

Minnesota Powers of Attorney; General Requirements

A Minnesota power of attorney is a document which is used to create a legal relationship whereby one party - known as a principal, authorizes another party - known as an “attorney-in-fact”, to act on behalf of the principal in regards to certain specified legal matters.

Delegation of Parental Rights

Minnesota powers of attorney can also be utilized to delegate parental rights over a minor child to another person for a limited period of time pursuant to a different, specialized form.

[see link to Delegation of Parental rights]

Authority for Creation

Minnesota powers of attorney can be created either pursuant to:

- ◆ **statutory authority** - including that which authorizes the execution of a Minnesota Statutory Short Form Power of Attorney,
- or
- ◆ **nonstatutory authority** - historical “*common-law*”.

In addition, powers of attorney which are validly created pursuant to the laws of another state or country may also be recognizable in Minnesota - for some purposes.

Nature of Power of Attorney

Minnesota powers of attorney can be either:

- ◆ “*durable*” - and will continue to be effective even if the principal becomes incapacitated,
- or
- ◆ “*nondurable*”, which will terminate upon the incapacity of the principal.

“Durable” Minnesota Powers of Attorney

A Minnesota power of attorney is “**durable**” if it contains a provision similar to the following:

"This power of attorney shall not be affected by incapacity or incompetence of the principal".

However, the power of attorney document may use the term “*disability*” in lieu of *incapacity or incompetence* in such a statement and still be a durable Minnesota power of attorney.

Who is Authorized to Designate a Minnesota Attorney-in-Fact?

Any **competent** adult may, as principal, designate:

- another **person**,
- or
- an **authorized corporation**,

as the principal's **attorney-in-fact**, pursuant to a **written power of attorney**.

Surprisingly, the Minnesota power of attorney statutes do not define the term “**competent**”, although an alternate statutory term - “**incapacity**” - refers to a person’s state of being during which legal grounds exist for the appointment of a guardian or conservator for such person.

Legal entities, such as corporations, partnerships, limited liability companies, or trusts, can also create a Minnesota power of attorney.

Execution Requirements for a Minnesota Power of Attorney

A Minnesota power of attorney is validly executed when it is **dated and signed by** the principal.

However, if the principal is physically unable to sign the power of attorney document, it can be signed:

- by another person **on the principal’s behalf**,
- or
- by means of the principal **making a mark** on the document in lieu of a signature,

providing that such signature or mark is properly acknowledged before a notary public.

Physical Limitation Accommodations

Minnesota has statutory provisions addressing the accommodation of a principal’s physical limitations with respect to the execution of a Minnesota Power of Attorney.

A Minnesota licensed attorney can properly advise a principal as to how they can execute a Minnesota Power of Attorney notwithstanding the principal’s physical limitations.

Presumption of the Valid Execution of a Minnesota Power of Attorney

A Minnesota Power of Attorney is presumed to be valid if it is dated, and purports to be signed by the principal named therein.

Acknowledgment of the Principal's Signature Before a Notary Public

Under the Minnesota power of attorney statutes, the principal's signature need not be acknowledged before a notary public.

However, third parties may require it, and with respect to a Minnesota Statutory Short Form Power of Attorney, the form will look incomplete without such an acknowledgment.

An acknowledgment of the principal's signature will be required in order for the Minnesota power of attorney document to be recorded to support a transfer of real estate by the attorney-in-fact.

Does Minnesota Have a "Standard" Form Power of Attorney?

Minnesota has no single "standard" power of attorney document, although it does have a permitted statutory power of attorney form - known as a Minnesota Statutory Short Form Power of Attorney - which may be used by an adult principal to appoint one or more attorneys-in-fact.

However, the Minnesota Statutory Short Form Power of Attorney document has numerous performance options which should be reviewed together with legal counsel.

A new Minnesota Statutory Short Form Power of Attorney has been adopted by the legislature for use after January 1, 2014.

Minnesota Common Law Powers of Attorney

The Minnesota Statutory Short Form Power of Attorney is not the only power of attorney document which can be validly created in Minnesota.

Powers of attorney created pursuant to nonstatutory "common-law" can also be effective in Minnesota.

However, the effectiveness of a Minnesota common law power of attorney may be limited if a third-party will not recognize its validity.

When Does a Minnesota "Standard" Power of Attorney Become Effective?

A Minnesota Statutory Short Form Power of Attorney becomes effective when it has been properly executed, and may require that it be acknowledged by the principal before a notary public.

However, if the power of attorney document is not delivered to the attorney-in-fact, the attorney-in-fact may be unable to take action pursuant to the power of attorney for lack of evidence of the attorney-in-fact's authority.

When Does a Minnesota Common-Law Power of Attorney Become Effective?

The effectiveness in Minnesota of a power of attorney document created pursuant to nonstatutory “common-law” can be conditioned upon the future incapacity of the principal, if the document contains a provision similar to the following:

"This power of attorney shall become effective upon the incapacity or incompetence of the principal"

Such a designation creates what is known as a “*springing power of attorney*”, because the authority of the attorney-in-fact “springs” into existence upon the satisfaction of such a condition.

Does a Minnesota Power of Attorney Get Recorded Anywhere?

Except with respect to real estate transactions, a Minnesota Power of Attorney document does not need to be recorded anywhere in order to be effective.

However, a certified copy of a Minnesota Power of Attorney which has been recorded in the office of a Minnesota County Recorder or Registrar of Titles has the same force and effect as a Minnesota Power of Attorney bearing the original signature of the principal.

Authority Held by an Attorney-in-Fact

Any **action taken by an attorney-in-fact** pursuant to a Minnesota power of attorney document binds not only the principal, but also:

- ◆ the principal's **heirs and assigns**,
- and
- ◆ the **personal representative** of the principal's estate,

to the same extent as if the same action had been taken by the principal - unless the principal has had a Guardian or Conservator appointed.

Multiple Attorneys-in-Fact

A Minnesota power of attorney document can authorize more than one attorney-in-fact to act on behalf of a principal, either jointly, or individually.

Unless the power of attorney document provides otherwise, each attorney-in-fact acting pursuant to the authority of a Minnesota power of attorney can bind the principal, whether or not any other attorneys-in-fact consent to the action.

What if One Attorney-in-Fact Does Not Agree with Actions Taken by Another Attorney-in-Fact on Behalf of a Principal?

When two or more attorneys-in-fact are authorized to act on behalf of a principal pursuant to a Minnesota power of attorney document, an attorney-in-fact who does not join with, or consent to, the action of one or more other attorneys-in-fact **is not liable for such action**.

In addition, the **failure of an attorney-in-fact to object** to the action of one or more other attorneys-in-fact **does not** constitute a consent to such action.

Death, Resignation, or Incapacity of an Attorney-in-Fact

Upon the death, incapacity, or resignation of one of several attorneys-in-fact appointed to act for a principal pursuant to a Minnesota Statutory Short Form Power of Attorney, the surviving or remaining attorneys-in-fact will continue to have authority to act for the principal.

Such surviving or remaining attorneys-in-fact will be authorized to execute an affidavit setting forth facts regarding the death, incompetency, or resignation of any of the other attorneys-in-fact who had been appointed to act for the principal.

Any such affidavit will be **conclusive proof** with respect to the occurrence of such facts as to any party relying on such an affidavit.

An attorney-in-fact:

- who is named in a Minnesota power of attorney document to succeed to an attorney-in-fact who has died, resigned, or is otherwise unable to serve,
- or
- who was named as a co-attorney-in-fact,

will not be liable for any action taken by any predecessor attorney-in-fact.

Term of a Minnesota Power of Attorney Document

Minnesota powers of attorney can have either an indefinite term, or a specified term of some duration.

Limited Duration

A Minnesota power attorney document can have a limited duration.

However, in order to be effective, any expiration date in a Minnesota power attorney document must be stated in terms of a specific month, day, and year - other than a temporary delegation of

parental authority, which pursuant to Minnesota statutory authority, cannot extend for more than one year.

In all events, the authority of an attorney-in-fact to act pursuant to a Minnesota power of attorney document will terminate upon the death of the principal.

When Does the Authority Granted by a Minnesota Power of Attorney Terminate?

The authority of an attorney-in-fact to act on behalf of a principal which was granted by a durable Minnesota power of attorney document will terminate upon the earliest to occur of:

- ◆ its **revocation** by the principal,
- ◆ the **death of the principal**,
- ◆ the **expiration of a termination date** properly stated in the power of attorney,
or,
- ◆ in the case of a power of attorney in which the **spouse of the principal was appointed as the attorney-in-fact**, upon the commencement of proceedings for dissolution, separation, or annulment of the principal's marriage.

In addition to the above terminating events, a non-durable Minnesota power of attorney will also terminate upon the earlier incapacity or incompetence of the principal.

When is a Minnesota Principal Determined to Have Died?

For purposes of a Minnesota power attorney document, a principal is presumed to be alive until either:

- **actual proof of death** can be obtained - pursuant to a death certificate,
or
- there is a **legal adjudication of the principal's death** by a court of competent jurisdiction.

Third Party Liability for Refusing to Accept the Authority Granted to an Attorney-in-Fact

Any third party who refuses to accept the authority of an attorney-in-fact appointed pursuant to a Minnesota Statutory Short Form Power of Attorney which:

- (1) **contains a specimen signature** of the attorney-in-fact authorized to act; and
- (2) **with respect to a power of attorney document executed on or after January 1, 2014,**

contains an acknowledgment that the attorney-in-fact has read and understood the notice to the attorney-in-fact required under M.S. Section 523.23; and

- (3) **when applicable**, is accompanied by legally sufficient affidavits that identify the non-revocation and continuing effect of the power of attorney;

is liable to the principal and to the principal's heirs, assigns, and representative of the estate of the principal in the same manner as the third party would have been liable had such a party refused to accept the authority of the principal to act on the principal's own behalf, **unless**:

- (1) the party has **actual notice of the revocation** of the power of attorney prior to the exercise of the power,
- (2) the duration of the power of attorney stated in the power of attorney document has expired,
- (3) **the party has actual knowledge of the death of the principal**, or
- (4) if the power of attorney is not a durable power of attorney, the party has actual notice of a judicial determination that the principal is legally incompetent.

(i) Minnesota Statutory Short Form Power of Attorney Signed After January 1, 2014

With respect to a Minnesota Statutory Short Form Power of Attorney which is signed after January 1, 2014, the attorney-in-fact must have signed a written acknowledgment with respect to receiving notice of his or her duties and obligations under the Power of Attorney in order for the principal to receive the benefit of the enforcement protections afforded a Minnesota Statutory Short Form Power of Attorney.

(ii) Common Law Powers of Attorney

A third party who refuses to accept the validity of a **nonstatutory common-law form** of a Minnesota power of attorney does not have any **statutory liability** to the principal's heirs, assigns, and representative of the estate of the principal by refusing to recognize the validity of such a power of attorney - although perhaps some liability may be imposed upon the third party pursuant to non-statutory common law.

Duties of an Attorney-in-Fact

An attorney-in-fact appointed pursuant to a Minnesota power of attorney document has **no duty**:

- to exercise any power conferred upon the attorney-in-fact,
- or
- to act in any capacity on behalf of a principal in any transaction.

However, if the attorney-in-fact **does exercise** any such power or act on behalf of the principal, the attorney-in-fact shall:

- exercise the power in the same manner as an ordinarily prudent person of discretion and intelligence would exercise in the management of the person's own affairs,
- have the interests of the principal utmost in mind,
and
- **keep complete records of all transactions** entered into by the attorney-in-fact on behalf of such principal.

Do-it-Yourself Minnesota Powers of Attorney

While “*fill in the blank*” Minnesota Statutory Short Form Power of Attorney or common law power of attorney forms can either be downloaded, or otherwise obtained from many sources - including perhaps *LegalDoom.com* :) - the preparation of such documents is best left to licensed attorneys, who can not only *fill in the blanks* properly, but also provide appropriate counsel regarding the legal effect, and perhaps the tax consequences, of the execution and delivery of the Power of Attorney document.

There is much that can go wrong when an executed Minnesota Power of Attorney document:

- ♦ grants improper powers to certain attorneys-in-fact,
or
- ♦ was drafted without the benefit of certain available statutory protections.

What Could Go Wrong - the Form is so Simple?

While the Minnesota Power of Attorney document forms may appear to be simple and self explanatory, preparing one is not a job for the do-it-yourselfer.

(i) Legal Description

If a Minnesota Statutory Short Form Power of Attorney uses a street address instead of a legal description with respect to a purported limitation on the authority of the attorney-in-fact to exercise powers of the principal over real estate, such a limitation makes the document ineffective for all real estate transactions.

It's also possible that if an improper or incomplete legal description was listed on the Minnesota Statutory Short Form Power of Attorney, the document may also be ineffective for all real estate transactions.

Since real property legal description mistakes can reasonably be anticipated to be made by someone who is not a licensed Minnesota attorney, it is always prudent, and usually cost

effective, to have a Minnesota Statutory Short Form Power of Attorney prepared by a licensed Minnesota attorney.

(ii) Recording

If a Minnesota Statutory Short Form Power of Attorney document is not properly acknowledged, or fails to include a draftsman's statement, it will not be recordable in the county real estate records, and thus will not allow a deed to be executed by an attorney-in-fact on behalf of the principal.

(iii) Capacity

If a Minnesota Statutory Short Form Power of Attorney document does not specify that it is to continue in event of the incapacity of the principal, its effectiveness is greatly reduced, and may not be usable just when it is needed most.

(iv) Necessity of a Conservator

If a Minnesota Power of Attorney document is ineffective for a proposed real estate transaction, and the principal no longer has capacity to execute a deed to the proposed transferee, a Conservatorship proceeding may be necessary in order to transfer the real estate - which would involve a sizable expense.

I have been involved in a Conservatorship proceeding where a purported Minnesota Statutory Short Form Power of Attorney document:

- ◆ was improperly prepared by someone other than a licensed attorney,
and
- ◆ thus not effective to allow the attorney-in-fact to convey real property belonging to the principal to purchaser.

It would have been much less expensive had the principal hired an attorney to properly prepare a Minnesota Statutory Short Form Power of Attorney.

(v) Accountability by the Attorney-in-fact

The issue of accountability by the attorney-in-fact to the principal, and perhaps to other family members as well, is a subject which should be properly addressed in a Minnesota Power of Attorney document by the principal - after discussions with a Minnesota licensed attorney.

(vi) Criminal Behavior

In addition to drafting or execution issues which might make a Minnesota Power of Attorney document ineffective, Minnesota County attorneys have had to prosecute several attorneys-in-

fact who misused their authority under a Minnesota Power of Attorney document for their own improper financial benefit.

Conclusion

Please contact Minnesota Attorney Gary C. Dahle for assistance with the preparation, or enforcement, of any Minnesota Power of Attorney document.

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Gary C. Dahle

Attorney at Law

2704 County Road 10
Mounds View, MN 55112

Phone: 763-780-8390

Fax: 763-780-1735

Gary@dahlelaw.com

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