

Financial Power of Attorney – Planning to Protect Yourself and Your Autonomy

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There are Montanans who, because of their circumstances, could benefit from having a power of attorney (POA). A POA is a legal document in which one person gives another person the power to conduct certain actions on his or her behalf. The Montana legislature passed the Uniform Power of Attorney Act in 2011, which came into effect on October 1, 2011. As a result of this enactment, in Montana there are now greater protections for those who grant power to another to conduct financial transactions on their behalf.

The Uniform Power of Attorney Act addresses only financial powers of attorney. Health care powers of attorney are addressed in other sections of the law. This fact sheet is about the provisions in the Uniform Power of Attorney Act.

A POA permits a person (principal) to designate another person (agent) to act on the principal's behalf. A principal can write a POA to be in effect for a limited time, such as for a vacation, or for a lifetime. It can also be written to come into existence only if something happens in the future, such as a change in a person's cognitive ability due to age, trauma, or other conditions. A principal may revoke an agent's authority at any time by signing a document that indicates that revocation.

Powers of attorney can be effective ways for people with disabilities to protect their autonomy while still getting help with financial matters. Too often, we hear of well meaning family or friends who believe that a court established guardianship or conservatorship of a loved one with a disability is the only way to help that person handle his or her financial matters. This can place the parties in an unnecessarily adversarial relationship as family or friends must go to court and establish the individual's lack of capacity and have a court give the appointed guardian or conservator the individual's rights to make some of the most important decisions that a person can make. The guardianship or conservatorship can only be terminated or changed by going back to court.

There are many circumstances where a person with a disability is entirely capable of making many decisions and taking care of his or herself from day to day, but needs help with financial matters, such as managing income and benefits. A statutory form for a financial power of attorney is available at <http://data.opi.mt.gov/bills/mca/72/31/72-31-353.htm> .

Commonly Asked Questions:

What decisions can my agent make on my behalf?

You as the principal decide what actions your agent can take on your behalf. The statutory form in the Montana Uniform POA Act provides a list of transaction categories that can be included in the agent's general authority:

Real property;
Tangible personal property;
Stocks and bonds;
Commodities and options;
Accounts at banks and other financial institutions;
Operation of entity or business;
Insurance and annuities;
Estates, trusts, and other beneficial interests;
Claims and litigation;
Personal and family maintenance;
Benefits from government programs, civil or military service;
Retirement plans; and
Taxes

What if I want to grant my agent additional financial decision-making authority?

The Montana POA Act lists certain actions that the agent can take only if you specifically grant those powers in the POA document. Examples include:

- Creating, amending, revoking, or terminating a revocable living trust;
- Making a gift;
- Creating or changing rights of survivorship;
- Creating or changing a beneficiary designation;
- Waiving the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or
- Disclaiming property.

However, an agent is not allowed to write a will for you.

May I grant POA authority to more than one person?

You can designate one person as an agent or two or more persons to act as co-agents. Unless the POA provides otherwise, each co-agent may exercise his or her authority independently. Before you decide to give power to co-agents, you should think about the potential issues if they disagree.

Can I grant my agent power to make health care decisions on my behalf?

The provisions in the Montana Uniform Power of Attorney Act only allow an agent to make financial decisions for you. It does not allow you to give that agent the power to make health care decisions on your behalf in the same document.

However, another provision of Montana law allows you to grant a health care power of attorney to an agent. These documents would need to be separate documents. You can decide to have different agents for these powers, or the same agent for both powers if you desire.

What makes a POA valid?

You must sign the POA document or have another person who you direct to sign your name on it for you. The Montana Statutory POA form provides for the document be notarized.

A signature on a POA is presumed to be legal if the principal acknowledges his or her signature before a notary public. A photocopy or electronically transmitted copy of an original POA has the same legal effect as the original.

When is my POA effective?

A POA is effective when it is signed unless you included instructions in the document that it becomes effective at a future date, or upon the occurrence of a future event or contingency. This is referred to as a *springing power*. The POA is said to “spring into” existence upon the conditions that you list in the document. If you decided to have a springing POA, you can authorize one or more persons to determine in writing that the event or contingency listed in the POA has occurred.

For example, if you decide that you want your POA to become effective if you are not able to communicate verbally, you can include that in your POA. If you want to have your personal doctor decide whether you meet the criteria, you should include that condition in the POA too.

If you do not include what physical or mental condition would cause the POA to spring into existence, or the person that you want to have certify this condition, the law provides that it will spring into effect at your “incapacity.” This means that it will spring into effect when a physician finds that you have an “impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance.” Incapacity can also be established when “attorney or a judge indicating that the principal is missing or outside the United States and unable to return.”

How long does my POA last?

You can specify that the POA lasts for your lifetime or only for a certain period of time. However, you always have the option to revoke the POA whenever you choose. It also terminates at your death. If a district court appoints a personal representative for probate, that person assumes legal authority for settling your final financial affairs.

- The Montana Uniform POA Act also provides that a POA terminates under the following other conditions:
- If the principal becomes incapacitated and the POA document expressly provides that it is terminated by the incapacity of the principal;
- If the principal revokes the POA;
- When the POA provides that it terminates;
- When the purpose of the POA is accomplished; or,
- If the agent dies, becomes incapacitated, or resigns and the POA does not provide for a successor agent to act under the POA.

If I decide to have a POA, whom should I name as my agent?

Only you can decide who should be your agent. The person you chose needs to be someone you trust and who can fulfill the responsibilities outlined in the POA. You should avoid naming someone who has a difficult time managing his or her own money, or someone who is inexperienced in financial matters. If you have any concerns about a person’s ability to handle this responsibility, you should not name them as the agent.

What happens if friends or relatives believe that my agent/co-agents are misusing the authority that I granted in the POA?

The Montana Uniform POA Act allows friends or relatives and others to request that the district court review the actions taken by the agent/co-agents on behalf of the principal. An agent who is found liable for misuse of the principal's property is responsible for restoring it, as well as any fees and costs that were incurred.

What if one of my co-agents believes the other co-agent has done something wrong?

If a co-agent uses your property for his or her own purposes or transfers your property into his or her own name, the co-agent has breached his or her fiduciary duty to you. If the other co-agent is aware of the breach, the Montana Uniform POA Act requires the co-agent to notify you.

If you are incapacitated, the co-agent should take action to safeguard your best interest. A co-agent who fails to notify you or fails to take action is liable for the loss that could have been avoided if the co-agent had notified you or taken action.

My POA was written before the Montana Uniform POA Act became effective, is it still valid?

A POA that was signed in Montana before October 1, 2011 is still valid as long as it followed the rules of the previous Montana law. If you already have a POA document and realize your family circumstances have changed since it was signed, you may wish to have an attorney review it to assure that the provisions are appropriate for your present situation. Such legal assistance can assure that you have granted only as much power to your agent as necessary and only under specific conditions.

What happens if an entity refuses to honor a POA?

The Montana Uniform POA Act addresses the problem of a refusal to honor a POA by some financial entities such as banks, credit unions, brokerage firms, or insurance companies. The Act requires that a bank accept a notarized POA unless: (1) the entity has actual knowledge of termination of the POA, or, (2) the entity believes in good faith that the POA is not valid. However, if the entity's refusal does not fall within one of these two exceptions, the entity refusing the POA is subject to a district court order mandating acceptance. The entity is then liable for attorney's fees and court costs.

The Act specifically states that the entity may not require an additional or different form of a POA. This statute applies to all entities doing business in the state of Montana.

How do I revoke a POA?

You may revoke an agent's authority at any time by signing a document that indicates that the POA is revoked. You should destroy prior copies of POAs. Under the Montana Uniform POA Act, signing a new POA does not revoke your previous POAs, unless you state that it does in the new POA. While the Montana Statutory POA form does not provide a statement that revokes all previously signed POAs, you can add revocation statement could be added in the *Special Instructions* section.

Financial entities or any other persons with whom the agent conducted business on your behalf should be notified of the revocation. Be aware, that until the financial institutions or other entities receive evidence of the revocation of the POA, you may be legally bound by any further financial actions taken by the agent.