

Power of Attorney

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Issues For POA's Conforming & Not Conforming To The Montana Uniform POA Act

MCA Title 72, Chapter 31, Part 3
[Effective 10-1-2011]

Principal = grantor

Agent = attorney-in-fact



POA substantially in the code form has the meaning and effect prescribed in MCA.

Code allows use of alternate forms with different meanings.

POA Must be signed by the principal,

- or in the principal's conscious presence by an individual directed by the principal to sign the principal's name.



MUST IT BE NOTARIZED?

MCA: Signature presumed genuine if acknowledged before a notary public

BUT "presumption" of being genuine does not protect against claims and loss if POA is fraudulent



KEY QUESTION: DURABLE OR NOT?

"Durable": not terminated by the principal's incapacity.

Effective 10-1-2011: Durable unless POA expressly provides otherwise.

BUT not applicable:

- ❑ Retroactively to POA's prior to 10-1-2011, or
- ❑ If POA not intended to be interpreted under the Uniform POA Act
- ❑ If POA executed outside of Montana unless expressly intended to be interpreted under Montana law

NOTE: Many other states don't have similar laws granting automatic durability.



KEY QUESTION: EFFECTIVE IMMEDIATELY OR UPON INCAPACITY?

If no statement, then it is effective immediately.

MCA 72-31-309: if effective upon incapacity but doesn't authorize anyone to make a determination, POA becomes effective when:

- Physician (in writing): principal incapacitated - has impaired ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; OR
- Attorney or judge (in writing): the principal is missing or outside the USA and unable to return.



UNDERSTANDING DISABILITY AND DETERMINATION OF DISABILITY

Individual suffering from Alzheimer's may execute a "durable" POA, even upon advice of a lawyer.

Often not possible to determine extent of disability at the time Alzheimer's is suspected or diagnosed.



GUARDIAN AND CUSTODIAN CODES USE A DIFFERENT DEFINITION:

"INCAPACITATED PERSON"

- ❑ Impaired by mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, except minority,
- ❑ Lacks sufficient understanding or capacity to make or communicate responsible decisions
- ❑ Has impaired judgment - incapable of realizing and making a rational decision with respect to need for treatment.



TERMINATION - WHEN?

- Principal dies;
- Principal becomes incapacitated, if the POA is not durable;
- Principal formally revokes the POA;

NOTE: MCA 70-21-308 provides that a recorded POA can be relied upon if no known events of termination have occurred and a revocation has not been recorded in the same county in which the original POA was recorded or which the POA specifically identifies.



TERMINATION - WHEN?

- The date the POA states it terminates;
- The POA purpose is fully accomplished;
- A newer POA is executed containing a provision revoking all prior POA's;
- Principal revokes one agent's authority and no alternate agent is named or is able to act;
- Agent dies, becomes incapacitated, or resigns and no alternate agent is named or is able to act;

TERMINATION - WHEN?

- Action is filed for the dissolution or annulment of the marriage of agent and principal or for their legal separation UNLESS the POA otherwise provides;

Note: POA "terminated" by filing a petition generally should not be interpreted as becoming "effective" again upon dismissal.

Note: POA from other state - different rules. BUT don't rely on on different state's rules without underwriting approval. Actions by the agent still open to challenge.



TERMINATION - WHEN?

BANKRUPTCY OF THE PRINCIPAL:

Bankruptcy court has jurisdiction over the real property of the principal.

A POA is not terminated but can't be relied upon unless used to comply with an order of the court.

APPOINTMENT OF CONSERVATOR OR GUARDIAN:

A POA is not terminated unless terminated, suspended, or limited by the court.



TERMINATION - WHEN?

ACTIONS PERFORMED WITHOUT KNOWLEDGE OF PRINCIPAL'S DEATH, INCAPACITY OR POA TERMINATION:

- Termination of an agent's authority or of a POA is not effective as to the agent or another person that, without actual knowledge of the termination, acts in good faith under the POA.



AGENT'S "DUTIES" TO THE PRINCIPAL

An agent shall always act:

- ❑ Within principal's reasonable expectations, if known, or in principal's best interest
- ❑ In good faith
- ❑ Only within scope of authority granted in POA

Except as provided in the POA, an agent shall:

- ❑ Act loyally for the principal's benefit;
- ❑ Not create a conflict of interest that impairs impartiality
- ❑ Act with the care, competence, and diligence
- ❑ Preserve the principal's estate plan, if consistent with principal's best interest



AGENT'S POWERS:

General authority for real property MCA 72-31-339:

- Sell, exchange, convey [*for market value, as opposed to gift or partial gift*]
- Buy, lease, mortgage, subdivide, dedicate
- Release, assign or satisfy a mortgage [*for appropriate consideration*]
- Change the form of title [*but not change the equity of the principal or estate planning.*]

[See limitations below for transfer of property to a revocable trust created by the principal as settlor]



AGENT'S POWERS:

General authority to make a gift under MCA 72-31-352 is very limited:

- Amount not to exceed the annual dollar limits of the federal gift tax exclusion under IRC 26 U.S.C. 2503(b). *[NOTE: Only \$14,000 in 2014]*
- Can only make a gift consistent with the principal's objectives if known, or with the principal's best interest



AGENT'S POWERS - OTHER STATES:

Powers to be strictly construed - granting only powers clearly and plainly expressed in the POA or in applicable state statutes.

In other states - a grant of "all the principal's powers of absolute ownership" usually grants similar real estate powers as in Montana code, but subject to similar limitations. But that language should never be presumed to include making gifts, changing estate planning or other powers limited to a specific grant under MCA 72-31-336.

ALWAYS REVIEW FOR CONFLICTING PROVISIONS



LIMITATIONS - ACTIONS REQUIRING A SPECIFIC GRANT OF AUTHORITY

Powers requiring an express grant in the POA:

- ❑ Create, amend, revoke, or terminate an inter vivos trust;
- ❑ Make a gift; *[but subject to limitations in 72-31-352]*
- ❑ Create or change rights of survivorship;
- ❑ Create or change a beneficiary designation;
- ❑ Delegate authority granted under the POA;
- ❑ Exercise fiduciary powers that the principal has authority to delegate;
- ❑ Disclaim property.



LIMITATIONS - ACTS REQUIRING A SPECIFIC GRANT OF AUTHORITY

Unless POA otherwise provides:

If agent is not an ancestor, spouse, or descendant of the principal, the agent cannot do the following unless POA expressly grants powers:

- Grant to or create in the agent, or in anyone to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.



RELIANCE ON A POA?

MCA 72-31-324 appears to allow reliance on an executed and acknowledged POA:

- That section is meant to protect against personal liability for relying in good faith on a void, invalid, or terminated POA.
- But it does not protect against the failure of the agent's signature to be binding.



RELIANCE ON A POA?

WE ARE ENTITLED TO REQUEST:

- Agent's certification under penalty of perjury of any factual matter concerning the principal, agent, or POA;
- An English translation;
- Opinion of counsel as to any matter of law concerning the POA if the person making the request provides in writing the reason for the request.

CAUTION: *Timely review necessary - translation or opinion is provided at the principal's expense only if requested within 7 business days after the POA is presented.*



RELIANCE ON A POA?

MCA 72-31-325: Liability for refusal to accept an acknowledged POA.

- A person shall either accept a POA or request a certification, translation, or opinion of counsel within 7 business days after presentation of POA;
- If a certification, translation, or opinion of counsel was requested - shall accept the POA within 5 business days after receipt;
- May not require additional or different form of POA for authority granted in the POA.



RELIANCE ON A POA?

A person is not required to accept a POA if:

- not otherwise required to engage in a transaction with the principal;
- In good faith believes that the power is not valid or that agent does not have the authority to perform the act requested;

Generally a title company (escrow or insuring) does not fall within category of parties "required to engage in a transaction with the principal."

But that does not mean an allegation won't be raised!

DOCUMENT EXECUTION BY AN ATTORNEY-IN-FACT

[Effective 10-1-2011] authorizes co-agents to act independently unless otherwise stated.

Usual interpretations:

- *Stating "and" = requires joint execution*
- *Stating "and/or" or simply "or" = independent authority.*

Out of State POA? Depends on laws of the state under which the POA is interpreted.

An agent cannot appoint a successor unless the POA expressly grants that power.



DOCUMENT EXECUTION BY AN ATTORNEY-IN-FACT

The attorney-in-fact shall subscribe the name of the principal to it and the attorney-in-fact's own name as attorney-in-fact.

SAMPLE: Bea Yonda Hill

Bea Yonda Hill

By: Samuel Hill

Samuel Hill, her attorney-in-fact

(Use a Representative Form notary acknowledgement)

OTHER STATES: Execution requirements differ!



RECORDING POA'S

MCA 70-21-102. An unrecorded instrument is valid as between the parties and those who have notice thereof.

MCA 71-1-102. A POA to execute a mortgage must be in writing, subscribed, acknowledged or proved, certified, and recorded in like manner as POA's for grants of real property.



RECORDING POA'S

POA need not be of record before the power is exercised, provided it is established that the POA, under which the attorney-in-fact was acting, was executed and effective prior to the date the power was exercised.

If POA is of record in another county. Technically "out of the chain of title."

A certified copy can be obtained and recorded.



MILITARY POA: AN EXCEPTION TO SOME RULES

10 U.S. Code § 1044b

POA exempt from any requirement of form, substance, formality, or recording provided under the laws of a State.

- *But read it to be sure what powers are granted! There are multiple forms!!*
- A report of "missing in action" or "missing" shall NOT constitute actual knowledge or actual notice of the death nor shall it revoke the powers.



COPING WITH A LOST ORIGINAL POA

MCA 72-31-306. Except as otherwise provided by statute, a photocopy or electronically transmitted copy of original POA has the same effect as the original.

LOST POA:

- ❑ Copies of the signed POA are often available.
- ❑ Unsigned copy - usually available from the records of the attorney who prepared it and was present when it was executed.




COPING WITH A LOST ORIGINAL POA

- Can you rely on a copy of an executed POA?
- Can you rely on an affidavit from an attorney or other party with an attached copy of an unsigned POA?

Was the original intentionally destroyed to terminate it?


OPTIONS(?): Obtain from those parties who would inherit the property if the principal died while still in ownership written verification of existence of the POA and consent to use of POA in the current transaction.



USE OF POA'S IN FIDUCIARY & ENTITY SITUATIONS:

POA is normally only a personal grant of authorization to act for the principal, individually, not a grant on behalf of other parties the principal might represent as fiduciary.

Use by a fiduciary is rarely allowed unless the governing document appointing the fiduciary expressly authorizes POA use.



USE OF POA'S IN FIDUCIARY & ENTITY SITUATIONS:

TRUSTS: Sometimes. Provisions should be contained in both the trust agreement, and the POA from Trustee.

PROBATES: NO!

PARTNERSHIPS AND LLC'S: No, unless partner or member signing only on their own behalf, and not as a representative of any non-signing partners or members.

CORPORATIONS: Board of Directors appoint an authorized signer by corporate resolution or direct officer to appoint by POA.

NOTE: Powers of Attorney are commonly contained in loan servicing agreements.



SPECIAL RISKS - OLDER POA

Montana Uniform POA Act does not allow rejection of a POA based only on age!

- Was it terminated by provision in a newer POA automatically revoking all prior POA's?
- Is the transaction in accordance with the wishes of the principal or best interest of the principal?
- Does the agent benefit?

Risk can be reduced by contacting the principal.

Is other documentation signed by the principal, such as a buy-sell agreement or loan application?



CLAIMS: FRAUD, FORGERY AND EXCEEDING GRANTED AUTHORITY

BEWARE of Fraudulent POA's or Fraudulent Use:

- ❑ Forgery by outsiders as part of criminal activity or fraudulent mortgage release scheme.
- ❑ Family member forging a POA or finding and using a POA not yet delivered to them.
- ❑ Agent exceeding the granted powers.
- ❑ Agent exploiting for personal benefit.



CLAIMS: FRAUD, FORGERY AND EXCEEDING GRANTED AUTHORITY

- Consider when and how the POA was executed.
- Obtain consent from the principal.
- Ask questions about the principal, the reason the POA is being used, the principal's awareness of the transaction, and how the transaction benefits the principal or any other parties.
- Option(?): Require new documents executed in a controlled setting with a trusted notary public.



CLAIMS: FRAUD, FORGERY AND EXCEEDING GRANTED AUTHORITY

Inquiry about the principal's capacity is required if the POA is not durable or only becomes effective upon incapacity.

Review signatures!

- Shaky or uncontrolled signature might be evidence of potential incapacity.

Your Underwriter should be consulted for any suspicious situation in which the principal cannot be contacted or the validity of the POA is questionable!