

Estate & Elder Law Services
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POWER OF ATTORNEY FACT SHEET

A power of attorney is a legal document that allows you (the principal) to authorize someone else (the attorney-in-fact) to handle your financial affairs. A power of attorney can be “durable,” which means it continues to be effective even if the principal becomes incapacitated or incompetent. No power of attorney continues beyond the principal’s death.

The power of attorney is a very powerful document and should not be entered into lightly. It is very important to choose the appropriate person as attorney-in-fact. No one who is untrustworthy or on shaky grounds financially should be named attorney-in-fact.

A power of attorney does not take anything away from the principal. The principal continues to have the right to transact business as always. You should not ask a social worker, financial worker or other person who is not a licensed attorney to prepare your power of attorney. It is always advisable to seek the assistance of an attorney who is familiar with powers of attorney.

Statutory Short Form Power of Attorney versus a Common Law Power of Attorney

Minnesota Statutes create a statutory power of attorney. The form printed in the statute must be followed exactly, or it will not be the statutory short form. The advantage of the statutory short form is that it is short, easy to use and is easily recognized. Statutory penalties can be imposed if it is not recognized, so it is very likely third parties will readily accept the statutory short form. The principal can name more than one attorney-in-fact. The attorneys-in-fact may be authorized to act independently or they may be required to act jointly. Successor attorneys-in-fact can be named.

Common law powers of attorney today are referred to as anything that *isn't* the statutory short form. Although they may not be as readily recognized as the statutory short form and may be subject to the scrutiny that a statutory short form will not, the common law power of attorney has more flexibility. In addition, common law powers of attorney may be more easily accepted in other states or countries as they aren't tied to our specific Minnesota statutes. A common law power of attorney allows the principal to give different attorneys-in-fact different powers and authority within the same document, thereby eliminating the need for several powers of attorney if such a feature is desired.

How can I revoke or terminate the power of attorney?

- The principal may revoke the power of attorney by a signed writing. The revocation does not have to be notarized unless the revocation is signed on behalf of the principal by another or the signature is made by a mark.
- The revocation is not effective until the attorney-in-fact receives notice of the revocation. The principal cannot “secretly” revoke the power of attorney.
- While not required, it may be advisable to mail the revocation by certified mail requesting a return receipt or, in serious cases, to serve the revocation. It is also advisable to inform any financial institutions with which the principal and/or the attorney-in-fact may have done business of the revocation.
- The power of attorney terminates upon the death of the principal, on the expiration date of the power of attorney if one is specified, upon the commencement of proceedings for dissolution, separation or annulment if the attorney-in-fact is the spouse, or on the incapacity or incompetence of the principal if the power of attorney is not durable.

Common questions.

- *Where should I keep my originals?* The originals should be kept in a safe place, preferably under the control of the principal but with access available to the attorney-in-fact when needed. If the client so desires, the attorney may keep an original in the client file in case the other originals are lost.
- *How does the attorney-in-fact sign using the power of attorney?*

John Jones, by Jane Smith, his attorney-in-fact *or*

Jane Smith, attorney-in-fact for John Jones *or*

Jane Smith, POA for John Jones

The last example is a “shortcut” that is not technically correct, but it is easily recognized.

- *My insurance company says my power of attorney is too old. Why didn't you make it so it would last forever?* The power of attorney may have been perfectly drafted and executed under Minnesota law. However, some entities or institutions just don't “get it.” Usually it is easier to give them what they want than to try to argue that you are right and they are wrong. You can have your attorney “certify” that the power of attorney is still in effect or provide whatever other documentation the institution thinks it needs.
- *Why should I make a power of attorney?* If you do not create a power of attorney and lose the ability to handle finances, the court may appoint a conservator. This is an expensive and time-consuming process, but it is also a safe alternative as the conservator is answerable to the court. Not everyone should have power of attorney nor does everyone need it. If there are no appropriate persons to act as attorney-in-fact or if you are uncomfortable giving such power, then a power of attorney is not appropriate.
- *I have no close relatives. Who will be my attorney-in-fact?* You may choose to work with a professional fiduciary. Choose carefully and pick a person with a good reputation and insurance. The professional fiduciary may insist that he/she be bonded which is an added expense but also a good safeguard.
- *Can I create a power of attorney if I am forgetful?* A person who is a competent adult may designate another person or an authorized corporation as attorney-in-fact. To be competent, one must have enough mental capacity to understand to a reasonable extent the nature and effect of signing a power of attorney. It doesn't matter if the principal is “forgetful” or later doesn't remember signing the power of attorney. It is a judgment call particular to each person as to whether the person has capacity to sign a power of attorney. For example, a person who will sign a power of attorney for anyone who asks probably does not have the capacity, even if the person understands what s/he is signing at the moment.

CONTACT OUR OFFICE AT 612-676-6300 TO PREPARE A POWER OF ATTORNEY

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