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## **Power of Attorney (Financial)**

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*This publication explains how to give another person the authority to make financial decisions for you through a legal document known as a power of attorney. It provides information about the Montana Uniform Power of Attorney Act passed by the legislature and explains the features of the new Statutory Power of Attorney form.*

**THERE ARE MONTANANS WHO, BECAUSE OF THEIR** circumstances, could benefit from having a financial Power of Attorney (POA). A POA is a document in which one person gives another person the power to conduct certain actions on their behalf. Examples of situations in which a written POA could be useful include:

- A single woman whose mother has Alzheimer's disease realizes she will need someone to make financial decisions for her if, in the future, she develops the same condition.
- An elderly grandmother with macular degeneration wants her daughter to find bills received in the mail and write checks for them because she can no longer see well enough to pay them.
- Spouses who want to give one another authority to manage finances should either one become incapacitated.
- A person with a disability has a supported decision-making plan (see below) and needs to ensure the people who help make financial decisions can access accounts.

The purpose of this MontGuide is to provide information about the Montana Uniform Power of Attorney Act (for finances). The Act sets out provisions for the creation and use of a POA for finances and provides safeguards 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 the risks of a POA and explains the features of two forms included in the Act:

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

Statutory forms are available to download at the MSU Extension Estate Planning website under the Power of Attorney (Financial) MontGuide at: [montana.edu/estateplanning/eppublications.html](http://montana.edu/estateplanning/eppublications.html).

### **Why have a financial POA?**

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

**Example:** Sara (principal), a homebound elderly woman who becomes agitated and stressed when confronted with financial decisions, wants 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 her daughter permission to perform these types of actions, and also to make any other financial decisions for Sara in the future.

**Example:** 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 who can draft a POA for specific circumstances.

### **What are the risks of a financial 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. In most cases, the money could not be recovered.

**Example:** David, a Montana National Guardsman, named his father as an 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 developed a gambling addiction. His father lost his own personal funds, as well as all 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 to recover his money, he chose not to do so because he didn't want to sue his own father. David also realized there were no assets to be recovered because his father had gambled away the money.

**Example:** Marlene, an elderly widow, contacted an attorney to draft a POA naming her niece, Beth, as the 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 informed Marlene of the risk of Beth misusing her assets. Marlene decided her risk of future incapacity outweighed the risk of her niece misusing 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 personal use. Although Marlene could sue her niece, she would recover nothing because Beth had no assets.

### **Who should be named as an agent in a financial POA?**

Only the principal can decide who should serve as the agent. The person needs to be someone the principal trusts to fulfill the responsibilities listed in the POA. An agent does not have to be a relative. The principal should avoid naming someone who is ill, someone who shows diminished capacity, 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 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 here: [montana.edu/estateplanning/powerofattorneyagentcertificationforms.pdf](http://montana.edu/estateplanning/powerofattorneyagentcertificationforms.pdf).

The Montana Uniform POA Act also includes a section, Important Information for Agent, describing 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. Consequences of any actions taken outside the authority given by the principal are also included. 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 to be included in the agent's authority:

- Real property (land and anything affixed to the land such as a house, buildings).
- Tangible personal property (items without a title showing ownership, such as jewelry, coin collection, sports equipment. etc.).
- Stocks and bonds.
- Commodities and options. (An *option* is a contract to exchange an asset like a share of stock at an agreed-upon price in the future).
- Banks, credit unions, and other financial institutions (checking and savings accounts, certificates of deposit).
- Operation of an entity or business.
- Insurance and annuities. (An *annuity* is a fixed sum of money paid to someone each year, typically for the rest of their life).

- Estates, trusts, and other beneficial interests. (A *beneficial interest* is a person's right to benefit from assets such as those held in a trust).
- Claims and litigation.
- Personal and family maintenance.
- Benefits from government programs, civil or military service.
- Retirement plans; and
- Taxes.

### **Are there any other decision-making authorities that can be given to an agent in a financial POA?**

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

- Create, amend, revoke, or end a revocable 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 (for example, disclaim an inheritance).

However, an agent cannot sign a Will for a principal. Nor can an agent use a POA authority to represent the principal in court. An attorney is needed for this purpose.

### **Can authority be granted to more than one person in a financial POA?**

A principal may choose one person as an agent or two or more people to function as co-agents. Unless the POA provides otherwise, each co-agent may use authority independently. Before a principal decides to give authority to co-agents, consideration should be given to the potential consequences if the co-agents 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 costly attorney's fees and court costs.

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

A principal can designate a successor agent to act on their 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:* Mark named his son, Dan, as his original agent in his POA. He named his other son, 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, he can name a different successor agent.

### **What makes a financial 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 financial 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 does a financial POA become 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 listed by the principal in the POA. If a POA has springing power, the principal may authorize one or more persons to decide 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 says 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 says in writing that the principal is missing or outside the United States and unable to return.

### **How long does a financial POA last?**

A POA lasts until the principal's death unless there is an earlier event or condition that ends 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 it is terminated by the incapacity of the principal.
- If the principal revokes the POA.
- When the POA provides it terminates.
- When the purpose of the POA is completed.
- 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 financial 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.

### **Can a person with memory loss complete a financial POA?**

During the early stages of Alzheimer's, a person may still understand the purpose of a financial POA. A packet "*Resources for Caregivers and Others Concerned About Memory Loss*" is available in collaboration between Montana State University Extension and the Montana Alzheimer's and Related Dementia Coalition. The packet is available to download or order at: [montana.edu/extension/alzheimers/packet/index.html](http://montana.edu/extension/alzheimers/packet/index.html), or call 406-994-3511.

### **What is a durable financial 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 says it ends at the incapacity of the principal. With a durable POA an agent can manage the principal's financial affairs without the need for court action.

### **Who can request a district court to review the financial POA agent's actions?**

The Montana Uniform Financial POA Act specifies who can make a request to the district court to review action taken by a principal's agent or co-agent:

- the principal
- the principal's guardian or conservator
- the principal's spouse
- the principal's parents, children, or other descendants
- the principal's caregiver or another person that shows sufficient interest in the principal's welfare
- a person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate
- a governmental agency having regulatory authority to protect the welfare of the principal
- and other identified individuals in the judicial relief provisions of the Uniform Power of Attorney Act.

An agent who is liable for breaching duties under the Act, such as misuse of the principal's property, is responsible for restoring value. The agent is also responsible for payment of attorney's fees and court costs.

*Example:* Janice, a 90-year-old woman, named her daughter as agent in a POA. Janice's other child, a son, believed his sister (the agent named in the POA) had used Janice's money to buy a new car for herself. Janice's son petitioned the court to have his sister removed as agent. The judge reviewed Janice's checking and savings accounts and ruled the daughter had breached her fiduciary duty and misused the money in her mother's checking account. The daughter was ordered by the court to not only reimburse her mother for the cost of the car, but also for trips the daughter had taken using her mother's credit card. The daughter had covered the costs of her legal defense using her mother's money, so she was ordered to repay those fees and costs as well.

### **If one co-agent believes the other co-agent has done something wrong, what can be done?**

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

If the principal is incapacitated, the co-agent should safeguard the principal's best interests. A co-agent who does not notify the principal about a breach of fiduciary or does not take proper action to protect the principal's finances is liable for any loss that could have been avoided.

### **If a revocable trust already exists, why bother with a financial POA?**

An agent may discover that one or more of the principal's assets were not transferred to the revocable trust. With proper 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 manage transactions for the principal that are not covered by the trust document. Examples include filing individual income tax returns, pursuing claims and benefits on behalf of the principal, and signing contracts on behalf of the principal to provide needed services such as home care, housekeeping, and transportation.

### **Why consider a financial POA when Montana law provides for the district court to appoint guardianship and/or conservatorship?**

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.

A court can grant full or limited guardianship. Unless someone specifically asks the court to grant a limited guardianship for a specific purpose, courts often grant full guardianship. Full guardianship is extremely restricting to the person under guardianship and takes away most of their fundamental rights, including choosing where to live, who to have a relationship with, and personal choices about their body and money.

There are more modern and less restrictive alternatives to guardianship, such as supported decision-making. Supported decision-making is a planning process that recognizes everyone needs help making some decisions. For example, a person could hire an accountant to help with taxes, a lawyer to help with a legal problem, or a mechanic to help with a car.

Supported decision-making asks the person with the disability in what areas they need help and who they want help from. This plan is written in a planning document called a

supported decision-making agreement. Currently in Montana, a supported decision-making agreement is for planning purposes only and is not legally binding. A power of attorney may be necessary to direct the supported decision-making agreement.

The appointment of a guardian and/or conservator is not automatic. A hearing must be held in district court. The person petitioning to be guardian, the petitioner's attorney, the person alleged to be incapacitated, and their attorney and witnesses must be in attendance. 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 financial POA, a guardianship and conservatorship proceeding is held in open court, not in private. The court process may result in delays when prompt decisions are needed to help a person with diminished capacity. The district court process can also be bewildering and stressful to a person whose ability to understand information is impaired, such as a person with some form of dementia.

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 keeping the ability to make other decisions. With a POA, a person could also avoid the continuing expenses of an inventory and an annual accounting to the district court needed from a conservator.

### **What happens if a family member petitions the court for a conservatorship after a financial 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 started after the principal has signed a POA. Unless there are good reasons to disqualify the nominated conservator, the district court makes an appointment that is in agreement with the principal's most recent nomination in the POA.

**Example:** Robert has two sons who have contrasting financial experience. Sam, his oldest son, has wisely managed his finances. However, Joe, Robert's 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 a conservator. Robert does not want his bankrupt son, Joe, to be his conservator. Therefore, the attorney recommended Robert

nominate Sam as his conservator in the POA. The district court would make the appointment of Sam to be consistent with Robert's most recent nomination in his POA, unless the district court found good cause not to do so.

### **How is a financial POA revoked?**

A principal may revoke an agent's authority at any time by signing a document that says the POA is revoked. For example, the principal could write a one-line statement, "I revoke my Power of Attorney dated January 12, 2024, 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 revoking 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, the principal may still be legally bound by the agent's actions.

### **If a financial 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 earlier 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 financial POA written in another state valid in Montana?**

Yes, a POA prepared and signed in another state is valid in Montana if it followed the laws of that state at the time of signing.

### **Is a financial 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 financial POA authority?**

Some entities may request proof of the agent's current authority to act on behalf of the 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 financial 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 the 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 asked.
- The entity has knowledge of another person making a report to the local office of the Department of Public Health and Human Services saying 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.
- 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 says 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 the agent has presented it. 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 POA validity.

## **Can Social Security benefits be managed by an agent under a financial POA?**

If the principal receives Social Security payments, once they are in the beneficiary's account and the financial institution has accepted the POA, an agent is free to help the beneficiary with the funds as part of the responsibility of managing finances for the principal.

The agent must keep records of any money spent for the principal in case the Social Security Administration (SSA) makes contact to check how the funds are being spent. An agent should always keep good records, but they are especially important for entitlement programs.

The agent under a power of attorney, however, does not have the authority to represent the principal on social security matters before the SSA. If the principal is incapable of managing their own benefits, the agent must apply to the SSA to be appointed "representative payee." Complete form SSA-11 (Request to be selected as payee). To find information about a representative payee, visit [www.ssa.gov/pubs/EN-05-10076.pdf](http://www.ssa.gov/pubs/EN-05-10076.pdf).

Other government benefit programs also require special fiduciaries. To find information about a Veterans Affairs fiduciary, visit [www.benefits.va.gov/fiduciary/](http://www.benefits.va.gov/fiduciary/).

## **Summary**

The Montana Legislature has adopted the Uniform Power of Attorney Act which sets out provisions for the creation and use of a financial Power of Attorney (financial) 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 financial POA can offer 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 financial POA should be specific about what authorities are being given to an agent and for how long. The principal will want to appoint an agent and successor agent who are knowledgeable about finances. The individuals should be trusted to act honestly and carry out the principal's expectations.

While the Uniform POA Act provides a statutory form, a family's financial circumstances may require an agent to have added or limited authority. Legal assistance can help to develop a financial POA that not only conveys specific intentions for a family situation, but also follows Montana law. A financial POA should be reviewed annually to ensure

it still meets the principal's needs.

If 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. Seek legal assistance if there are any parts of the principal's financial POA and agent's duties you do not understand.

## **Acknowledgments**

Representatives from the following have reviewed the content of this MontGuide and recommend it to all Montanans who want to learn more about the Montana Uniform Power of Attorney Act.

- AARP-Montana
- Business, Estates, Trusts, Tax and Real Property Section: State Bar of Montana
- Disability Rights Montana
- Alexander Blewett III School of Law, University of Montana

## **References**

Montana Code Annotated 2023, Title 72, Chapter 31, Part 3: Uniform Power of Attorney Act (§72-31-301 through §72-31-). [https://leg.mt.gov/bills/mca/title\\_0720/chapter\\_0310/part\\_0030/sections\\_index.html](https://leg.mt.gov/bills/mca/title_0720/chapter_0310/part_0030/sections_index.html)

## **Disclaimer**

This publication is not intended to be a substitute for legal advice. Rather, it is designed to create an awareness of the Montana Uniform Power of Attorney Act. Future changes in Montana laws cannot be predicted, and statements in this MontGuide are based solely upon laws in force on the date of publication.

