

Minnesota Powers of Attorney

A Minnesota power of attorney is a document which is used to create a legal relationship where 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.

Authority for Creation

Minnesota powers of attorney can be created either pursuant to:

- ◆ statutory authority,
- or
- ◆ nonstatutory historical “common-law”.

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

Nature of Power of Attorney

Minnesota powers of attorney can be either:

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

Term of Power of Attorney

Minnesota powers of attorney can have either:

- ◆ an indefinite term,
- or
- ◆ a specified term of some duration.

Terminable on Death

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

Who is Authorized to Create a Minnesota Power of Attorney?

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**.

The Minnesota power of attorney statutes do not define the term “*competent*”, although judicial decisions have found a principal to be competent when he had sufficient mental capacity to understand the nature and effect of his signature on the document.

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, and limited liability companies can also create a Minnesota power of attorney.

What are the 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,
and
- in certain circumstances, the principal’s signature is **acknowledged before a notary public**.

What are the Signature Requirements for a Minnesota Power of Attorney?

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

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

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

Does Minnesota Have a “Standard” Form Power of Attorney?

Minnesota has a statutorily prescribed power of attorney form - called 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 nevertheless has a number of performance options that should be reviewed together with legal counsel.

Is the “Standard” Form the Exclusive Means of Creating a Minnesota Power of Attorney?

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

Powers of attorney created pursuant to nonstatutory “common-law” can also be effective in Minnesota, under some circumstances.

How Does a Minnesota Power of Attorney become “durable”?

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".

Alternatively, 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.

When Does a Minnesota “Standard” Power of Attorney Become Effective?

The Minnesota Statutory Short Form Power of Attorney becomes effective immediately when it has been properly executed and acknowledged by a 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 created pursuant to nonstatutory “common-law” can be conditioned upon the future incapacity of the principal, if the form 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.

What is the Extent of the Authority Held by an Attorney-in-Fact Pursuant to a Minnesota Power of Attorney?

Any **action taken by an attorney-in-fact** pursuant to a Minnesota power of attorney 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.

Can a Minnesota Power of Attorney Authorize Multiple Attorneys-in-Fact to Act for the Principal?

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

Unless the power of attorney 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, 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.

What Happens When One of Several Attorneys-in-Fact Authorized to Act for a Principal Dies, Resigns, or Becomes Incapacitated?

Upon the death, incompetency, or resignation of one of several attorneys-in-fact appointed to act for a principal pursuant to the statutorily prescribed form of Minnesota 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 to succeed to an attorney-in-fact who has died, resigned, or is otherwise unable to serve, will not be liable for any action taken by any predecessor attorney-in-fact.

Can a Minnesota Power of Attorney Be Limited in its Duration?

A Minnesota power attorney can have a limited duration.

However, in order to be effective, any expiration date in a Minnesota power attorney 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.

When Does a Minnesota Power of Attorney Terminate?

A durable Minnesota power of attorney 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 Presumed to Have Died?

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

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

How Does a Principal Revoke a Minnesota Power of Attorney?

A previously executed Minnesota power of attorney may be revoked only by a **written instrument of revocation** which is either:

- **actually signed by the principal**,

- **signed on behalf of the principal by another person**, which signature is acknowledged by the principal before a notary public,
or
- **signed by the principal by making a mark in lieu of a signature**, which mark is acknowledged by the principal before a notary public,
and
- **delivered to the attorney-in-fact**, or in some cases, **recorded in the County Records**.

A duly appointed conservator or guardian of the principal may also revoke, suspend, or terminate all or any part of a power of attorney to the same extent that the principal would have had the power to do so if the principal were not incapacitated or incompetent.

When is a Revocation of a Minnesota Power of Attorney Effective?

Revocation of a Minnesota power of attorney is not effective as to any party until such party has **actual notice** of the revocation - which means that a written instrument of revocation has been received by such party, or in some cases, recorded in the County Records.

How Does an Attorney-in-Fact Provide Evidence to a Third Party that a Minnesota Power of Attorney Has Not Been Revoked or Terminated When Real Property is Not Involved?

In the exercise of any power granted pursuant to a Minnesota power of attorney - other than with respect to a transaction relating to real property:

- ♦ a signature made by an attorney-in-fact similar to the following:
 - ♦ "***attorney-in-fact for*** (Name of the principal)"
or
 - ♦ "(Name of the principal) ***by*** (Name of the attorney-in-fact) ***the principal's attorney-in-fact***"
or
- ♦ any comparable written disclosure of the **principal and attorney-in-fact relationship**, **constitutes an attestation** by the attorney-in-fact that the attorney-in-fact did not have, at the time of such signing or comparable written disclosure:
 - ♦ **actual knowledge of the termination of the power of attorney**,
 - ♦ **by the death of the principal**, or

- ◆ **where the spouse of the principal** is the attorney-in-fact, by the commencement of proceedings for dissolution, separation, or annulment of the principal's marriage, or
 - ◆ **if the power is one which terminates upon incapacity or incompetence of the principal**, actual knowledge of the principal's incapacity or incompetence,
- or
- ◆ **actual notice of the revocation of the power of attorney**,

and is **conclusive proof** as to any party relying on the attestation that the power of attorney had not terminated or been revoked at the time that such signature or comparable written disclosure was made by the attorney-in-fact on behalf of the principal, except as to any party who has:

- ◆ **actual knowledge** that the power of attorney **had terminated** prior to such signature or comparable written disclosure,
- or
- ◆ actual notice of **the revocation** of the power of attorney.

How Does an Attorney-in-Fact Provide Evidence that a Minnesota Power of Attorney Has Not Been Revoked With Respect To a Real Property Transaction?

An affidavit by the attorney-in-fact in support of a real property transaction entered into or consummated by the attorney-in-fact on behalf of a principal is **conclusive proof**:

- ◆ that the power of attorney **has not** terminated or been revoked,
and
- ◆ that the authority granted to the attorney-in-fact pursuant to the power of attorney **extended to the real property described in the power of attorney**:
 - as of the time of the exercise of the power,
 - as to any party relying on the affidavit, except any party dealing directly with the attorney-in-fact who has:
 - **actual knowledge** that the power of attorney **had terminated** prior to the exercise of the power, or
 - **actual notice** of the revocation of the **power of attorney**, or
 - actual knowledge that the powers do not extend to the real property legally described in the power of attorney.

Can a Third Party Who Refuses to Accept the Authority Granted to an Attorney-in-Fact By a Principal be Subject to Liability for any Such Refusal?

Any third party who refuses to recognize the validity of a Minnesota Statutory Short Form Power of Attorney which:

- (1) **contains a specimen signature** of the attorney-in-fact authorized to act,

and
- (2) when applicable, is accompanied by a legally sufficient affidavit that identifies the non-revocation and continuing effect of the power of attorney,

With respect to a transaction document which is signed by a person as “attorney in fact” for an identified principal, a third party **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 third party refused to accept the authority of the principal to act on the principal’s own behalf, **unless**:

- (1) the third party had **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 itself had expired,
 - (3) **the third party had actual knowledge of the death of the principal**,
- or
- (4) if the power of attorney is not a durable power of attorney, the third party had actual notice of a judicial determination that the principal is legally incompetent.

However, 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 some liability may be imposed upon the third party pursuant to non-statutory common law.

What are the Duties of an Attorney-in-Fact Appointed Pursuant to a Minnesota Power of Attorney?

With the possible exception of a duty by an attorney in fact to use the financial resources of a vulnerable adult principal to provide food, clothing, shelter, health care, therapy, or supervision to such principal, an attorney-in-fact appointed pursuant to a Minnesota power of attorney has **no statutory 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.

What Liability Does the Attorney-in-Fact Have for Misconduct While Acting Pursuant to a Power of Attorney?

An attorney-in-fact is **personally liable to** any person, including a principal, **who is injured** by:

- an action taken by the attorney-in-fact **in bad faith** under the power of attorney,
or
- the attorney-in-fact's **failure to account when the attorney-in-fact has a statutory duty to account.**

In addition, an attorney-in-fact who:

- ♦ knowingly **executes a false affidavit** regarding the attorney-in-fact's authority under a power of attorney,
or
- ♦ signs a document on behalf of a principal **knowing that the power of attorney has either been revoked, or has terminated,**

is liable for treble the amount of damages suffered by the principal.

In addition to civil liability, an attorney-in-fact may face criminal charges if any of the principal's assets are misappropriated.

When Does an Attorney-in-Fact Acting Pursuant to a Minnesota Power of Attorney Have a Duty to Render an Accounting?

An attorney-in-fact appointed pursuant to a Minnesota power of attorney has no duty to render an accounting of transactions entered into by the attorney-in-fact on behalf of the principal unless:

- (1) **requested to do so at any time by the principal;**
- (2) **the instrument conferring the power of attorney:**

- requires that the attorney-in-fact to render accountings,
and
 - specifies to whom the accounting must be delivered;
- or
- (3) **the attorney-in-fact has reimbursed the attorney-in-fact for any expenditure** the attorney-in-fact has made on behalf of the principal.

What Constitutes an “Accounting” by an Attorney-in-Fact Appointed Pursuant to a Minnesota Power of Attorney?

A written statement that gives reasonable notice of all transactions entered into by the attorney-in-fact on behalf of the principal constitutes an adequate accounting.

Who Has the Right to Examine and Copy the Records of the Transactions Entered Into By an Attorney-in-Fact Appointed Pursuant to a Minnesota Power of Attorney?

In addition to the principal, the following persons are entitled to **examine and copy the records** of an attorney-in-fact appointed pursuant to a Minnesota power of attorney:

- a person designated by the principal in the document creating the power of attorney as the recipient of any required accountings,
- the **guardian or conservator of the estate** of the principal while the principal is living,
and
- the **personal representative of the estate** of the principal, after the principal’s death.

What Are the Benefits of Using a Minnesota Statutory Short Form Power of Attorney Over a Common-Law Power of Attorney?

The Minnesota Statutory Short Form Power of Attorney has the benefit of being:

- somewhat standard,
and
- easily recognizable by Minnesota-based third parties.

In addition, there are statutory liabilities imposed upon third-parties who refuse to recognize the validity of the authority created by the Minnesota Statutory Short Form Power of Attorney.

Because it is relatively short, and somewhat standard, a Minnesota Statutory Short Form Power of Attorney is generally less costly to prepare than a common-law power of attorney.

What Are the Benefits of Using a Common-Law Power of Attorney Form Over a Minnesota Statutory Short Form Power of Attorney?

A common-law power of attorney form has the benefit of being more flexible than the Minnesota Statutory Short Form Power of Attorney.

For example, a common-law power of attorney form may become effective only upon the incapacity of the principal, whereas a Minnesota Statutory Short Form Power of Attorney will become effective immediately upon its execution by the principal.

In addition, a common-law power of attorney form can provide the following advantages not available with a Minnesota Statutory Short Form Power of Attorney:

A. Gifting

Under the Minnesota Statutory Short Form Power of Attorney, an attorney-in-fact is only authorized to make gifts on behalf of the principal to:

- ◆ certain charities,
- ◆ the principal's spouse, children and other descendants,
- ◆ the spouse of any child or other descendant,
and
- ◆ if specifically authorized, to the attorney-in-fact,

for purposes which are in the **best interests of the principal**.

The statute however, specifically limits the attorney-in-fact's power to make gifts:

- ◆ to the attorney-in-fact,
and
- ◆ to individuals the attorney-in-fact is legally obligated to support,

to those transfers which do not, in the aggregate, exceed \$10,000 per recipient in any one calendar year.

In contrast, a common law power of attorney is not subject to any such \$10,000 annual gift limitation.

There can be several significant tax and nontax advantages to the increased gifting flexibility permitted under a common law power of attorney.

B. Tailored restrictions.

Within each statutory category of authority granted to an attorney-in-fact pursuant to a Minnesota Statutory Short Form Power of Attorney, the scope of the individual powers cannot be limited - other than with respect to certain real estate transactions.

For example, if a principal authorizes an attorney-in-fact appointed pursuant to a Minnesota Statutory Short Form Power of Attorney to engage in banking transactions, the attorney-in-fact's authority may not be limited to only one specific account.

In contrast, the authority granted to an attorney-in-fact appointed pursuant to a common law power of attorney could be restricted to less than all of the principal's bank accounts.

C. Self-contained provisions.

A common-law power of attorney is self-contained in the sense that it need not incorporate by reference any statutory provisions of authority for the attorney-in-fact.

Therefore, third parties who need to determine the scope of authority for an attorney-in-fact would not have to look beyond the document in front of them for such authority.

This can be particularly helpful to out-of-state entities who don't have access to Minnesota legal counsel and/or statutory sources.

In contrast, a Minnesota Statutory Short Form Power of Attorney incorporates by reference numerous provisions found in Minnesota Statutes, Chapter 523.

D. Disparate Attorney-in-Fact Authority.

A common law power of attorney allows the principal to nominate more than one attorney-in-fact, or successor attorney(s)-in-fact, each of whom may have different powers and authority.

For example, a common law power of attorney may allow one attorney-in-fact to make gifts to the attorney-in-fact, but prohibit a successor attorney-in-fact from making such gifts.

In contrast, a Minnesota Statutory Short Form Power of Attorney does not allow the principal:

- ♦ to grant self-dealing authority to only one of several attorneys-in-fact,
or
- ♦ to require an accounting of only one particular attorney-in-fact.

F. Compensation of the attorney-in-fact.

The Minnesota Statutory Short Form Power of Attorney contains no explicit provisions regarding the compensation of the attorney-in-fact.

However, a common-law power attorney can identify either a minimum, or a maximum, compensation to be paid to the attorney-in-fact for serving in such capacity.

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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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