

Power of Attorney

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MontGuide

This publication explains the details and concerns of giving another person authority to act in your place through a legal document known as a power of attorney. The Montana Statutory Form for power of attorney is included.

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AN ELDERLY WOMAN IS WORRIED ABOUT WHO

will withdraw cash and pay her bills for her if she isn't able to make her weekly trips to the bank.

- A young couple is concerned about who would manage the family finances should either of them become physically or mentally disabled.
- A Montana National Guardsman wants to be sure his finances will be looked after at home while he is on an overseas assignment.

All these people may be able to find the assistance and peace of mind they're looking for by giving someone else legal authority to act in their place. A legal instrument designed to achieve this goal is called a power of attorney. This MontGuide will answer questions about powers of attorney and will explain the Montana Statutory Form Power of Attorney Act.

What is Power of Attorney?

A **power of attorney** is a written, notarized document in which one person gives another the power to conduct certain acts on his or her behalf. These actions could include selling property, depositing or withdrawing funds from checking or savings accounts, and paying bills. It differs from a guardianship or conservatorship, which are legal relationships ordered by a district court for the protection of a minor or incapacitated person.

Montana law defines a **guardian** as one who is legally empowered and charged with the duty of *taking care of* another who, because of age, intellect or health, is incapable of managing his or her own affairs. A **conservator** is defined as one who is appointed by a district court to *manage the affairs* of a protected person who, because of age, intellect or health, is incapable of managing his or her own property.

The person giving the power of attorney is called the **principal**. The person to whom the power is given is called **attorney in fact** or an **agent**. Obviously, the person selected to receive the power of attorney must be one who can be trusted and who is somewhat knowledgeable about finances because of the financial nature of his or her duties.

How Do I Grant Someone Power of Attorney?

Although it is not essential that you have an attorney draft a power of attorney document, you may wish to do so. Such legal assistance can assure that you grant only as much power to someone else to act on your behalf as necessary and only under specific conditions. An attorney could also provide advice about the risks involved in granting powers for someone to act on your behalf.

What Kinds of Power of Attorney Are There?

There are two kinds of power of attorney: **general** and **special**. A **general** power of attorney grants the agent authority to do anything for the principal.

For example, a homebound elderly mother may want her daughter to have the authority to write checks and pay for groceries, medicine and other personal items. The mother may grant a general power of attorney to her daughter to perform these types of financial tasks.

A **special** (or limited) power of attorney restricts the agent's authority to specific actions, such as buying a particular piece of property or paying bills while the person who granted the power (principal) is out of the country.

For example, a Montana National Guardsman assigned to Iraq for a year may wish to write a special power of attorney authorizing his wife to sell their home. He could also indicate that he is granting permission for her to cash a Certificate of Deposit titled in his name only that will reach maturity while he is out of the country.

Persons confined to a nursing home may wish to write a power of attorney authorizing relatives or trusted friends to make deposits to, but not withdrawals from, their savings accounts.

How Long Does the Power of Attorney Last?

A person may specify that the power of attorney last indefinitely or for a certain period of time. However, the power ends at the death of the person granting the power of attorney.

How Do I Cancel a Power of Attorney?

A principal may cancel (revoke) his or her power of attorney at any time by signing a document that contains much the same information as the document granting the power. This document should clearly identify the power of attorney and state that it is revoked. If the agent has conducted business with financial institutions or any other person, a copy of the revocation should be sent by certified mail to them. This action clarifies that the person who had power of attorney no longer has its capacity. Until the financial institutions or persons receive evidence of revocation of the power of attorney, the principal may still be legally bound by any financial actions taken by the agent.

What is a Durable Power of Attorney?

Generally, a power of attorney ceases if the principal becomes incapacitated. But, through what's known as a durable power of attorney, a person can plan ahead to have the power of attorney survive any disability he or she could suffer. To provide a durable power of attorney, the person must include in his or her written document a statement of this intention.

Without such a statement, the principal may not have authorized someone to act on his or her behalf at a time when he or she would most need one. To make a power of attorney durable, the following or similar language could be used: "This power of attorney shall not be affected by subsequent disability or incapacity of the principal."

What is Springing Power of Attorney?

A springing durable power of attorney can be used when the principal does not want the agent to take any authority until the principal is determined to be incapacitated and unable to direct his or her own affairs. The durable power of attorney is said to spring into existence upon the disability of the person granting the power. The term "disability" should be defined in the document, such as the principal being in a coma or diagnosed with Alzheimer's or another debilitating disease.

The power of attorney could also be conditioned upon the agent presenting a written statement signed by a physician licensed to practice in any state. As a practical matter, the agent would therefore need to present such a statement as well as the power of attorney document itself, when dealing with parties. A cautious third party may wish to verify with the appropriate licensing board that the physician is, in fact, licensed to practice, and may not accept any written statement that is dated well before the agent's attempted use of the power.

There are other potential problems, and these practical considerations lead many attorneys to recommend durable powers that are effective immediately upon execution of the document.

By planning ahead and preparing a springing durable power of attorney, a person can reduce the expense and time by relatives and friends of petitioning a district court for a guardianship and/or conservatorship.

What Form of Power of Attorney Should be Used?

The Montana Legislature amended the Statutory Form Power of Attorney Act in 2005 to delineate the fiduciary responsibility of the agent to the principal. The statutory form that lists powers relating to finances is provided on page 3. Health care matters are not included. The Act provides a practical method of granting powers, in a wide variety of circumstances, that may be appropriate for people.

Are There Problems With Powers of Attorney?

Two common problems with the power of attorney are that sometimes the principal tends to grant it in too broad a manner, or that the power is granted to someone who turns out to be untrustworthy.

For example, an elderly Montana woman granted power of attorney to a niece, because the aunt was having trouble handling her daily finances. The niece cashed in all of her aunt's Certificates of Deposit and moved to another state. The only source of income for the aunt was a Social Security check.

A power of attorney can be a very useful instrument if used properly, but it may unfortunately be abused. "When you give a person this power, there should be no doubt about his or her integrity and his or her ability to perform the duties," suggests a representative of Montana's Seniors' Office of Legal and Ombudsman Service. "Relatives," the representative added, are sometimes "the worst ones, not necessarily because they're crooks, but because they begin to rationalize that they have a right to the principal's resources. They may think 'I've used my own gas to run all these errands.' Or, 'my grandmother can't really enjoy this money anymore.'"

Summary

Anyone considering granting powers of attorney should be as specific as possible about what powers are being given and for how long. Legal assistance is recommended to help develop a document that conveys your intentions with a power of attorney.

Disclaimer

This publication is not intended to be a substitute for legal advice. Rather, it is designed to create an awareness of the need for estate planning, and to help families become better acquainted with some of the devices used in such planning. Future changes in laws cannot be predicted, and statements in this MontGuide are based solely upon those laws in force on the date of publication.

Acknowledgment

The Montana State Bar Section on Business, Estates, Trusts, Tax and Real Property has approved this MontGuide and recommends its reading by all Montanans.

References

Montana Codes Annotated 2007, 72-31-201 through 72-31-238.

NOTICE: The powers granted by the following document are broad and sweeping. They are explained in this part. If you have questions about these powers, obtain competent legal advice. This document does not authorize anyone to make medical and other health care decisions for you. You may revoke this power of attorney if you later wish to do so.

STATUTORY FORM POWER OF ATTORNEY

(1) The following statutory form of power of attorney is legally sufficient:

I (insert your name and address) appoint (insert the name and address of the person appointed) as my agent (attorney-in-fact) to act for me in any lawful way with respect to the following initialed subjects:

TO GRANT ALL OF THE FOLLOWING POWERS, initial the line in front of (N) and ignore the line in front of the other powers.

TO GRANT ONE OR MORE, BUT FEWER THAN ALL, OF THE FOLLOWING POWERS, initial the line in front of each power you are granting.

TO WITHHOLD A POWER, do not initial the line in front of it. You may, but need not, cross out each power withheld.

INITIAL

- | | |
|---|--|
| ____(A) real property transactions; | ____(H) estate, trust, and other beneficiary transactions; |
| ____(B) tangible personal property transactions; | ____(I) claims and litigation; |
| ____(C) stock and bond transactions; | ____(J) personal and family maintenance; |
| ____(D) commodity and option transactions; | ____(K) benefits from social security, Medicare, Medicaid,
or other governmental programs or from military service; |
| ____(E) banking and other financial institution transactions; | ____(L) retirement plan transactions; |
| ____(F) business operating transactions; | ____(M) tax matters; |
| ____(G) insurance and annuity transactions; | |
| ____(N) ALL OF THE POWERS LISTED ABOVE. You need not initial any other lines if you initial line (N). | |

SPECIAL INSTRUCTIONS:

On the following lines you may give special instructions limiting or extending the powers granted to your agent.

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

. . . . This power of attorney revokes all previous powers of attorney signed by me.

STRIKE THE PRECEDING SENTENCE IF YOU DO NOT WANT THIS POWER OF ATTORNEY TO REVOKE ALL PREVIOUS POWERS OF ATTORNEY SIGNED BY YOU.

IF YOU DO WANT THIS POWER OF ATTORNEY TO REVOKE ALL PREVIOUS POWERS OF ATTORNEY SIGNED BY YOU, you should read those Powers of Attorney and satisfy their provisions concerning revocation. Third parties who received copies of those Powers of Attorney should be notified.

. . . . This power of attorney will continue to be effective if I become disabled, incapacitated, or incompetent.

STRIKE THE PRECEDING SENTENCE IF YOU DO NOT WANT THIS POWER OF ATTORNEY TO CONTINUE IF YOU BECOME DISABLED, INCAPACITATED, OR INCOMPETENT.

If it becomes necessary to appoint a conservator of my estate or guardian of my person, I nominate my agent.

STRIKE THE PRECEDING SENTENCE IF YOU DO NOT WANT TO NOMINATE YOUR AGENT AS CONSERVATOR OR GUARDIAN.

If any agent named by me dies, becomes incompetent, resigns or refuses to accept the office of agent, I name the following (each to act alone and successively, in the order named) as successor(s) to the agent:

1. _____
2. _____
3. _____

For purposes of this subsection, a person is considered to be incompetent if and while: (1) the person is a minor; (2) the person is an adjudicated incompetent or disabled person; (3) a conservator has been appointed to act for the person; (4) a guardian has been appointed to act for the person; or (5) the person is unable to give prompt and intelligent consideration to business matters as certified by a licensed physician.

I agree that any third party who receives a copy of this document may act under it. I may revoke this power of attorney by a written document that expressly indicates my intent to revoke. Revocation of the power of attorney is not effective as to a third party until the third party learns of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

Signed this _____ day of _____, 20____

(Your Signature)

State of _____ County of _____

This document was acknowledged before me on _____
(Date)

by _____
(Name of Principal)

(Signature of Notarial Officer)

(Seal, if any) (Title and Rank)

[My commission expires:]

BY SIGNING, ACCEPTING, OR ACTING UNDER THE APPOINTMENT, THE AGENT ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT. THE AGENTS WORKS EXCLUSIVELY FOR THE BENEFIT OF THE PRINCIPAL. THE FOREMOST DUTY AS THE AGENT IS THAT OF LOYALTY TO AND PROTECTION OF THE BEST INTERESTS OF THE PRINCIPAL. THE AGENT SHALL DIRECT ANY BENEFITS DERIVED FROM THE POWER OF ATTORNEY TO THE PRINCIPAL. THE AGENT HAS A DUTY TO AVOID CONFLICTS OF INTEREST AND TO USE ORDINARY SKILL AND PRUDENCE IN THE EXERCISE OF THESE DUTIES.

(Signature of Agent)

Signed this _____ day of _____, 20____

- (2) A statutory power of attorney is legally sufficient under this part if the wording of the form substantially complies with subsection (1), the form is properly completed, and the signature of the principal is acknowledged. The agent's signature is not necessary if the agent accepts or acts under the appointment.
- (3) If the line in front of (N) of the form under subsection (1) is initialed, an initial on the line in front of any other power does not limit the powers granted by line (N).



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