obviously, you want to be sure you trust the person you name as your agent since he or she may literally be holding your life in his or her hands. It is strongly recommended that you talk with your physician and/or clergy person before signing a health care power. Also, you should discuss your intentions with your prospective agent prior to drafting the document to ensure he or she is willing to carry out your instructions. Generally speaking, a treating physician will administer as much medical treatment as consented to by family members. Therefore, a health care power is especially important if you desire to limit the medical treatment you receive, such as a respirator or other life support system, the primary purpose of which is to prolong your life.

Guardianship

A guardianship is another legal mechanism by which one person exercises control over the property and/or health care arrangements of another. Specifically, a guardianship is a legal arrangement under which one person (the guardian) has the

legal right and duty to care for another (the ward) and his or her property. Guardianships are usually established because of a ward's inability to act on his or her own behalf, either because the ward is not old enough to act legally, or because the ward is mentally or physically incapable of conducting his or her own affairs. All guardianships are established only by order of the probate court in the district in which the proposed ward resides or has property located.

Guardianships may be voluntary or involuntary, total or limited. In a voluntary guardianship, any person over eighteen not mentally ill or mentally retarded who needs assistance managing his or her personal affairs can petition the probate court for a guardian to be appointed for them. In the petition, the person seeking the guardianship can name who they want as guardian and what powers they want that person to have. If appointed, the guardian has the ability to exercise those powers granted by the court. If any other person interested in the ward's welfare feels the guardian is no longer suitable for carrying out his or her duties, or that the guardianship is no longer needed, that person can petition the court to terminate the guardianship. Addition-

ally, the ward at any time may petition the court to revoke the guardianship.

An involuntary guardianship is established when somebody interested in the affairs of another feels that the other person cannot care for himself or herself, either financially or otherwise, because that person is mentally disabled. Because of the potential for abuse by self-motivated individuals, and because these guardianships may be established against the will of the prospective ward, courts are very careful to gather as much information as possible before granting them. For example, the court may appoint a lawyer to represent the prospective ward if he or she cannot afford one. Also, a qualified physician must file a report with the court stating whether or not, in the doctor's opinion, the ward is mentally disabled and unable to care for himself or herself, and the reason for this opinion. Involuntary guardianships are allowed only after the court has had a hearing to examine the physician's report and hear from the petitioner, the prospective ward or the ward's lawyer, and anybody else who may be an interested party to the petition.

Whether voluntary or involuntary, the powers granted to a guardian, if at all, may be total or limited. Under a total guardianship, the guardian has power to control the personal and real estate of the ward, including the ability to make contracts and buy, sell or liquidate any of the ward's assets, and control over the care and treatment of the ward's person, including medical procedures. Residential placement of the ward can be changed with court approval. In a limited guardianship, the guardian is granted only some, but not all, of these powers.

In either case, the guardian must report to the court on an annual basis, which report must include a financial accounting, a report of health issues, a report on how the guardian carried out his or her duties, and the guardian's opinion as to the continued need of the guardianship.

Conclusion

In far too many instances, couples neglect to plan for what medical treatment they might receive or who might have control over their personal assets once they become incapable of doing it themselves. Although parties to a marriage or civil union are afforded some protection under Vermont law, such protection is often not enough. Through a Power of Attorney, Durable Power of Attorney for Health Care, or by voluntary guardianships, individuals can direct who will control life decisions made on their behalf in the event of incompetence or temporary or permanent disability.

(Note: This article is intended for information purposes and does not constitute legal advice. I have tried to provide quality information, but I make no claims, promises or guarantees about the accuracy, completeness, or adequacy of the information contained herein. Legal advice must be tailored to the specific circumstances of each case, and laws are constantly changing. Therefore, nothing contained herein should be used as a substitute for the advice of competent legal counsel. The information contained in this article is the property of the author and cannot be used without the express written consent of the author.)

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(cont'd from page 7) it's up to each state to devise its own set of rules. While these dictate minimal standards for cleanliness, safety and number of children per adult caretaker, they often don't address children's educational or psychological needs.

"Vermont's standards are pretty good," says Bratton. "But in many states the requirements and regulations are appallingly weak - even non-existent. And even these bare requirements are hardly enforced. Essentially, our country is okay with putting young children on a daily basis in places that can harm their development."

How do parents sort the good programs from the not-so-good? "Often parents judge a child care program on whether they and their child feel comfortable in that setting," says Janice Stockman of the Head Start Collaboration Project. "That could mean they're in a program that has aspects of high quality, but I don't think it always does. You really need to talk with the center director. And it's always useful to talk to an organization that knows about issues of quality, like Windham Child Care Association, Early Education Services, or the Family Infant Toddler Program."

Increasingly, parents can look for centers accredited by the National Association for the Education of Young Children (NAEYC). Accreditation, as opposed to state licensing, is a voluntary process that looks at an early childhood center from top to bottom, judging it in areas ranging from the physical facilities to how well the teachers focus on children's individual needs.

"The accreditation process looks at programming and staffing, how the staff works as a team, and at developmentally appropriate curriculum," says Kathy Apgar, president of NAEYC's Vermont affiliate, VAEYC. "Nothing in the state licensing regulations looks at that."

But because the process is costly and time consuming, only 21% of the center-based early education programs in Windham County have become accredited. To encourage others to join their ranks, Windham Child Care Association has teamed up with VAEYC to provide support and funding.

Accreditation is now available to home-based programs as well, thanks to a new program of the National Association for Family Child Care. It's a move that family providers hope will bring increased professionalism to a field that has long suffered from a low self-image.

"Accreditation is a really critical project that is going to make a huge difference in quality nationally," says Laura Lawson Tucker, an instructor in CCV's Early Childhood Certificate program and a family child care provider in Guilford. "It will be a very valid way for parents to ensure that they will receive quality care and will remind providers that this is a very serious responsibility."

Despite these strides towards quality, Stockman cautions parents to carefully assess any program they're considering - accredited or not. "Accreditation is a good thing, but the fact that a program is accredited doesn't mean you don't have to ask any more questions."

And while higher test scores and school readiness are important measurements of program quality - as well as practical proof of the benefits of early education - Stockman reminds parents that they're not ends in themselves. "If we're just preparing children for kindergarten, we're losing sight of early childhood as a beautiful and wonderful time in itself, when you don't need to get ready for anything."

Ellen Keelan is a freelance writer living in Williamsville, Vermont.