

Power of Attorney

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This publication explains how to give another person authority to make financial decisions for you through a legal document known as a power of attorney. Information about the Montana Uniform Power of Attorney Act that was passed by the 2011 Montana Legislature is provided. Features of the new Statutory Power of Attorney form are explained.



MontGuide

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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 document in which one person gives another person the power to conduct certain actions on his or her behalf. Examples of situations in which a written POA could be useful include:

- A single woman whose mother has Alzheimer's disease realizes she would need someone to make financial decisions if she develops the same condition.
- An adult with a cognitive or psychiatric disability who lives and works independently, but needs assistance with financial decisions.
- An elderly grandmother with macular degeneration wants her daughter to identify bills received in the mail and write checks for them because she can no longer see.
- A wife and husband who want to give each other authority to manage finances should either one should become incapacitated.

The purpose of this MontGuide is to provide information about the Montana Uniform Power of Attorney Act (effective October 1, 2011). The Act sets out provisions for the creation and use of a POA and provides safeguards that are designed to protect:

- The person who gives the power (**principal**);
- The person who is authorized to make decisions on behalf of the principal (**agent**); and,
- Those who are asked to rely on the POA authority, such as financial institutions, businesses and other entities.

The MontGuide also highlights some of the risks of a POA and explains features of two forms that were included in the Act:

- Montana Statutory Power of Attorney
- Agent's Certification as to the Validity of Power of Attorney and Agent's Authority

Statutory forms are available to download at the MSU Extension Estate Planning website under the Power of Attorney MontGuide at www.montana.edu/estateplanning.

Why have a POA?

With a POA a person (**principal**) can designate another person (**agent**) to act on the principal's behalf. The agent can sign legal documents when the principal is unavailable, when the principal prefers the convenience of having someone else sign, or when the principal becomes incapacitated.

Example A: Sara (principal), a homebound elderly mother who becomes agitated and stressed when confronted with financial decisions, wanted her daughter (agent) to have the authority to write checks to pay for groceries, medicine and other personal items for her. Sara signed a POA to give authority for her daughter to perform not only these types of actions, but also to make any other financial decisions for Sara in the future.

Example B: Jack (principal), a Montana National Guardsman who has been deployed overseas, signed a POA that gives his wife (agent) authority to sell their home. He also authorized her to redeem a certificate of deposit titled solely in his name that will reach maturity while he is out of the country. Jack's POA limits his wife's actions to those two transactions only.

A POA document can be created by using the statutory form referred to in this MontGuide or by having an attorney prepare one. The statutory form may be suitable for many Montanans. However, those with complicated finances or special circumstances may wish to consult with an attorney.

What are some of the risks of a POA?

The **major risk** for the principal is the possible **dishonesty of the agent**. Unfortunately, there have been instances of agents who proved to be untrustworthy and misused money belonging to the principal. And, in most cases the money could not be recovered.

Example C: David, a Montana National guardsman, named his father as agent in a POA before he was deployed overseas. David's pay was deposited in a savings account that his father could access under the POA. Unknown to David his father had a gambling addiction and lost all of his personal funds, as well as all of the money in David's savings account. David did not discover his father's misuse of the funds until he returned to Montana a year later. Although David could have gone to court in an attempt to recover his money, he chose not to do so because he didn't want to sue his own father. He also realized there were no assets to be recovered because his father gambled away everything.

Example D: Marlene, an elderly widow, contacted an attorney to draft a POA naming her niece, Beth, as agent. The attorney asked Marlene why she felt she needed a POA at this point in her life. He also asked Marlene about her relationship with her niece. He advised Marlene of the risk that Beth could misuse her assets. Marlene decided her risk of future incapacity outweighed the risk that her niece could misuse the POA. Six months after the POA was signed, Marlene discovered her stocks and bonds had been sold by her niece. Beth used Marlene's money for her personal use. Although Marlene could sue her niece, she would recover nothing because Beth had no assets.

Who should be named as agent in a POA?

Only the principal can decide who should serve as agent. The person needs to be someone the principal trusts to fulfill the responsibilities stated in the POA. An agent does not have to be a relative. The principal should avoid naming someone who is ill, someone who has difficulty managing money, or someone who is inexperienced in financial matters.

What are the responsibilities of an agent?

The principal should inform the agent what **authority** (often called a **power**) has been given in the POA document and be sure that the agent understands what actions can be taken. The discussion should also include a clarification of the principal's financial interests and how the potential decisions of the agent could affect those interests.

The Montana Uniform POA Act lists the agent's duties and specific authority. Additional details can be found in the Montana Code Annotated §72-31-301 through §72-31-367: http://data.opi.mt.gov/bills/mca_toc/72_31.htm.

The Montana Statutory POA act also includes a section, Important Information for Agent, describing some of the agent's duties and circumstances for termination of the agent's authority. The section also has information about potential liability for any losses caused by the agent's violations of the Montana Uniform POA Act, including any actions taken outside the authority given by the principal. The principal should ask whether the agent is willing to assume the duties and liabilities as outlined in the Montana Uniform POA Act.

What decisions can an agent make on the principal's behalf?

The principal decides what actions can be taken by the agent. The statutory form within 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;
- 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 additional decision-making authority can be given to an agent in a POA?

The Montana Uniform POA Act lists certain actions the agent can take, but only if the principal specifically states the powers in the POA. The principal should carefully consider whether the additional powers below should be given to an agent as they could significantly affect the principal's estate plan.

- Create, amend, revoke, or terminate a revocable living trust;
- Make a gift;
- Create or change rights of survivorship;
- Create or change a beneficiary designation;
- Waive the principal's right to be a beneficiary of a joint and survivor annuity; including a survivor benefit under a retirement plan; or
- Disclaim property.

However, an agent is not permitted to write a will for a principal. Nor can an agent use POA authority to directly represent the principal in court.

May authority be given to more than one person in a POA?

A principal may designate one person as an **agent** or two or more persons to act as **coagents**. Unless the POA provides otherwise, each coagent may use his or her authority independently.

Before a principal decides to give authority to coagents, consideration should be given to the potential consequences if the coagents disagree about an action to be taken on the principal's behalf. Such disagreements may generate "family feuds" that, if the district court becomes involved, result in attorney's fees and court costs.

What if an agent dies while a POA is in effect?

A principal can designate a **successor agent** to act on his or her behalf if the **original agent** resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. Unless the POA states otherwise, a successor agent has the same authority as was given to the original agent.

Example E: Mark named his son, Dan, as his **original agent** in his POA. He named Luke to serve as the **successor agent** if Dan resigns, dies, becomes incapacitated, or declines to serve. If Mark decides he no longer wants Luke to be the successor agent after Dan's death, he can name a different successor agent.

Should the same POA be used to give an agent health care decision making authority?

Whether one or two documents would be appropriate for a financial POA and health care POA depends on the principal's situation. Two documents would be preferred when naming one person to be a health care agent and a different person to be a financial agent.

However, if the principal is naming the same person as agent to serve in both capacities, the principal could use one POA. Using one document may be more efficient, while using two documents may result in more privacy.

Example F: Doug decided to name his sister, Susie as his agent under both a health care POA and a financial POA. Doug does not want the staff at his hospital to know that Susie is also his agent under his financial POA. Doug decided to have two documents. He will provide his health care POA to the hospital and his financial POA to his broker.

An example of a health care POA is available from the Montana Department of Public Health and Human Services, Senior and Long Term Care Division, available online at <http://www.dphhs.mt.gov/sltc/forms.shtml> and click on 'Power of Attorney Medical.'

What makes a POA valid?

A POA is valid if the document was signed by the principal or in the principal's presence by another individual who is directed to sign the principal's name. The Montana Statutory POA form provides for the document to be notarized.

A signature on a POA is assumed to be genuine if the principal has acknowledged the 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 a POA effective?

A POA is effective when it is signed unless the principal provided instructions within the POA 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 stated by the principal. If a POA is springing, the principal may authorize one or more persons to determine that the event or contingency stated in the POA has occurred.

Under the Montana Uniform POA Act, if a POA becomes effective upon the principal’s incapacity, but if the principal did not authorize anyone to make that determination, the POA becomes effective when:

- A physician indicates in writing that the principal is incapacitated because of an impaired ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance.
- An attorney or a judge indicates in writing that the principal is missing or outside the United States and unable to return.

How long does my POA last?

A POA lasts until the principal’s death unless there is an earlier event or condition that terminates it. The Montana Uniform POA Act provides that a POA terminates under the following additional conditions:

- If the principal becomes incapacitated and the POA document states 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;
- If the agent dies, becomes incapacitated or resigns and the POA does not name a successor agent; or,
- If a dissolution or annulment of the agent’s marriage to the principal or their separation is filed, unless the POA provides otherwise.

Does a POA agent get paid?

Unless the POA states otherwise, the Montana Uniform POA Act allows an agent to claim **reimbursement** of expenses reasonably incurred on behalf of the principal. An agent is also allowed reasonable **compensation** unless the principal states otherwise in the POA document.

If relatives believe an agent or coagents are misusing the authority stated in the POA, what should they do?

The Montana Uniform POA Act includes a provision that allows for friends, relatives and others to request a district court review of the actions taken by a principal’s agent or coagents. An agent who is found liable for breaching duties under the Act, such as misuse of the principal’s property, is responsible for restoring the value. The agent is also responsible for repayment of attorney’s fees and court costs.

Example G: Janice, a 90-year old woman who didn’t have children, named her niece as agent in a POA. Janice’s sister believed the niece had used the Aunt’s money to buy a new car for herself. Janice’s sister petitioned the court to have the niece removed as agent. The court reviewed Janice’s checking and savings accounts and ruled that the niece had breached her fiduciary duty and misused the money that was in her aunt’s checking account. The niece was ordered to not only reimburse the Aunt for the car but also for several trips that the niece had taken. The niece had covered the costs of her legal defense using her Aunt’s money, so she was ordered to repay those fees and costs as well.

If one coagent believes the other coagent has done something wrong what should be done?

If a coagent uses the principal’s property for personal gain without the principal’s permission, that coagent is said to have **breached a fiduciary duty**. If the other coagent is aware of the breach, the Montana Uniform POA Act requires the coagent to notify the principal.

If the principal is incapacitated, the coagent should take action to safeguard the principal’s best interest. A coagent who fails to notify the principal or to take appropriate action is liable for the loss that could have been avoided.

If a revocable living trust already exists, why consider having a POA?

An agent may discover that one or more of the principal’s assets were not transferred to the living trust. With appropriate authority in the POA, the agent could transfer those assets to the trust while the principal is alive. This action would avoid probate of the assets upon the principal’s death.

In addition, a POA could provide authority for an agent to handle transactions for the principal that are not covered by the trust document. Examples could include: filing individual income tax returns, pursuing claims and benefits on behalf of the principal and entering into contracts on behalf of the principal to provide needed services such as home care, housekeeping and transportation.

Why consider a POA when Montana law provides for guardianships/conservatorships?

Montana law allows for the appointment of a **guardian** and **conservator** if an individual should become incapacitated. A **guardian** has the duty of *taking care of someone* who is incapacitated. A **conservator** has the duty to *manage the financial affairs* of someone who is incapacitated.

The appointment of a **guardian** and/or **conservator** is not automatic. A hearing must be held in district court that is attended by the person petitioning to be guardian and the petitioner's attorney, the person alleged to be incapacitated and his or her attorney, and witnesses. In some families there are disagreements about who is the "most capable" and who would be the "best" guardian and/or conservator, often resulting in lengthy and costly court proceedings.

In addition to being more costly than a POA, a guardianship and conservatorship proceeding is conducted in open court, not in private. The court process may result in delays when timely decisions are needed to help a person who has diminished capacity. The district court process also can be bewildering and stressful to a person whose ability to comprehend information is impaired.

Authority for decision making rests with the court-appointed conservator or guardian. With a POA, a person could limit the decision making authority of an agent, while retaining the ability to make other decisions. With a POA a person could also avoid the continuing expenses of an inventory and annual accountings that are required of a conservator.

What happens if a relative petitions the court for a conservatorship after a POA is signed?

The Montana Statutory POA form allows a principal to nominate a conservator for consideration by the district court if a conservatorship proceeding is initiated after the principal had signed a POA. Unless there are good

reasons to disqualify the nominated conservator, the district court generally makes the appointment that is in agreement with the principal's most recent nomination in the POA.

Example H: Robert has two sons who have contrasting financial experiences. Sam, his oldest son, has wisely managed his finances. However, Joe, his younger son, has recently declared bankruptcy. Robert's attorney cautioned him that in a conservatorship hearing both sons would have an equal priority to be named as conservator. Robert definitely does not want his "bankrupted" son, Joe, to be his conservator. Therefore, the attorney recommended that Robert nominate Sam as his conservator in the POA. The district court would likely make the appointment of Sam to be consistent with Robert's most recent nomination in his POA.

What is a durable POA?

Durable means the POA remains effective even if the principal becomes incapacitated. Under the Montana Uniform POA Act, a POA is considered durable unless the document specifically states that it is terminated by the incapacity of the principal. With a durable POA an agent can handle the principal's financial affairs without the need for court action.

How is a POA revoked?

A principal may revoke an agent's authority at any time by signing a document that indicates that the POA is revoked. For example, the principal could write a one-line statement, "I hereby revoke my Power of Attorney dated January 12, 2011, naming John Jones as my agent."

After a new POA has been prepared and signed, prior POAs should be destroyed because the signing of a new POA does **not** automatically revoke a POA previously signed by the principal. An exception is allowed if the new POA states that a particular POA is revoked or that all other POAs are revoked. While the Montana Statutory POA form does **not** provide a statement that revokes all previously signed POAs, a revocation statement could be added in the *Special Instructions* section.

Financial entities and any other persons with whom the agent conducted business on behalf of the principal should be notified of the POA revocation. Until such entities and persons receive notice that a POA is revoked, a principal may still be legally bound by the agent's actions.

If a POA was signed before the Montana Uniform POA Act became effective, is it still valid?

A POA prepared and signed in Montana before October 1, 2011 is still valid provided it met the requirements of previous Montana law. Principals who already have a POA, but realize their circumstances have changed since it was signed, may wish to have an attorney review it to determine whether the POA is still adequate to meet their present and future needs.

Is a POA written in another state valid in Montana?

Yes, a POA prepared and signed in another state is valid in Montana, if at the time the POA was signed, it complied with the laws of the other state.

Is a military POA valid in Montana?

Yes, a POA prepared and signed under the requirements for a military POA is valid in Montana.

How does an agent prove POA authority?

Some entities may request proof of the agent's **current authority** to act on behalf of a principal. The Montana Uniform POA Act includes a form for this purpose: Agent's Certification as to the Validity of Power of Attorney and Agent's Authority. By signing the form the agent is certifying the truth of the facts stated in the certificate.

What if an entity refuses to honor a POA?

The Montana Uniform POA Act addresses the problem of a refusal to honor a POA by entities such as banks, credit unions, brokerage firms, or insurance companies. The Act mandates acceptance of a notarized POA when presented to an entity unless:

- The entity has actual knowledge of termination of the POA.
- The entity believes in good faith that the POA is not valid.
- The entity believes the agent does not have the authority to perform the act requested.
- The entity has knowledge that another person has made a report to the local office of the Department of Public Health and Human Services stating the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting for or with the agent, or

- The entity believes engaging in a transaction with the agent or principal in the same circumstances would be inconsistent with federal law.

However, if the refusal does not fall within one of these exceptions, the entity 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 an 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.

An entity is required to accept a POA no later than seven business days after it has been presented by the agent. If an agent is requested to provide the form, Agent's Certification as to the Validity of Power of Attorney and Agent's Authority, the entity is required to accept the POA no later than five business days after receipt of the requested document. The same five-day requirement applies if the entity seeks an opinion from legal counsel about the validity of the POA.

May an agent handle Social Security benefits under a POA?

While a principal can give authority to the agent to handle almost all finances in a POA, Social Security benefits are a different matter. If the principal receives Social Security payments, a POA is *not* accepted for the management of a beneficiary's benefits.

The Social Security Administration recognizes only a **representative payee** for handling beneficiary's funds. A representative payee's responsibilities include: using a benefits to pay for the current and foreseeable needs of the beneficiaries; saving any remaining benefits; and keeping good records of how the benefits are spent. A booklet that describes the process for being appointed as representative payee is available by calling 1-800-772-1213. The booklet can also be downloaded at www.socialsecurity.gov/pubs/10076.html.

Summary

The 2011 Montana Legislature adopted the Uniform Power of Attorney Act that sets out provisions for the creation and use of a POA and provides a statutory POA form. The Act provides safeguards for the protection of the principal, the agent, and entities who are asked to rely on the authority of the agent.

While a POA can provide a low-cost private alternative to a guardianship or conservatorship, the decision to sign one should be made after careful consideration of the **risks**. Montanans who are considering a POA should be specific about what authorities are being given and for how long. The principal will want to appoint an agent and successor agent who are knowledgeable about finances and **can be trusted to act honestly** and carry out the principal's expectations.

While the Uniform POA Act provides a statutory form, your family financial circumstances may require an agent to have more or less authority than the form provides. Legal assistance is recommended to help you develop a POA that, not only conveys your specific intentions for your family situation, but also complies with Montana law. A POA should be reviewed annually to assure that it still meets the principal's needs.

If you are asked to assume the role of agent, be aware of potential liability for any losses caused by your violations of the Montana Uniform POA Act, including any actions taken outside the authority given by the principal. You may wish to seek legal advice if there are any parts of the principal's POA and agent's duties that you do not understand.

Acknowledgements

Representatives from the following have provided a review of the content of this MontGuide and recommend its reading by all Montanans who want to learn more about the Montana Uniform Power of Attorney Act.

- AARP Montana
- Department of Public Health and Human Services:
 - Senior and Long-Term Care Division
- State Bar of Montana
 - Business, Estates, Trusts, Tax and Real Property Section: State Bar of Montana
 - Elderly Assistance Committee
- Disability Rights Montana
- Montana Bankers Association
- Montana Credit Union Network
- Montana Health Care Association
- Montana Independent Bankers Association
- Montana Uniform Law Commission
- State Law Library of Montana
- University of Montana School of Law

References:

Montana Code Annotated 2011, Title 72, Chapter 31, Part 3: Statutory Form Power of Attorney Act (§72-31-201 through §72-31-637). http://data.opi.mt.gov/bills/mca_toc/72_31.htm

Uniform Law Commission, The National Conference of Commissioners on Uniform State Laws, Downloaded on June 10, 2011. www.law.upenn.edu/bll/archives/ulc/dpoaa/2008_final.htm

Disclaimer

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