

**STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2008**

Order Promulgating Rule 80.8 of the Vermont Rules of Probate Procedure

Pursuant to Chapter II, Section 37, of the Vermont Constitution and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 80.8 of the Vermont Rules of Probate Procedure be added to read as follows:

RULE 80.8. ACCOUNTING BY AN AGENT UNDER A POWER OF ATTORNEY

(a) Petition. An agent named under a durable power of attorney created as provided in 14 V.S.A. § 3508 who has reason to believe that the principal has become incompetent and that no guardian has been appointed may file a petition in the probate court for the district in which the principal resides seeking review and approval of the accountings of the agent. The petition shall be accompanied by the following:

- (1) the entry fee;
- (2) a copy of the power of attorney;
- (3) the accounting for which the agent seeks review and approval;
- (4) an inventory of any assets of the principal under the control of the agent;
- (5) the names and addresses of the interested persons listed in Rule 17(a)(3)(i)-(v).

(b) Notice. Upon receipt of the petition, the court shall set a date and place for hearing and shall send notice thereof, together with a copy of the petition and the accounting for which approval is sought, by appropriate methods specified in Rule 4 to the interested persons named pursuant to clause (a)(5) of this rule and to such other persons as the court may direct. The notice of hearing shall inform each recipient of the necessity to file a written objection if the recipient desires to contest the accounting.

(c) Accounting; Appraisal. The provisions of Rule 66(c)-(f) govern the form of the accounting, the filing of an interim accounting, the filing of objections, and the appraisal of the principal's assets.

(d) Hearing. At the hearing, if the court determines that no guardian has been appointed and that there is reason to believe that the principal is incompetent, the court shall proceed to review the accounting presented by the agent. The court may appoint a guardian *ad litem* or attorney to represent the interests of the principal. If no timely written objections have been filed and the court finds that the property interests of the principal are adequately protected, the court may allow a verified accounting

without further hearing. If timely written objections have been filed or other questions are raised concerning the adequacy of protection of the principal's property interests, the court, after hearing, shall determine whether to allow or disallow the agent's accounting or grant other appropriate relief.

(e) Prior and Future Accountings. At the request of the petitioner or any party, or on its own motion, the court may order that the agent provide

- (1) copies of any prior accountings provided by the agent on request of the principal, or as specified in the power of attorney, pursuant to 14 V.S.A. § 3505(a)(10) or pursuant to a petition filed in accordance with 14 V.S.A. § 3510; or
- (2) future accountings for a period, and according to a schedule, ordered by the court.

Reporter's Notes

Rule 80.8 is added to implement the grant of jurisdiction to the probate courts in 4 V.S.A. § 311, as amended by Act 135 of 2001 (Adj. Sess.), § 1, over "accountings of attorneys in fact where no guardian has been appointed and the agent has reason to believe that the principal is incompetent." That grant of jurisdiction was part of the enactment of 14 V.S.A. §§ 3501-3516, providing for creation, implementation and enforcement of powers of attorney. The purpose of the jurisdiction is to allow the "agent"—*i.e.*, the attorney in fact—to protect himself or herself in a situation where the principal is not able to call for an accounting but issues may arise concerning the agent's handling of the principal's funds or other property.

Rule 80.8(a) provides for a petition for an accounting by an agent under a durable power of attorney—one that, pursuant to 14 V.S.A. § 3508, is not affected by the subsequent disability or incapacity of the principal. (A power of attorney not executed under that provision terminates on the principal's disability or incapacity, pursuant to 14 V.S.A. §3507 (a)(4).) The petition is to set forth the agent's belief that no guardian has been appointed and that the agent has reason to believe that the principal is incompetent. The entry fee, a copy of the power of attorney, the accounting for which approval is sought, the inventory of any assets of the principal held by the agent, and a list of interested persons similar to that in Rule 17(a)(3) covering adult involuntary guardianships are to be filed with the petition. The petition is to be filed in the probate district where the principal resides by analogy to statutory venue provisions for probate guardianship proceedings. *See* 4 V.S.A §§ 311a(7)(A), (9)(B), (13)(B).

Rule 80.8(b) provides for notice of the petition and hearing in accordance with Rule 4. The final sentence, taken from Rule 66(b), is intended to alert any recipient of notice as to the need to file a written objection at least three days before the hearing as provided in Rule 66(e), incorporated by Rule 80.8(c).

Rule 80.8(c) incorporates key provisions of Rule 66 that govern the form of the accounting, the filing of interim accounts, the necessity for timely written objections, and the authority to employ an appraiser on the agent's or the court's own motion.

Under Rule 80.8(d), at the hearing the court must make an initial determination that no guardian has been appointed and that there is reason to believe that the principal is incompetent. The proceeding is not a competency hearing as such, so it is only reasonable belief—a kind of probable cause—not an absolute finding of incompetency. If the court makes these preliminary findings, it has discretion to appoint a guardian *ad litem* if there appear to be concerns about the adequacy of the agency’s ability to protect the principal’s interests. If there are no such concerns, whether in the eyes of the court or a G.A.L. if one has been appointed, and no timely written objections have been filed, the court, as under Rule 66(e), may allow the accounting without further hearing. If there are doubts about the adequacy of agent’s handling of the principal’s funds or property, or objections have been filed, the court must hold a hearing to determine whether to allow the accounting. The court may grant other appropriate relief, including appointment of a guardian under 14 V.S.A. § 3509 or, as a matter of inherent power, the same relief that the superior court may grant under 14 V.S.A. § 3510.

Rule 80.8(e) permits the court on its own motion, or that of the agent or another party, to order the submission of prior accountings rendered by the agent on the principal’s property and to provide for future accountings on a schedule to be determined. The question whether to exercise this power would be determined on the basis of the nature of the principal’s disability and the likely duration of the agent’s authority.

2. That this rule as added is prescribed and promulgated effective _____, 2008 The Reporter's Notes are advisory.

3. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this _____ day of _____, 2008

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice