MONTANA LEGAL GUIDE TO LONG-TERM CARE PLANNING

2015 - 2017

RESOURCES

Internet Resources	Montana only: www.montanabar.org; www.montanalawhelp.org; Montana Law Libraries: (State) www.lawlibrary.mt.gov ; (U of M) www.umt.edu/law/library/ ; Nationwide: www.findlaw.com; www.freeadvice.com; www.findlegalhelp.org; www.nolo.com; www.law.cornell.edu/topics/
American Civil Liberties Union (ACLU)	1-406-443-8590 – The office does not routinely assist individuals, but focuses resources on cases affecting groups. www.aclumontana.org
Citizens Advocate Office	1-800-332-2272 – Helps with problems or complaints related to state agencies. http://citizensadvocate@mt.gov
Montana Consumer Protection	http://www.dojmt.gov/consumer; 1-800-481-6896 — Assists with consumer problems relating to complaints with vehicles, telemarketers, etc. and educates consumers about their rights.
Crime Victim Compensation Program (CVC)	1-406-444-3653 or 1-800-498-6455 http://dojmt.gov/victims/crime-victim-compensation; CVC provides direct services to victims and processes claims for compensation for innocent victims injured or killed as a result of
Domestic Violence	1-800-666-6899 – MLSA Domestic Violence Intake provides legal assistance to victims of domestic violence.
Aging Services Legal Division	Legal Services Developer at 1-800-332-2272 Legal Resources: Legal Guide to Long Term Care Planning; Power of Attorney Made Easy; Advance Directive Made Easy; Consumer Debt Made Less Difficult; Tenant Rights
Adult Protective Services	1-800-551-3191; http://dphhs.mt.gov/sltc/services/APS protects older persons from abuse and neglect
Montana Human Rights Bureau	1-800-542-0807; http://erd.dli.mt.gov/human-rights/human-rights Receives and investigates complaints of discrimination.
Landlord-Tenant Issues/Housing & Discrimination Resources	See internet site for information on all housing issues: www.montanafairhousing.org

Disability Rights Montana	1-800-245-4743 - Provides information and referral services, representation by professional advocates and training and publications on the rights of people with disabilities. http://disabilityrightsmt.org; 406-449-2344 Voice/TDD
Montana Attorney General's Office	215 N. Sanders, PO Box 201401, Helena MT 59620-1401 1-406-444-2026
Office of Disciplinary Counsel	1-406-442-1648 ; www.montanaodc.org – Investigates claims of ethical violations by lawyers
People's Law Center	P.O. Box 5046, Helena, MT 59604, 1-406-443-3896, The People's Law Center handles social security disability cases (SSI and SSDI), Bozeman/Butte: 1-866-650-9013; Helena/Missoula: 1-800-406-5567; North-Central Montana: 1-800-406-5560; Eastern Montana: 1-877-469-7439; www.peopleslawcenter.org
Public Service Commission	1-406-444-6199; http://psc.mt.gov/ Assists with complaints regarding utility companies.
Montana Legal Services	Help Line 1-800-666-6899; www.mtlsa.org Free civil legal assistance for low income persons.
State Law Library of Montana	215 North Sanders, Helena, MT 59620-3004 1-406-444-3660, www.lawlibrary.mt.gov
University of Montana School of Law	1-406-243-4311, Fax 1-406-243-2576, www.umt.edu/law
Veteran's Administration	Veteran's Administration Center: 1-877-468-8387 www.montana.va.gov
State Auditor's Office	Senior Fraud Protection Network 1-800-332-6148
DPHHS - Senior and Long Term Care	1-800-332-2272; http://dphhs.mt.gov/seniors
Montana State Bar	1-406-442-7660; www.montanabar.org

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DISCLAIMER

This Legal Guide was compiled by the DPHHS Aging Services Division Legal Service Developer Program. This publication is not intended to be a substitute for legal advice. Rather, it is designed to help families become better acquainted with some of the devices used in long-term planning and to create an awareness of the need for such planning. Future changes in laws cannot be predicted and statements in this narrative are based solely on those laws in force on the date of publication.

We recommend that you seek legal advice for all your planning needs.

INTRODUCTION

Montanans face numerous choices. This is especially true in their retirement years. Life can become complicated. However, through proper planning, every person will be able to prepare for these changes in life.

This manual provides a layman's understanding of various legal documents and explanations of their uses. These documents are important components in planning for your future. It is important, however, to seek competent legal advice for your estate planning.

The manual is divided into five sections:

1. POWERS OF ATTORNEY
2. ESTATE PLANNING
3. LIVING TRUSTS
4. ADVANCE DIRECTIVES (LIVING WILLS)
5. GUARDIANSHIP AND CONSERVATORSHIP.

PART I. POWERS OF ATTORNEY

One of the most cost effective ways to make certain your decisions regarding health, medical treatment, domicile, and business affairs are followed is through the use of a power of attorney. This document allows you to identify another person to make financial and/or health care decisions in the event you are unable to do so.

You are able to decide and control the amount of authority you give to another person. You do not need a lawyer or a Court order to make a legally binding power of attorney.

1. Montana statutory form Power of Attorney; and

2. Durable Power of Attorney for Health Care and Medical Treatment.

The first power is primarily a financial power of attorney. It allows you to delegate authority to another to make financial, banking, real estate, and insurance decisions or you.

There are two different powers of attorney provided in this manual:
The first power allows you to delegate authority to another to make financial, banking, real estate, and insurance decisions for you. It also allows you to determine whether you want the power to be durable**,** meaning that it is enforceable

after you have become incompetent.

The second power allows you to delegate decision-making authority to another for your health and medical care and treatment. This power of attorney is also very important, especially when you are unable to make decisions for yourself.

A third document is a revocation of the power of attorney. This document allows you to revoke or “take back" the authority you have given to a person if you later wish to do so.

PART II. ESTATE PLANNING

We have heard the statement there are two certainties in life: death and taxes. Estate planning allows you to determine how and to whom you will disperse your assets after you have died. You also have the ability to decide who will administer your estate and how the administration will be performed.

This section provides a common checklist of items you should think about when you are engaged in estate planning. This checklist will be helpful when working with your attorney. It provides an overview of your present estate and your intent for distribution of assets upon your passing.

The second document is an example of a simple Last Will. You must be careful in drafting a Last Will. **We recommend you seek the assistance and consultation of an attorney licensed to practice law in Montana.** You can draft and execute a Last Will without an attorney. However, there are certain legal principles that you may not be aware of that might prevent you from achieving the result you wanted.

Your Last Will must be dated and signed by you. If you have typed your Last Will, you must also have two adults who are not beneficiaries of your estate witness your signing of the Last Will.

Finally, you should make certain that a copy of your Last Will is available to your personal representative (administrator) so that he/she knows what your intent is after you have passed away.

The third document is used and filed while you are alive. It is known as the Montana Homestead Exemption form. Montana law allows you to declare a homestead exemption. If the form is completed and recorded in the Clerk and

Recorders' Office in the county in which you live and where you own your home, the form will protect a portion of your "homestead" from creditors' claims. It does not protect you from mortgages, Medicaid liens, or construction liens. The homestead is the home in which you live. It includes your dwelling (permanent structure or mobile home) and the land and improvements legally defined as "appurtenances" to the land. There are limitations on homestead exemptions. The explanation following the Declaration of Homestead will provide you with the additional information.

PART III. LIVING TRUSTS

Montanans have become increasingly interested in establishing a "living trust" for their estate. The living trust is a legal document that is effective while you are alive. It provides a legal means for transfer of your assets into a trust, to be managed by a trustee for the beneficiaries designated in the trust agreement. A beneficiary can include yourself. Upon your passing, the trustee can transfer your assets according to the instructions in the trust. This can be done without any probate.

The second section is an article prepared by the former Dean of the Montana School of Law. He cautions individuals to be careful before they engage in the creation of a revocable living trust. The living trust document can be expensive and may not necessarily save you money in a probate. If the assets are not transferred properly into the trust, it may not achieve what you had desired - the avoidance of probate and additional costs.

We urge you to contact your local licensed attorney if you are seriously considering creating a trust. We caution you not to utilize "financial firms" or "trust organizations" who sell you a trust package. You may want to contact the Montana Attorney General's office, the Montana Insurance Commissioner or the Office on Aging to get additional information before you pay out any monies to a trust company.

PART IV. ADVANCE DIRECTIVES - LIVING WILLS

Montana law allows you to make a "living will." This living will is called a Declaration of Living Will, and it allows a legally competent adult to instruct his/her physician to withhold or withdraw life-sustaining procedures if he/she

is in a terminal condition and unable to make medical treatment decisions. You are also able to designate another person to make these end-of-life decisions for you.

An explanation of the Living Will in Montana and a copy of the Montana Rights of the Terminally Ill Act follow. We have also provided a copy of the "Living Will" or "Declaration" forms. The Living Will must be witnessed by two adults. Once you have completed the form, you should make it available to your physician and local hospital so they may place it in your medical records.

You have the ability to revoke the Living Will at any time. We have provided you a form to revoke your Living Will if you should choose to do so.

PART V. GUARDIANSHIP AND CONSERVATORSHIP

It is frightening to think that there could come a day when we are unable to care for ourselves or handle our own finances. However, it is reassuring to know that there are certain legal safeguards in place to protect us if we do become incapacitated. These safeguards include court appointed guardianships and conservatorships.

Montana law defines a guardian as one who is legally empowered and charged with the duty of taking care of another whom, because of age, intellect, or health, is incapable of managing his or her own affairs. A conservator is defined as one who is appointed by a district court to manage the affairs of a protected person who, because of age, intellect, or health, is incapable of managing his or her own property.

This section provides a detailed description of the responsibilities, roles, and limitations for guardians and conservators; the rights of the alleged incapacitated person; and the procedure followed by the court when a petition is filed for the appointment of a guardian or conservator.

CONCLUSION

If you should have any questions or desire to discuss these documents or legal issues further, please feel free to contact:

☐State Office on Aging at 1-800-332-2272.

If you would like to receive additional information on any topics in this publication, please feel free to also contact your

Local Extension Office -
(in the yellow pages under county government)

Family Economics Specialist
Marsha A. Goetting, PhD, CFP, CFCS
P.O. Box 172800
Montana State University
Bozeman, MT 59717
406-994-5695

Powers of Attorney

POWER OF ATTORNEY

A Power of Attorney is a written document authorizing someone you name (your "agent" or "attorney-in-fact") to make decisions for you. These decisions can include financial and business decisions. They may include health and medical care decisions. A Power of Attorney can also contain instructions or guidelines you want your agent to follow.

You will find two different forms of Power of Attorney in this section:

- ☐ Statutory Form Power of Attorney; and
- ☐ Durable Power of Attorney for Health Care and Medical Treatment.

The Statutory Power of Attorney form was created by the Montana legislature. It will allow you to decide the powers you want to delegate to another person. You will be able to decide when the authorization to act on your behalf will take effect.

You will also find a Durable Power of Attorney for Health Care and Medical Treatment form. If you should ever lose your capacity to make and/or communicate decisions because of a temporary or permanent illness or injury, the Durable Power of Attorney for Health Care allows you to retain some control over important health care decisions by designating a person to make health care decisions for you.

Without a Power of Attorney, many health care providers and institutions will make critical decisions for you, not necessarily based on what you would want. In some situations, a court appointed guardian may become necessary unless you have a health care power of attorney, especially where the health care decision requires that money be spent for your care.

A Durable Power of Attorney for Health Care is different from a Living Will. A Living Will is a written statement of your wishes regarding the use of medical treatments in end-of-life situations. The statement is to be followed if you are unable to provide instructions at the time the medical decision needs to be made. Living wills are recognized in Montana. However, they are limited to decisions about "life-sustaining procedures" in the event of "terminal illness" and when your life expectancy is a "short period of time."

The Health Care Power of Attorney applies to all medical decisions, unless you decide to include limitations. This Power can include specific instructions to your agent about any treatment you want done or want to avoid.

You need to be careful with the use of the Power of Attorney. The power you grant to another person may be broad and sweeping. The power will become effective immediately unless you state otherwise.

You need to have your signature notarized on your Power of Attorney by a Notary Public. You also need to give the original Power of Attorney to your agent so he/she will have the document when the time comes to make decisions for you. You want to make certain the person to whom you give the power is trusted and knows your intent.

You may revoke your Power of Attorney at any time. You will find a "Revocation of the Power of Attorney" form at the end of this section. You must sign and date the revocation. You must make a copy of the revocation and deliver it to the businesses, physicians, banks and hospitals that may be relying upon the Power of Attorney you originally executed.

MONTANA STATUTORY FORM POWER OF ATTORNEY

IMPORTANT INFORMATION

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in the Uniform Power of Attorney Act, Title 72, chapter 31, part 2. This power of attorney does not authorize the agent to make health care decisions for you. You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until you die or revoke the power of attorney or the agent resigns or is unable to act for you. Your agent is entitled to reasonable compensation unless you state otherwise in the Special Instructions. This form provides for designation of one agent. If you wish to name more than one agent, you may name a co-agent in the Special Instructions. Co-agents are not required to act together unless you include that requirement in the Special Instructions. If your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor agent. This power of attorney becomes effective immediately unless you state otherwise in the Special Instructions.

If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form.

POWER OF ATTORNEYFOR FINANCIAL
DESIGNATION OF AGENT

I, _____, name the following person as my agent:
Name of Agent: _____
Agent's Address: _____
Agent's Telephone Number:_____

DESIGNATION OF SUCCESSOR AGENT(S) (OPTIONAL)

If my agent is unable or unwilling to act for me, I name as my successor agent:
Name of Successor Agent: _____
Successor Agent's Address: _____
Successor Agent's Telephone Number: _____

GRANT OF GENERAL AUTHORITY

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the Uniform Power of Attorney Act, MCA Title 72, chapter 31, part 3: (INITIAL each subject you want to include in the agent's general authority. If you wish to grant general authority over all of the subjects you may initial "All Preceding Subjects" instead of initialing each subject.)

_____ Real Property
_____ Tangible Personal Property
_____ Stocks and Bonds
_____ Commodities and Options
_____ Banks and Other Financial Institutions
_____ Operation of Entity or Business
_____ Insurance and Annuities
_____ Estates, Trusts, and Other Beneficial Interests
_____ Claims and Litigation
_____ Personal and Family Maintenance
_____ Benefits from Governmental Programs or Civil or Military Service
_____ Retirement Plans
_____ Taxes
_____ All Preceding Subjects

REVOCATION OF PRIOR POWER OF ATTORNEY

This Power of Attorney revokes all previous Power of Attorney forms signed by me. This Power of Attorney may only be revoked in writing signed by me.

LIMITATION ON AGENT'S AUTHORITY

An agent that is not my ancestor, spouse, or descendant MAY NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the Special Instructions.

SPECIAL INSTRUCTIONS (OPTIONAL)

You may give special instructions on the following lines:

.....

.....

EFFECTIVE DATE

This power of attorney is effective immediately unless I have stated otherwise in the Special Instructions.

NOMINATION OF CONSERVATOR OR GUARDIAN (OPTIONAL)

If it becomes necessary for a court to appoint a conservator or guardian of my estate or guardian of my person, I nominate the following person(s) for appointment:

Name of Nominee for conservator of my estate: _____

Nominee's Address:_____, _____, _____

Nominee's Telephone Number:_____

Name of Nominee for guardian of my person: _____

Nominee's Address:_____, _____, _____

Nominee's Telephone Number:_____

RELIANCE ON THIS POWER OF ATTORNEY

Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person knows it has terminated or is invalid.

SIGNATURE AND ACKNOWLEDGMENT

_____ _____

Principal's name Date:

_____

Address

_____

City, State, Zip

_____

Phone

STATE OF MONTANA

County of _____

This document was acknowledged before me on _____, 20__, by _____ .

(Notarial Seal)

_____

Notary Signature

IMPORTANT INFORMATION FOR AGENT

AGENT'S DUTIES

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or the power of attorney is terminated or revoked. You must:

(1) do what you know the principal reasonably expects you to do with the principal's property or, if you do not know the principal's expectations, act in the principal's best interest; (2) act in good faith; (3) do nothing beyond the authority granted in this power of attorney; and (4) disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner: (Principal's Name) by (Your Signature) as Agent. Unless the Special Instructions in this power of attorney state otherwise, you must also: (1) act loyally for the principal's benefit; (2) avoid conflicts that would impair your ability to act in the principal's best interest; (3) act with care, competence, and diligence; (4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal; (5) cooperate with any person who has authority to make health care decisions for the principal to do what you know the principal reasonably expects or, if you do not know the principal's expectations, to act in the principal's best interest; and (6) attempt to preserve the principal's estate plan if you know the plan and preserving the plan is consistent with the principal's best interest.

TERMINATION OF AGENT'S AUTHORITY

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. Events that terminate a power of attorney or your authority to act under a power of attorney include:(1) death of the principal; (2) the principal's revocation of the power of attorney or your authority; (3) the occurrence of a termination event stated in the power of attorney; (4) the purpose of the power of attorney is fully accomplished; or (5) if you are married to the principal, a legal action is filed with a court to end or annul your marriage, or for your legal separation, unless the Special Instructions in

this power of attorney state that such an action will not terminate your authority.

LIABILITY OF AGENT

The meaning of the authority granted to you is defined in the Uniform Power of Attorney Act, Title 72, chapter 31, part 3. If you violate the Uniform Power of Attorney Act, Title 72, chapter 31, part 3, or act outside the authority granted, you may be liable for any damages caused by your violation. If there is anything about this document or your duties that you do not understand, you should seek legal advice.

AGENT CERTIFICATION – OPTIONAL FORM

Agent's Certification is an optional form and may be used by an agent to certify facts concerning a power of attorney.

****Note: The Legal Service Developer Program recommends this form be signed by the agent**.

AGENT'S CERTIFICATION AS TO THE VALIDITY OF POWER OF ATTORNEY AND AGENT'S AUTHORITY

I, _____, Agent, certify under penalty of perjury that _____, Principal, granted me authority as agent or successor agent in a power of attorney dated _____.

I further certify that to my knowledge:

(1) the principal is alive and has not revoked the power of attorney or my authority to act under the power of attorney and the power of attorney and my authority to act under the power of attorney have not terminated;

(2) if the power of attorney was drafted to become effective upon the happening of an event or contingency, the event or contingency has occurred;

(3) if I was named as a successor agent, the prior agent is no longer able or willing to serve; and

(4) _____
(Insert other relevant statements)

SIGNATURE AND ACKNOWLEDGMENT

_____ _____

Agent's Signature Date

_____

Agent's Name Printed

_____

Agent's Address

_____

Agent's Telephone Number

STATE OF MONTANA

County of _____

This document was acknowledged before me on _____, 20___ by _____, agent.

(Notarial Seal) _____

Notary Signature

DURABLE POWER OF ATTORNEY
FOR HEALTH CARE AND MEDICAL TREATMENT

I, _____, of the City of _____, State of Montana do hereby make, constitute, nominate and appoint _____presently residing in _____ County, State of Montana, as my true and lawful attorney-in-fact to act for me, and in my place and stead for the purpose of making any and all decisions regarding my health and, medical care and treatment at any time that I may be, by reason of physical, mental disability, incompetency or incapacity, incapable of make decisions on my behalf. This Power of Attorney revokes all previous Power of Attorney forms signed by me. This Power of Attorney may only be revoked in writing signed by me.

1. I grant said attorney-in-fact complete and full authority to do and perform all and every act and thing whatsoever requisite, proper and necessary to be done in the exercise of the rights herein granted, as fully for all intents and purposes as I might or could do if personally present and able with full power of substitution or revocation, hereby ratifying and confirming all that said attorney-in-fact shall lawfully do or cause to be done by virtue of this power of attorney and the rights and powers granted herein.

2. If, at any time, I am unable to make or communicate decisions concerning my medical care and treatment, by virtue of physical, mental or emotional disability, incompetency, incapacity, illness or otherwise, my said attorney-in-fact shall have the authority to make all health care decisions and all medical care and treatment decisions for me and on my behalf, including consenting or refusing to consent to any care, treatment, service or procedure to maintain, diagnose or treat my mental or physical condition.

3. In the absence of my ability to give directions regarding my health care, it is my intention that my said attorney-in-fact shall exercise this specific grant of authority and that such exercise shall be honored by my family, physicians, nurses, and any other health care provider(s) or facility in which or by which I may be treated, as a final expression of my legal rights.

4. This power of attorney is durable and will continue to be effective if I become disabled, incapacitated, or incompetent.

5. This durable power of attorney is effective in any state that I may seek or receive medical-treatment and health care.

6. I specifically direct all health care providers, including physicians, nurses, therapists and medical and hospital staff to follow the directions of my attorney-in-fact and such decisions are superior to and shall take precedence over any decisions made by any member of my family.

7. The rights, powers, and authority of said attorney-in-fact herein granted shall commence and be in full force and effect immediately.

8. If any agent named by me dies, becomes incompetent, resigns or refuses to accept the office of agent, I name the following persons (each to act alone and successively, in the order named) as successor(s) to the agent:

A._____

B._____

9. Special instructions: On the following lines I give special instructions limiting or extending the powers granted to my agent.

_____

_____

10. 1 hereby designate _____ to determine whether I am unable to make or communicate decisions concerning my medical care and treatment by virtue of my physical, mental, or emotional disability, incompetency, incapacity, illness or otherwise. This determination will be provided in writing and attached to this Durable Power of Attorney For Health Care and Medical Treatment.

Dated this _____ day of _____, 20___.

_____

(Signature)

STATE OF MONTANA

County of _____

Subscribed, sworn to and acknowledged before me this _____day of _____, 20___.

(Notarial Seal)

_____

(Signature of Notary)

REVOCATION OF POWER OF ATTORNEY

I, _____, hereby revoke all powers of attorney granted to _____ on _____. This is a full revocation and is effective immediately.

Dated this _____day of _____, 20___.

_____
Signature

STATE OF MONTANA

County of _____

This document was acknowledged before me this _____ day of _____, 20___, by _____.

(Notarial Seal)

_____
Notary Signature

Estate Planning

ESTATE PLANNING

Who will get my assets when I die? How will these assets be distributed? Do I have any control over how these assets are distributed? What issues and concerns must I think about prior to contacting an attorney in preparation for preparing my will? These are common and important questions that all Montanans have in their estate planning process. This section of the manual is intended to assist you through this process.

Two planning forms are included in this guide. They are entitled "Checklist for Estate Planning" and "Estate Planning Data Sheet". They are intended to assist you with estate planning. The checklists are common questions that will be asked by your attorney. They will be very helpful if you have completed them prior to meeting with your attorney. You will have the benefit of time and consideration in making some of these decisions.

Estate planning is a complicated and a personal process. It should not be delayed. It is also very important that you consult with a licensed attorney. Estate law and will preparation requires professional training. Your attorney will explain several options available to you in your estate planning.

You will see the term "personal representative." A personal representative is the administrator of your estate (previously known as an executor or executrix of the estate). They do not have any power until you have passed away. A personal representative position requires appointment by the court.

Also included is a "Sample Will." This is only a sample and should be used as a reference for your estate planning needs. **We do not recommend you draft your own will.**

Will preparation is relatively inexpensive for the typical middle-income Montanan. Feel free to call or visit several attorneys and request information on their fee charges

for will preparation. The general rule of thumb is, the more complex your family situation and the more assets you have to distribute when you die, the greater the cost in the preparation of the will.

Montana recognizes holographic wills, which are written documents, prepared in your own handwriting and signed and dated by you. You have the ability to declare your intent through the use of a holographic will.

Finally, we have provided a copy of the Montana "Declaration of Homestead Exemption. Montana law allows you to protect part of the equity in the home you live in. You must reside in the home. A detailed explanation of the instructions and recording of a Homestead Exemption Declaration is found on the reverse side of the declaration form.

BENEFICIARY DEEDS IN MONTANA

By
Marsha A. Goetting, PhD, CFP, CFCS
Montana State University Extension

THE 2007 MONTANA LEGISLATURE AUTHORIZED beneficiary deeds as a way for people to transfer at death their real property (located in Montana) to one or more beneficiaries without probate. Real property is land, including whatever is erected, growing on or affixed to it, such as homes, garages, or other buildings, fences, water systems (unless removable), mineral deposits and standing uncut timber.

This MontGuide answers questions about the new law (*Montana Code Annotated Section 72-6-121*) that applies to owners who have signed and recorded a beneficiary deed with the clerk and recorder in the Montana county where the real property is located and who pass away after October 1, 2007. Statutory language for a beneficiary deed and a beneficiary deed revocation are also provided in this MontGuide.

What is a beneficiary deed?

A *beneficiary deed* is one in which an owner conveys an interest in Montana real property to a *grantee beneficiary* effective upon the owner's death. In other words, real property is transferred from the deceased person to the person(s) listed on the deed. The deed must specifically state that it is effective only upon the death of the owner. The deed must also have a complete legal description of the Montana property that the owner wishes to convey at death. An owner should use the legal description for the real property from a previously recorded deed--***not*** the description appearing on the property tax bill that is sent annually to the owner by the county treasurer.

A beneficiary deed must be recorded before the death of the owner (or, for joint tenancy property, before the death of the last surviving owner) with the clerk and recorder in the Montana County where the property is located. All beneficiary deeds must have the post office address of the grantee listed on it before the clerk and recorder's office can record it. The owner must also prepare a Montana realty

transfer certificate before the clerk and recorder will record a beneficiary deed. A Montana Realty Transfer Certificate is available at any Montana county clerk and recorder's office.

The cost of filing a beneficiary deed is $7 per page if a standard document form is used. There are certain requirements for a form to be considered "standard" in Montana. If these specific requirements are not met, the document is considered as "non-standard" and the filing fee is $11 per page for the first five (5) pages--$7 for each page thereafter. The requirements for a standard document are listed in the Montana Codes Annotated: http://data.opi.mt.gov/bills/mca/15/7/15-7-305.htm or contact your local clerk and recorder for a copy of the requirements.

Who can be a grantee beneficiary?

The term *grantee beneficiary* means the party to whom an owner grants an interest in the Montana real property that is described on the beneficiary deed. *Grantee beneficiaries* may be a variety of parties, for example: spouse, children, relatives, friends, charitable organizations, trustee of a trust, or a corporation.

An owner is not required to have the signature, consent, or agreement of the *grantee beneficiary.* Nor is the owner required to give the *grantee beneficiary* notice that a beneficiary deed has been recorded. The *grantee beneficiary* also has no ownership rights in the Montana real property described on the beneficiary deed until the owner dies.

Can there be more than one grantee beneficiary?

An owner may designate more than one grantee beneficiary for his or her Montana real property. However, the owner should specify in the beneficiary deed whether the grantee beneficiaries will own the property (after the death of the owner) as tenants in common or as joint tenants with right of survivorship. For further information regarding these two forms of property ownership, read Montana State University (MSU) Extension MontGuide *Property Ownership* (MT198907HR). Request a copy from your local Extension office.

Because the language for a beneficiary deed provided by the Montana statute does not specify the type of ownership when there is more than one grantee beneficiary, an owner should consult an attorney for advice about which form of ownership would be best to accomplish his or her estate planning goals.

What happens if a grantee beneficiary dies before the owner of the real property?

If an owner designates only one grantee beneficiary and is concerned about what happens to the property if the grantee beneficiary dies before the owner, he or she may designate one of the several alternatives listed below for the distribution of the property listed on the beneficiary deed.

1. The owner may specify that the beneficiary deed becomes void upon the death of the grantee beneficiary.

2. The owner may specify that the Montana real property becomes part of the estate of the deceased grantee beneficiary. Under this condition, when the owner(s) die, the real property is distributed according to the will of the deceased grantee beneficiary or, if the deceased grantee beneficiary had no will, to the heirs of the deceased grantee beneficiary under Montana intestate statutes. This alternative may present complications if several years lapse between the death of the grantee beneficiary and death of the owner(s). An attorney can provide information about potential consequences of using this alternative for your specific circumstances.

3. The owner may specify a *successor grantee beneficiary*, as discussed in more detail in the next section.

Who can be a successor grantee beneficiary?

An owner of Montana real property can also designate a *successor grantee beneficiary* in case the grantee beneficiary dies before the owner. If an owner designates a *successor grantee beneficiary*, the beneficiary deed should state the condition under which the successor inherits.

> **Example**: Mark owns real property in Montana. Mark recorded a beneficiary deed to be effective upon his death, naming his son, Evan, as his grantee beneficiary. Mark also designated his grandson, Luke, as the *successor grantee beneficiary* in case Evan dies before Mark. Mark's attorney recommended the following language in the beneficiary deed: "If Evan dies before me, I name Luke as the successor grantee beneficiary effective upon my death, should he survive Evan and me. If Luke does not survive Evan and me, this deed shall be void."

If an owner names more than one grantee beneficiary and specifies that they are to become owners as joint tenants with right of survivorship, the surviving joint grantee beneficiaries inherit the real property if one of the joint grantee beneficiaries dies before the owner. An owner should specify what he or she wants to happen to the property if all of the joint tenant grantee beneficiaries die before the owner.

> **Example**: Patricia recorded a beneficiary deed for her Montana land to be effective upon her death, naming her sisters, Fay and Ellen, as grantee beneficiaries with the title to be held as joint tenants with right of survivorship. If Fay dies before Patricia, Ellen will become the sole grantee beneficiary. Patricia's beneficiary deed should specify what happens if neither Fay nor Ellen survive Patricia. Therefore, Patricia's attorney recommended the following language in the beneficiary deed: "If both Fay and Ellen predecease me, the Montana 4-H Foundation will become the successor grantee beneficiary effective upon my death."

If an owner names more than one grantee beneficiary and does not specify that they own the property as joint tenants with right of survivorship, the grantee beneficiaries inherit as tenants in common. The beneficiary deed should specify what happens to the interest of a deceased tenant in common grantee beneficiary if he or she fails to survive the owner.

> **Example**: Edna owns real property in Montana and has recorded a beneficiary deed to be effective upon Edna's death. She named her two sisters, Wendy and Patsy, grantee beneficiaries with the title to be held as tenants in common. Edna's beneficiary deed should specify what happens to either Wendy or Patsy's interests if they do not survive Edna. Therefore Edna's attorney recommended the following language in the beneficiary deed: "In the event that either Wendy or Patsy does not survive me, her one-half interest in the real property shall be distributed to the Montana State University Foundation effective upon my death."

If Edna had named Wendy and Patsy grantee beneficiaries as joint tenants with right of survivorship, upon the death of either Wendy or Patsy, the survivor would inherit the entire property. However, Edna could name a successor grantee beneficiary if both Wendy and Patsy predecease her. To accomplish this goal

Edna's attorney suggested the following statement: "I convey the property described below to the grantee beneficiaries, Wendy and Patsy, as joint tenants with right of survivorship, effective upon my death. If both Wendy and Patsy fail to survive me, the property shall be distributed to the University of Montana Foundation effective upon my death."

The advice of an attorney should be sought when drafting a beneficiary deed that lists more than one grantee beneficiary to assure that the owner has considered the forms of property ownership and decided what he or she wants to happen to the property if one of the beneficiaries dies before the owner.

What happens if more than one person owns the real property?

Whether a grantee beneficiary receives the property as the result of a beneficiary deed depends upon how the owners hold title to the real property. Do the owners have the property titled as joint tenants with right of survivorship or as tenants in common?

When the Montana real property is titled by the owners as *joint tenants with right of survivorship*, the right of the surviving joint tenant takes priority over the right of the grantee beneficiary.

> **Example:** Doug and his wife, Laura, own real property in Montana as joint tenants with right of survivorship. Doug signed and recorded a beneficiary deed naming their two daughters as grantee beneficiaries to be effective upon his death. If Doug dies before Laura, their daughters will not inherit the property upon his death because the existing joint tenancy contract with his wife, Laura, takes priority. However, if Laura dies before Doug, and Doug dies six days later, the beneficiary deed signed by Doug naming their two daughters as grantee beneficiaries will be effective, and their two daughters will inherit the property upon Doug's death.
> Ownership of Montana real property that is held as *joint tenancy with right of survivorship* is not affected by the recording of a beneficiary deed unless the deed is signed by all of the owners or signed by one owner, who is the last one to die.

> **Example:** Donna, Debbie and Kristi own real property in Montana as joint tenants with right of survivorship. Donna signed and recorded a beneficiary

deed without obtaining the signatures of the other two joint owners, Debbie and Kristi. If Donna dies before Debbie and Kristi, the grantee beneficiary that Donna designated would not receive the Montana real property because all joint owners did not sign the beneficiary deed. However, if Donna was the last survivor, the grantee beneficiary she named would inherit the Montana real property upon Donna's death.

If all of the owners of real property titled as joint tenants with right of survivorship sign a beneficiary deed designating a grantee beneficiary, the transfer to the grantee beneficiary does not become effective until the death of the last surviving owner. However, the deed should specifically state that the transfer to the grantee beneficiary becomes effective upon the death of the last surviving owner.

Example: Phyllis and Bob own real property in Montana as joint tenants with right of survivorship. They both signed and recorded a beneficiary deed naming their son as the grantee beneficiary to be effective on the death of the last surviving owner. This means their son will not receive the Montana real property until after both Phyllis and Bob die.

If the last surviving joint owner of real property held as *joint tenancy with right of survivorship* had not signed the beneficiary deed, the deed becomes void.

Example: Lynn and Eric own real property in Montana as joint tenants with right of survivorship. Lynn signed and recorded a beneficiary deed naming her daughter from a prior marriage as the grantee beneficiary. Because Eric did not sign the beneficiary deed, it becomes void if Lynn dies before Eric. Lynn's daughter, the grantee beneficiary, would not receive the property upon Lynn's death. If Lynn and Eric want to assure that Lynn's daughter receives their Montana real property as a result of the beneficiary deed, Eric should also sign the beneficiary deed before it is recorded with the clerk and recorder in the county where the land is located.

If the owners have their real property titled as *tenants in common* rather than as joint tenants with right of survivorship, each owner may execute a beneficiary deed to distribute his or her interest in the property upon death. The beneficiary deed does not affect the interest that is held by the other tenant in common co-owner(s).

Example: Carol and Amy own real property in Montana as tenants in common. Carol recorded a beneficiary deed for her one-half interest in the real property, naming her daughter as the grantee beneficiary to be effective upon Carol's death. Amy did not execute a beneficiary deed for her one-half interest in the real property. Upon Carol's death, her one-half interest in the property as a tenant in common becomes owned by her daughter, her grantee beneficiary. Amy will continue to own the other one-half interest in the property. Upon Amy's death her one-half interest in the property will be distributed according to her will or Montana intestate statutes if she doesn't have a will

What wording on a beneficiary deed makes it legal?

The wording that was included in the Montana statute for a beneficiary deed is provided on Chapter II – 1-2.

How is a beneficiary deed revoked?

A beneficiary deed may be revoked at any time by the owner, or if there is more than one owner, by the owners who have signed the beneficiary deed. To be effective, the revocation must be signed and recorded before the death of the owner(s) in the office of the Montana clerk and recorder of the county in which the real property is located. The cost of filing a revocation ranges from $7 to $11 per page.

If the real property is owned as joint tenants with right of survivorship and the beneficiary deed was signed by all joint owners, a revocation is not effective unless it is signed by all of the joint owners, or signed by one owner, when that owner is last to die.

Example: Michael and Kris owned real property in Montana as joint tenants with right of survivorship. Both signed and recorded a beneficiary deed naming Michael's sister as the grantee beneficiary to be effective upon the death of both Michael and Kris. Several years later Michael signed and recorded a revocation. Michael died before Kris as a result of an automobile accident. The revocation was not effective because Kris had not signed the revocation. However, after Michael's death Kris, as the surviving joint owner, could record a revocation or record a new beneficiary deed naming the grantee beneficiary she prefers.

The filing and recording of a new beneficiary deed by the same owner for the same property will also revoke a previously filed and recorded beneficiary deed. The wording that was included in the Montana statute for the revocation of a beneficiary deed is provided on Chapter II 1-2.

What is required to re-title the property into the name of the grantee beneficiary upon the owner's death?

To re-title the real property in the name of the grantee beneficiary upon the owner's death, proof must be provided that the owner has died. A notarized affidavit certifying the death of the owner signed by the grantee beneficiary or beneficiaries is an acceptable document. Sample wording for an affidavit of death is provided on Chapter II - 16. A grantee beneficiary should consult an attorney if he or she has any questions about verifying the death of the owner(s) of Montana real property.

The grantee beneficiaries can take title to the real property with a beneficiary deed without going through the probate process by recording the affidavit with the county clerk and recorder where the real property is located. If there is more than one grantee beneficiary, they will take title as tenants in common, unless the beneficiary deed has specified that the grantee beneficiaries are to become owners as joint tenants with right of survivorship.

What if the real property listed on the beneficiary deed has an encumbrance against it?

Montana real property that is conveyed in a beneficiary deed to a grantee beneficiary is subject to any *encumbrances* arising against the property during the owner's lifetime. *Encumbrances* against real property include for example: mortgages; deeds of trust; liens for unpaid taxes or failure to pay for labor, materials, equipment or services on the property; contracts; assignments; and any other legal conveyance document recognized by the state of Montana. This would include a marriage dissolution settlement or order.

Any Medicaid payments to an owner may also become an *encumbrance* against the Montana real property in certain situations. If the owner was a recipient of Medicaid and had conveyed an interest in Montana real property by means of a beneficiary deed, the Montana Department of Public Health and Human Services may assert a claim against the real property. The claim typically would be for the dollar amount of Medicaid payments that were provided to the owner before his or her death, up to the value of the Montana real property. For further

information about Medicaid read MSU Extension MontGuide *Medicaid and Long-Term Care Costs* (MT199511HR). Request a copy from your local Extension office.

If there are insufficient assets in the owner's estate to pay valid creditors' claims, the creditors may seek payment from the value of the Montana real property that was conveyed by a beneficiary deed. The personal representative is in charge of making sure that all valid creditors' claims are paid, if necessary, from the beneficiary deed real property.

What is the effect of a will on a beneficiary deed?

After a beneficiary deed has been signed and recorded with the Montana clerk and recorder in the county where the real property is located, the deed cannot be revoked by a provision in the owner's will. A beneficiary deed may only be revoked by recording a revocation in the manner described previously or by recording a new beneficiary deed.

> **Example:** Gary signed and recorded a beneficiary deed naming his daughter as grantee beneficiary of real property he owned in Montana to be effective upon his death. Gary later wrote a will leaving the same Montana real property to his son. Upon Gary's death, the provision in the will leaving the real property to his son is not valid. The real property would pass to Gary's daughter under the terms of the beneficiary deed.

What is the effect of a trust on a beneficiary deed?

If an owner's real property has not been re-titled in the name of the owner's revocable living trust, a beneficiary deed may be executed naming the trustee of the revocable trust as the grantee beneficiary. The terms of the trust document control how the property will be distributed upon the death of the person who established the trust.

What rights do the surviving spouse and minor children have in the real property if they were not named as grantee beneficiaries on a beneficiary deed?

Montana law provides certain allowances for the surviving spouse and minor or dependent children of a deceased property owner. If assets of the estate are insufficient to provide for the Montana statutory allowances for the spouse's elective share (which increases in percentage from three to 50

percent based on the length of the marriage); exempt property ($10,000); family allowance ($18,000); homestead allowance ($20,000); the Montana real property listed in a beneficiary deed can be claimed for the statutory amounts. For further information about rights of the surviving spouse and minor or dependent children read MSU Extension MontGuide *Probate* (MT199006HR). Request a copy from your local Extension office.

The $20,000 *homestead allowance* is different from the Montana *homestead declaration* that protects up to $250,000 in the value of the home while the owner is living against most creditors' claims. The personal representative for the estate is in charge of making sure the statutory allowance claims are paid to the spouse and minor or dependent children.

What if there are water rights on the real property?

If there are water rights associated with the Montana real property that is subject to the beneficiary deed, the owner should prepare and sign a DNRC Water Right Ownership (Form 608). Store the form in a safe place with your beneficiary deed. The form should be filed after the death of the owner by the grantee beneficiary with the Department of Natural Resources. The certificate is available at: www.mt.gov/revenue/formsandresources/forms/488RTC.pdf . Scroll down to form 608.

What if more than one beneficiary deed is recorded?

Beneficiary deeds can be revoked at any time by the owner, so the latest recorded beneficiary deed is the controlling document. In other words, if owners change their minds about whom they want to receive the real property after they die, one recorded beneficiary deed can be replaced with a later recorded document naming different beneficiaries. The recording of a new beneficiary deed revokes any beneficiary deed dated earlier.

Can a beneficiary deed be used to transfer personal property after death?

No. A beneficiary deed is designed to transfer real property not personal property. However, certain *personal properties* of a Montana resident can also be transferred at death by other methods without probate by designating beneficiaries on contracts.

For example, a person can list one or more beneficiaries on a life insurance

policy; make a payable on death (POD) beneficiary designation on accounts at financial institutions, or sign a transfer on death (TOD) beneficiary registration for stocks, bonds, and mutual funds. For further information about PODs and TODs read MSU Extension MontGuide *Non-Probate Transfers* (MT199509HR). Request a copy from your local Extension office.

Summary

After October 1, 2007 a person can transfer his or her Montana real property at death to one or more parties by signing and recording a beneficiary deed with the clerk and recorder in the county where the real property is located. The beneficiary deed must contain a complete legal description of the Montana real property. All beneficiary deeds must have the post office address of the grantee listed on it before the clerk and recorder's office can record it. The owner also must prepare a Montana Realty Transfer Certificate. After recording, the beneficiary deed should be stored in a safe place such as a safe deposit box or a secure place in the grantor’s home.

References

2007 Montana Codes Annotated Section 72 - 6 - 121;

Return to:

BENEFICIARY DEED

I (we) _____ (owner) hereby convey to _____ (grantee beneficiary) effective on my (our) death the following described real property:
(insert legal description)

If a grantee beneficiary predeceases the owner, the conveyance to that grantee beneficiary must either (choose one):

_____ Become void. OR _____ Become part of the estate of the grantee beneficiary.

Dated this ____ day of _____, 20___.

_____
Owner(s)

_____
Owner(s)

STATE OF MONTANA

County of _____

Signed and sworn to before me by _____, and _____, and subscribed and sworn to before me by _____ and _____, witnesses, this _____day of _____, 20___.

(Notarial Seal)

_____
Notary Signature

Return to:

REVOCATION OF BENEFICIARY DEED

The undersigned hereby revokes the beneficiary deed recorded on _____ _____, _____ in book _____, page _____, or instrument number _____, records of _____ County, Montana, concerning the following described real Property: (Legal description from previously recorded deed)

Dated this ____ day of _____, 20___.

_____
(Grantor signature)

STATE OF MONTANA
COUNTY OF _____

THIS instrument was acknowledged before me on the _____ day of _____, 20__, by _____.

(NOTARY SEAL)

_____
(Signature of Notary)

Return to:

AFFIDAVIT OF DEATH

I _____ , being first duly sworn, upon oath, depose and say the following:

1. _____signed and recorded a beneficiary deed with the intent to convey the following property located in _____ County, Montana described as follows:

2. The beneficiary deed was recorded in _____ County, Montana, on _____ day of _____20___. Book _____, Page _____, or Instrument Number_____.
3. The grantor died on the _____ day of _____ 20____. At the time of death, the grantor had not revoked the above described beneficiary deed.
4. The following person(s) is/are the person(s) named as the grantee beneficiary(ies) under the beneficiary deed described above, and are entitled to succeed to the grantor's interest in the real property described above as a result of the grantor's death:
   Grantee Beneficiary Name:_____
   Mailing Address:_____

Dated this ____ date of _____, 20___.

_____
Affiant

STATE OF MONTANA

County of _____

Signed and sworn to before me by _____, and subscribed and sworn to before me by _____ and _____, witnesses, this _____day of _____, 20___.

(Notarial Seal) _____
Notary Signature

WILL OF
JOHN DAMIEN WHITE

I. INTRODUCTION

I, John Damien White, also known as J.D. White, domiciled and residing in Missoula, Missoula County, Montana, declare this to be my will, revoking all prior wills and codicils.

II. FAMILY INFORMATION

I am married to Mary Helen White. All references of "my wife" are to her. I have two (2) children, namely, David Baxter White and Cynthia Baxter White. All references to "my children" refer to the two children named in this paragraph and any other children hereafter born to or adopted by me and my wife.

III. DEBTS & EXPENSES

I direct that all of my legally enforceable debts, funeral expenses and expenses in connection with the administration of my estate be paid as soon as practicable after my death.

IV. PRE-RESIDUARY GIFTS

A. Gifts of Special Items:

If my sister, Mary Vivian Jones, 115 Main Street, Prairie City, Utah, survives me, I give her (and not her descendants) the Steinway grand piano which was given to me by my mother. If for any reason I do not own that Steinway grand piano at my death, the devise to my sister is canceled.

B. Tangible Personal Property List:

If my wife survives me, I give her all of (the rest of) my tangible personal property.

If my wife fails to survive me, I might leave a written statement of list disposing of items of tangible personal property. If I do and if my written statement of list is found and is identified as such by my personal representative no later than 30 days after, the statement of list is to be given effect to the extent authorized by law. Any

Dated: _____

tangible personal property not effectively disposed of by such a statement or list shall be distributed to my surviving children (and not to their descendants) as they may agree. If my surviving children fail to reach agreement within 90 days after the probate of this will, such tangible personal property shall be divided among my surviving children as my personal representative determines appropriate, in shares of substantially equal value.

If any child of mine is a minor at the time of such division, my personal representative may distribute the child's share to the child or for the child's use to the child's guardian or to any person with whom the child is residing, without further responsibility, and the distributive's receipt shall be a sufficient discharge to my personal representative.

IV. RESIDUARY CLAUSE

If my wife survives me, I give her the residue of my estate. If she fails to survive me, I give the residue of my estate to my descendants who survive me by representation.

V. METHODS OF DISTRIBUTION TO CERTAIN BENEFICIARIES

If under this will any property is distributable to a minor or to a person under twenty-one (21) years of age, my personal representative in my personal representative's absolute discretion, may distribute such property in any manner permitted by law and additionally in any one or more of the following ways:

(A) If the person is a minor, directly to the minor or on behalf of the minor for the minor's exclusive benefit;

(B) If the person is a minor, to a guardian or conservator for the minor; or

(C) If the person is under twenty-one (21) years of age, to any person (including my personal representative) selected as a custodian by my personal representative under the applicable Uniform Transfers to Minors Act of any state.

VI. APPOINTMENT OF PERSONAL REPRESENTATIVE

I appoint my wife as personal representative of my estate. In the event she shall die, be adjudicated incompetent, or resign, I hereby name as successor personal representative to fill such vacancy or any vacancy that may thereafter occur, the first in the order named who is then willing and able to serve:

(A) Steve Johnson
(B) Arvid Thompson
(C) Norwest Capital Management & Trust Co., Montana

VII. POWERS OF PERSONAL REPRESENTATIVE

In addition to the powers given to my personal representative by law effective at death, my personal representative shall have all powers authorized by the Montana Uniform Probate Code, as that Code exists on the date of this will.

VIII. MONTANA LAW

This instrument shall be construed under the laws of the State of Montana.

IX. REPRESENTATION

The persons who take under this will as "descendants by right of representation" shall take in accordance with the rules of S72-2116 MCA as that section exists on this date of this will.

X. CAPTIONS

The captions set forth in this Will at the beginning of various provisions are for convenience of reference only, and shall not be deemed to define or limit the provisions of this Will, or to affect in any way its construction or application.

Dated_____

XI. CONCLUSION AND ATTESTATION

I, John Damien White, the testator sign my name to this instrument this _____day of _____**,** and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, that I am 18 years of age or older, of sound mind, and under no constraint or undue influence.

_____
JOHN DAMIEN WHITE

We, witnesses, sign our names to this instrument, consisting of four pages, being first duly sworn, do hereby declare to the undersigned authority that the testator signs and executes this instrument as the testator's last will and that the testator signs it willingly (or willingly directs another to sign for the testator), that each of us, in the presence and hearing of the testator, hereby signs the will as a witness to the testator's signing, and that to the best of our knowledge the testator is 18 years of age or older, of sound mind, and under no constraint or undue influence.

_____
WITNESS
Residing at _____

_____

_____
WITNESS
Residing at _____

_____

Dated_____

STATE OF MONTANA):ss
County of Missoula)

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me by John Damien White, the testator, and subscribed and sworn to before me by the above-named witnesses, this _____day of _____, _____.

_____
(Signature of Notarial Officer)
(Printed Name): _____
(Notarial Seal) Notary Public for the State of Montana
Residing at: _____
My Commission expires: _____

Page 5 of 5 Pages
Dated: _____

WRITTEN LIST OF TANGIBLE PERSONAL PROPERTY

This written list of bequests of tangible property shall be placed with and made a part of the Last Will and Testament of _____.

1.	
2.	
3.	
4.	
5.	
6.	
7.	
8.	
9.	
10.	
11.	
12.	
13.	
14.	
15.	

Dated this _____ day of _____, 20__.

_____
(name of testator)

1 of 1

_____ _____
Initial Witness

INSTRUCTIONS FOR RECORDING HOMESTEAD EXEMPTION DECLARATIONS

I. PURPOSE OF HOMESTEAD EXEMPTION DECLARATION

If you complete this form and record it in the Clerk and Recorder's Office in the county in which you live and have your home, it protects your home from creditors' claims except for mortgages, construction liens, and Medicaid liens.

II. MEANING OF HOMESTEAD

The exemption protects the home you live in. You must actually reside on the property for it to be apply. Homestead includes the dwelling house, or mobile home, and the land and improvements legally defined as appurtenances to the land. This may include a mobile home where the mobile home owner does not own the land the mobile home is situated on.

III. LIMIT ON VALUE EXEMPT

The maximum value of the protection is two hundred fifty thousand dollars ($250,000). If the value of the property exceeds this amount, the creditors may partition the land, selling part of it or may sell all the property. If they sell all the property you get the first two hundred fifty thousand dollars ($250,000) of the proceeds and this money is protected from creditors for 18 months.

IV. WHO SHOULD SIGN

If married, both spouses should sign the declaration. If one does not sign, his or her interest in the property is not protected. Both must sign in front of a notary.

NOTE: Under Montana property law, a spouse may acquire an interest in property due to the marriage, even though the spouse is not listed on the deed or other documents of title, and even though the spouse has not directly contributed money to pay for the property. Therefore, every effort should be made to have both spouses sign the declaration.

V. RECORDING DECLARATION

After the Homestead Exemption Declaration form on Chapter II - 40 is completed, signed, and notarized, record the form in the Office of the County Clerk and Recorder for the county in which the land (or mobile home) is located. The recording fee for a one page document is between $7 and $12 and this fee must be paid when the document is delivered to the Clerk and Recorder for recording.

Return to:

DECLARATION OF HOMESTEAD

KNOW ALL MEN BY THESE PRESENTS:

That _____, and _____ of _____, _____, Montana _____, select, claim and declare a homestead on the dwelling house and all appurtenances which are situated and located in the County of _____, State of Montana:

That the persons making this declaration are acting solely and makes this declaration for their own benefit and that of their family's; that the undersigned reside on the premises above described and claim the same as a homestead under the provisions of Sections 70-32-101 through 70-32-107, MCA.

This Declaration of Homestead amends and supercedes any Declaration of Homestead executed by prior to this.

IN WITNESS WHEREOF, the undersigned have hereunto set their hand and seal this _____ day of _____ 20__.

_____
Signature

_____
Signature

_____

STATE OF MONTANA

County of _____

This instrument was acknowledged before me this _____ day of _____ 20___ by _____(and)_____(owners).

(Notarial Seal)

_____
Notary Signature

Living Trusts

REVOCABLE LIVING TRUSTS

By
Marsha A. Goetting, PhD, CFP, CFCS
Montana State UniversityExtension

Living trusts have been promoted as the ideal solution for Montanans who wish to secure a wide variety of financial planning objectives. Avoiding probate and taxes are the primary goals of some. Others are concerned about protecting assets for family members should they be confined to a nursing home for a long period of time. Another may feel the need for investment assistance because of his or her inexperience. Still others want a way to continue their business if they should become disabled. Are all these objectives possible? The answer is **yes** - but the most appropriate legal tool to accomplish each one may not be a living trust.

What is a Living Trust?

A revocable living trust is just what its name implies - one that is created during an individual's life that can be changed and terminated at any time. It is a legal arrangement by which an individual transfers ownership of assets to a trustee who manages the assets for the beneficiaries designated in the trust agreement. Beneficiaries named, in the trust agreement, can be the individual who formed the trust, friends, family members, a college, hospital, library, charity or other organization. Any type of asset - cash, certificate of deposits, stocks, bonds, life insurance or real estate - can be placed into a living trust.

The person providing assets for the trust is called the trustor or grantor. The grantor must actually change the title of ownership of each asset that will be placed in the trust from his or her name to ownership by the trust. The trustee manages the assets according to the directions in the trust agreement. The trustee can be the person creating the trust, several individuals, a corporate entity such as a bank or trust company, or any combination of these.

A trust agreement is a document containing instructions to the trustee stating, for example, who is to receive income from the trust and when and how it is to be distributed. When the trust terminates, the agreement designates the distribution of the assets to the beneficiaries who are named in it.

Considerations in Forming a Living Trust

Consider the following issues to determine whether a living trust would fit into your specific financial planning goals.

Tax Consequences A revocable living trust is sometimes promoted as a tax avoidance tool. However, a living trust does not provide the tax savings that are often attributed to it. Income earned in a revocable living trust is taxed to the person creating it (grantor) and must be reported on his or her personal state and federal income tax returns. No federal gift tax is payable upon the creation of a revocable living trust because the trust can be changed at any time by the person forming it.

State and federal law require the value of revocable living trust property to be included in the grantor's estate upon death. Since the grantor is viewed as having control of the assets, their value must be included for determining federal estate and Montana estate tax. Typically, the following rights are reserved by the grantor when he or she forms a living trust: to amend the trust, to change the beneficiaries, to change the trustee, to change the date of termination or to change the entire trust by revoking it and having the property returned.

If none of these rights or similar rights are retained by the grantor, then the trust becomes irrevocable and the value of the assets in it are subject to federal gift taxation at the time the trust is formed. At the death of the grantor, the value of assets in an irrevocable trust is not usually subject to the Federal estate tax.

Probate Costs vs. Living Trust Costs Probate in Montana is not nearly as burdensome as it is in other states that have not adopted the Uniform Probate Code. In some states probate can be quite costly, as the attorney and personal representative must appear before the court for approval of almost every act involved in probating an estate. In Montana, formal approval by the court is not required for any action authorized in the Uniform Probate Code. The Montana Uniform Probate Code specifically exempts from probate the following: assets in living trusts, property owned as joint tenants with right of survivorship, payable-on- death deposits, and life insurance payable to a named beneficiary.

How much of your present estate is subject to probate? Typically only solely-owned property or a deceased's share in tenancy in common property is subject to probate. However, even for non-probate property there are reporting requirements for inventory taxes, and perhaps Montana and federal income taxes.

Even if your property is subject to probate, your heirs have the right to ask the attorney to handle the case on an hourly fee basis which may be less than the maximum statutory percentage. In Montana the maximum charge allowed for the attorney is one and one half times (1 1/2) the amount allowable to the personal representative. The percentage for the personal representative (which is a maximum fee) is three (3%) percent of the first $40,000 and two (2%) percent in excess of that amount.

For example, on a $200,000 estate, a personal representative could receive a maximum of $4,400 and the attorney $6,600. ($40,000 X .03 = $1,200; $160,000 X .02 = $3,200; $1,200 + 3,200 = $4,400; $4,400 X 1.5 = $6,600).

An hourly fee could result in less expense for the estate and/or heirs, especially if the individual accomplished estate planning before his/her death.

There is no guarantee that a living trust will save money over probate. For example, if you use a paid trustee such as a bank or trust company, management fees over the years could easily exceed the cost of probate. Trust fees are often based on a percentage of income or principal, with annual minimums ranging from $500 to about $2,500 depending upon the institution. Many institutional trustees won't accept trusts with under $50,000 in assets.

Protecting Assets For Heirs With private nursing home costs averaging $69,800 a year, many parents are concerned with preserving assets for their heirs. One source of assistance is Medicaid. But to be eligible an applicant must not have cash and other non-exempt assets exceeding $2,000 as an individual. Assets in a living trust would be considered as non-exempt assets. A home placed in a living trust is not exempt from creditors' claims. The one exception to the general rule is the family home; as long as one spouse is living at home, he or she can't be forced to sell the home to pay for the other's nursing home care. The state of Montana, however, can make a creditor's claim on the estate after the surviving spouse has died to recoup the nursing home costs. However, the Montana homestead allowance protects value in a home up to $20,000. The homestead allowance is exempt from, and has priority over, all claims against the estate.

Those who are concerned about nursing home costs should explore a long-term care insurance policy to see if it would better meet their financial planning goals than does a living trust.

Is an Inexperienced Investor A Concern? There are many instances where inexperienced investors may prefer placing assets in a living trust until they feel the confidence to take over management themselves. For example, a recent widow had very little investment experience and did not want to be responsible for investing the sizable amount of money she received upon the death of her husband. Although she is willing to learn more about investing, she needed the emotional security of having someone else manage her assets for her, so she established a revocable living trust.

Incompetency Advancing age, serious illness, or accident may render a person incapable of either supervising his or her investments and business, or making necessary payments for his or her well-being. A revocable living trust could be a management tool in this case. As an example, a retired bachelor with only distant relatives suffered a severe heart attack and was away from his business for several months. As a result of that experience he chose two living trusts - one naming a corporate -- trustee for his investments and the other naming a trusted partner for the business. Under this arrangement his investments are being continually supervised and, if he should become incapacitated, the corporate trustee can step in to take care of his living expenses. An alternative to a living trust may be a power of attorney.

SUMMARY

Before establishing a living trust, make a list of financial planning objectives you wish to achieve. Then discuss your needs with professionals such as an attorney, a trust officer, a certified public accountant and/or a certified financial planner. They may suggest an array of financial planning tools that could better help you achieve your goals than a living trust.

Living Trust Scams: Montana Seniors Beware

By
Rick Bartos

The popular television series Dragnet introduced us to Sergeant Friday. A constant fighter of crime, Sergeant Friday was always able to protect the innocent by asking for, "Just the facts." Here are a few facts about living trusts.

What is a living trust?

A living trust is an alternate way to own, manage and dispose of your property. It is much like a bank account in that you cannot see or touch the trust. The trust owns the property you transfer into it while you or someone you choose takes care of that property.

The living trust is created by a trust document. The document states who is creating the trust (grantor), who will manage the trust (the trustee), who will benefit from the trust (the beneficiary), and what property will become part of the trust.

You are the grantor of your living trust. You decide which pieces of your property should become part of the trust body. Your trust can include real estate, bank accounts, stocks, bonds and other personal property items. You decide if you want to transfer all or only some of your assets into your trust.

You may also be the trustee of your living trust. Being the trustee allows you to exercise full control of the property you have transferred into the trust. If you do not want to manage your living trust, you may appoint another person or a financial institution to do so for you.

Can I avoid probate with a living trust?

In many instances the answer is yes. However, the cost of buying a living trust and transferring your assets into the trust may well exceed any probate costs you may encounter.

Your assets must be properly transferred into the trust. If they are not, you might not avoid probate. Even if you have a proper trust, you still need a will to cover property you might have missed or which is later acquired and never transferred into the trust.

In many instances, if your property is held in joint tenancy with right of survivorship (husband and wife) you will not have to probate any property when the first spouse passes away. The surviving spouse has no legal need to probate. Do not be misled by probate delay and fee horror stories**.** Not all individuals need a trust - not all probates are expensive or time consuming.

Can a living trusts save me estate or inheritance taxes?

No.

Can a living trust allow me to qualify for Medicaid if I were to enter a nursing home and thereby save my assets?

In virtually every instance the answer is no. It is unlikely a living trust will save any assets from the spend-down requirements to become Medicaid eligible.

What are the expenses of a living trust?

1. Cost of having the trust instrument drawn up to establish the trust.

2. Paying the trustee's fee.

3. Paying for transferring the assets into the living trust.

Why should I consult an attorney?

1. Licensed Montana attorneys must follow strict ethical standards. They are subject to review for their actions by the Commission on Practice and ultimately the Montana Supreme Court.

2. Montana attorneys have at least 7 years of higher education. They are required to complete rigorous legal education training and testing.

3. In consulting an attorney, you establish an attorney-client relationship. The information you share with the attorney must be kept confidential. You continue to receive the services long after the trust document was created.

If you are reluctant to approach an attorney, your local Area Agency on Aging office has trained volunteer counselors to assist. Also your bank trust officer or a licensed or certified public accountant would be excellent resource people to assist you.

Many trust kits and commercial packages are sold by unlicensed persons claiming to be insurance salespersons or financial planners. They walk the line of unfair trade practices and the unauthorized practice of law. They exaggerate the time and cost considerations of probate. And because they are neither licensed nor regulated, they may not keep your financial information confidential.

Why should I be cautious about the commercial trust packages?

1. These salespersons are regulated by Montana Living Trust Act.

2. Trust kits do not allow the trust to be tailored to your specific needs and goals. You receive no individualized legal or estate planning advice.

3. Commercial trust packages will more likely cost you more than it costs to have a lawyer establish a living trust.

4. Trust kits and commercial trust packages require you to transfer your property into your trust. This can be a time consuming and complicated task, involving the completion of new deeds and transfer documents. If you have an attorney establishing your trust the attorney can assist in transferring your property into your trust.

Where can I get the facts on living trusts?
Montana Office on Aging: 1-800-332-2272
Montana Attorney General Office: 1-406-444-2026
Montana State Bar Elder Assistance Committee**:** 1-406-442-7660

REMEMBER: Determining if you really need a trust is the first step; correctly identifying your assets and tailoring the trust is the second step; and do not forget the third and critical step, legally and properly transferring assets into the trust.

They're your assets. It's your future. Be careful.

THE USES AND ABUSES OF REVOCABLE TRUSTS IN MONTANA: WHEN THEY ARE NEEDED AND WHEN THEY ARE NOT

By
E. Edwin Eck
Former Dean University of Montana School of Law

I. INTRODUCTION

A revocable trust is one where the trustor (settlor) has a right to revoke. In most states, this right to revoke must be retained by the trustor in the trust instrument. However, in Montana unless a trust is expressly made irrevocable by the trust instrument, the trust is revocable. Of course, from a drafting standpoint, it is preferable to include an express provision indicating the trustor's ability to revoke the trust.

Revocable trusts are often characterized as either "funded" or "unfunded". The primary purpose of the funded trust is to avoid probate of those assets which were placed in the trust prior to the trustor's death. The "unfunded" trust does not contain assets prior to the estate owner's death. Rather, the unfunded trust is to receive assets upon the death of the estate owner. Thus, the unfunded trust does not avoid probate.

The focus of this presentation is the funded revocable trust.

II. USES OF REVOCABLE TRUSTS

There are a variety of uses of such trusts.

A. Asset Management (during lifetime). An estate owner may wish to have someone else manage assets for him or her during lifetime, but does not want to give up control. A number of circumstances could be cited where management by someone else is desirable. I will list three such circumstances:

1. Client A may have recently received a windfall but be inexperienced in asset management.

2. Client B may be intending to travel substantially. Client B wants someone else to handle the continuing monitoring of investments as well as the mechanics of transferring dividends and interest to a checking account.

3. Client C is an elderly person and no longer enjoys investment decision making.

In all of these circumstances, a revocable trust could be considered. In all of these cases, someone other than the trustor will be named trustee. While the trustee selection is beyond the scope of this outline, the client in need of asset management often considers the corporate trustee because of its investment experience.

This use of a revocable trust involving the selection of a corporate trustee is not one of the uses typically cited by promoters of revocable trusts. They focus on the "self- trusteed" trust, where the trustor is also the trustee.

B. Future Incapacity (during lifetime). An estate owner may fear a possible future incapacity. Without a revocable trust, if a Montanan became incapacitated, a conservatorship proceeding could be initiated (see discussion under Guardianships & Conservatorships). Critics of the conservatorship proceedings cite the following, which they perceive to be disadvantages of a conservatorship.

- court costs;
- attorney fees;
- the potential publicity associated with a hearing concerning the alleged incapacity;
- the possibility of the court imposing bond;
- the requirement to inventory assets within ninety (90) days of appointment;
- the limitations on conservators making gifts, conveying or releasing contingent interests, entering into contracts, creating trusts, exercising options to purchase, and other restraints of conservators' powers which require prior court approval;
- the requirement of annual accounts.

With the use of a funded revocable trust, all of these disadvantages are avoided. A revocable trust is not the sole devise used to avoid the disadvantages of a conservatorship. The estate owner can also utilize a durable power of attorney, to achieve the same goal.

C. Privacy in the disposition of assets (Probate Avoidance). A will is filed as part of the probate proceeding. A revocable trust is not part of the public record. Thus, clients who wish to dispose of their assets privately are likely to find the revocable trust to be the preferred vehicle.

Examples of clients who wish private disposition include:

- ♦ a parent who wishes to disinherit a child;
- ♦ a parent who wishes to impose further trust restrictions on an adult child who is incapable of managing assets;
- ♦ a man who is acknowledging the existence of an illegitimate child; and
- ♦ a man or woman whose estate plan is beyond the mores of the community.

D. Privacy in the nature and value of assets (Probate Avoidance). The probate statutes of many states require the personal representative to file in court an inventory of the property owned by the decedent and to list fair market values as of the date of the decedent's death. Some clients do not wish the nature and extent of their assets to be part of the public record.

However, privacy in the nature and value of assets is not a valid reason to establish a revocable trust in Montana. MCA §72-3-607(3), reads:

> **The personal representative shall send a copy of the inventory to interested persons, or file the original of the inventory with the court and send a copy of the inventory to interested persons who request it.**

Thus, a personal representative in Montana is not required to file an inventory with the court.

E. Avoiding the fees and costs associated with probate (Probate Avoidance).

1. Effective July 1, 1992, the filing fee for the commencement of a probate is $70. MCA §25-1-201(m).

2. The personal representative is required to publish a notice to creditors. MCA §72-3-801. Publication fees vary from newspaper to newspaper.

3. Personal representatives are entitled to reasonable compensation. Under Montana law, that compensation shall not exceed 3% of the estate for the first $40,000 of assets and 2% of the value of the estate in excess of $40,000 without court approval. MCA §72-3-631.

4. The compensation of the attorney shall not exceed 1 1/2 times the compensation allowable to the personal representative. MCA §72-3-633. An interested person may file a motion for a court determination of the "reasonableness" of the compensation of any person employed by the personal representative, including any attorney. MCA §72-3-634.

The Montana Supreme Court has concluded that these statutes require that the fee charged for legal services be reasonable. Such is ascertained by considering thetime spent, the nature of the service, and the skill and experience required. ESTATE OF ROBERT E. STONE, 768 P.2d 334, 336 (Mont. 1989). In the same case the court expressly rejected the argument that the percentages set forth in MCA §§72-3- 631 and 72-3-633 are standard fees.

Because of the lack of published and reliable data concerning all of these fees, it is simply difficult, if not impossible, to make any certain comparisons. Further, it is likely that fees vary substantially from lawyer to lawyer. Also, the same lawyer might charge different amounts to different clients for performing similar services depending upon the responsibility assumed, the matter's complexity, and the time devoted to the project. These variances in fees and the lack of data concerning fees opens the door for irresponsible advocates of revocable trusts and the advocates for probate to overstate their positions.

F. Avoiding the delays associated with probate (Probate Avoidance)

The public perceives that there are a number of delays associated with probate. In fact, the Montana Uniform Probate Code does set certain time periods which must elapse before the estate can be closed. A creditor has four months after the date of the first publication of notice to creditors within which to file a claim. An estate cannot be closed by a sworn statement until the expiration of six months after the date of the original appointment of the personal representative. No corresponding restrictions are applicable to a revocable trust.

If the value of the gross estate exceeds the applicable exclusion amount, a federal estate tax return must be filed within 9 months after the decedent's death. IRC §§6018 and 6075. If either a probate estate or a trust estate contains assets which are difficult to value or assets which raise other estate tax issues, it is not unreasonable to assume that the fiduciary will need the full nine months to collect the data necessary to complete the return. Further, the Internal Revenue Service has three years after the return was filed, to audit and assess additional tax. IRC §6501. This three year period applies both to a probate estate and to a trust estate.

In summary, while a probate estate does require that certain time periods elapse prior to closure, both the probate estate and the trust estate face the same tax considerations which could mean the continuation of the estate.

G. Avoiding probate generally. As noted, one primary use of the revocable trust is simply to avoid probate generally. Without identifying any specific perceived undesirable characteristic of probate, such as a lack of privacy or excessive cost, some of the public simply believe that probate is bad.

III. PROMOTERS OF REVOCABLE TRUST

Unfortunately, there are a variety of unscrupulous promoters of revocable trusts who make misstatements and misleading statements concerning their uses. The following is a listing of such statements and one teacher's response.

A. A revocable trust can save taxes which cannot be saved though a will and probate.

> **False.** To a considerable extent a revocable trust is disregarded for all tax purposes. For gift tax purposes, the transfer of assets to a revocable trust is not a taxable gift because of the trustor's power to revoke renders that transfer incomplete. For income tax purposes, the income, deductions, and credits of the trust are attributed to the trustor. IRC §§676 and 671. For estate tax purposes, all of the trust's assets are included in the trustor's gross estate. IRC §2038.

A common estate tax planning technique is the use of a "bypass B", or "credit shelter" trust. Assets placed in such a trust are not subject to estate taxation upon the death of the surviving spouse. Often the maximum amount of assets which can be sheltered against the estate tax unified credit of IRC §2010 are placed in such a trust.

These trust provisions can be part of a will (a testamentary trust) funded upon the death of the estate owner. The same trust provisions can be made part of a revocable trust. The same estate tax savings can be achieved either instrument.

B. A will is subject to possible contests. A revocable trust is not subject to contest, or is subject to contest to a lesser degree.

> **ESSENTIALLY FALSE.** Montana has cases which indicate that gratuitous transfers by trust are subject to attack on the basis of a lack of capacity, undue influence, and fraud. See e.g. ADAMS v. ALLEN, 679 P.2D 1232 (Mont. 1984). These same grounds can be used to attack a transfer by will.

Perhaps one could argue that the Montana Uniform Probate Code's notice requirements might encourage a contest. For example, MCA §72-3-603 requires a personal representative to give notice of his appointment to the decedent's heirs and devises within 30 days of the personal representative's appointment. No similar requirement exists for revocable trusts upon the death of the trustor. However, I think that if there is evidence of a lack of capacity, undue influence, or fraud, a substantial gratuitous transfer will be attacked whether the transfer is made by trust or will.

C. Assets placed in a revocable trust are not subject to creditor attack.

> **FALSE** During the trustor's lifetime, property in a revocable trust is subject to the claims of the trustor's creditors. MCA §72-36-301. After the trustor's death, trust property is subject to the claims of the creditors of the decedent trustor's estate. MCA §72-36-302.

D. Assets placed in a revocable trust are not subject to a spouse's claim for an elective share.

> **FALSE** Assets placed in a revocable trust are included in the trustor's augmented estate and subject to the spouse's right of election.
> MCA §§ 72-2-222 and 72-2-221.

E. Assets placed in a revocable trust are not counted for Medicaid purposes.

FALSE. The income and principal of a trust is treated as an available resource of the trustor for Medicaid purposes if the trust was established by the trustor during the trustor's lifetime. 42 USC §1396p(d).

F. One may transfer assets at death in trust wherein a second person is a discretionary beneficiary. The second person does not have to count those assets for Medicaid purposes.

ESSENTIALLY TRUE. If such a trust is a testamentary trust (i.e., if the trust was created by will), the assets of such a trust are expressly excluded by statute. 42 USC §1396p(d). There is no similar express statutory exclusion if the discretionary trust provisions are part of a revocable trust. Policy considerations could argue that there should be no distinction between either trust since the discretionary beneficiary cannot force a distribution to him/herself in any event. Nevertheless, a cautious practitioner might prefer a discretionary trust created by will over one created by a revocable trust in such a circumstance.

G. A probate proceeding necessarily includes many court hearings.

FALSE An estate can be probated informally under the Montana Uniform Probate Code. While documents have to be filed with the Clerk of Court, NO HEARINGS ARE REQUIRED**.** MCA §72-3-201 et seq.

H. Everyone needs a revocable trust.

FALSE In Montana there are some good reasons to consider a revocable living trust. Perhaps a client desires asset management by another person or a trust company. Perhaps a client desires privacy in the disposition of his assets. Or perhaps, a client owns real property in another state where probate proceedings are more cumbersome or clearly costly.

While there are good reasons for some to consider revocable trusts, there is no good reason for everyone to adopt a revocable trust. Potential disadvantages must be considered.

First, typically revocable trusts are more expensive than wills to create. Trust instruments are usually more complex than wills. Also, time has to be devoted to assets transfers.

Second, simplicity favors retaining assets in the name of the estate owner. During the estate owner's lifetime there is no trust instrument which must be provided to a stockbroker, a title company, or other third party.

One alternative for a married couple who wants to avoid probate is to place assets in joint tenancy with rights of survivorship and adopt durable powers of attorney.

IV. THE TRANSFER AND HOLDING OF ASSETS IN REVOCABLE TRUSTS: CONSIDERATIONS PRIOR TO THE TRUSTOR'S DEATH

A. Title to assets should be transferred to "[name of trustee], trustee under Trust Agreement dated [date of execution] between [name of trustee] and [name of trustor]." Some trust drafters also provide a name for the trust in the trust instrument and include that name in the title of transferred assets.

B. If a partnership interest is to be transferred, any written partnership agreement should be examined. Express procedures for making the trustee an assignee of the partnership interest should be followed. Written consent of the other partners may be necessary. If a limited partnership interest is being transferred, it will also be necessary to amend the certificate of limited partnership.

C If real property is to be transferred, the trustor's title insurance policy should be examined to see if the title company's guarantee will be sufficient after the transfer.

If the property is subject to an encumbrance, the deed of trust or the mortgage should be examined to see if it includes a "due on transfer" clause. Some practitioners as a matter of course obtain express written permission from the lender before making a transfer of encumbered property to a revocable trust.
D. If an asset does not have title, a written assignment should be prepared. Some practitioners who routinely include clauses in wills authorizing the use of a separate writing to dispose of tangible personal property as provided in MCA §72-2-533, include similar clauses in both the pour over will and in the revocable trust. Thus, even if such an asset was not effectively transferred in trust prior to the trustor's death, the dispositive provisions of both the will and the trust are identical.

E. Stock in an S corporation can be held in a revocable trust. IRC §1361 (c)(2)(A)(I) provides that when the grantor is treated for general income tax purposes as the owner of a trust, as is the case with a revocable trust, such a trust may own stock in an S corporation without jeopardizing the S election.

F. The transfer of an installment obligation to a revocable trust is not a disposition of the obligation which would result in a realization of the untaxed profit at the time of transfer. Rev. Rule. 76613. 1974 2 C. 3. 153.

Some uncertainty can arise if the installment obligation is owned by husband and wife and a transfer is intended to a trust which is revocable by only one spouse. One alternative is to make the transfer in two distinct steps. First, one spouse could simply make an outright transfer of his interest in the obligation to the other spouse. This transfer should not result in the recognition of gain. IRC §§453B(g)(1) and 1041. Second, the transferee spouse could make a subsequent transfer to her revocable trust.

G. The transfer of Series EE U.S. savings bonds to a revocable trust does not cause the acceleration of recognition of bond interest. Rev. Rul. 58-2, 1958-1 C.B. 236. PLR 9009053.

H. The capital gains exclusion on the sale of a principal residence is not affected if title to the house is held in trust. IRC § 121 provides a capital gains exclusion of up to $125,000 to a person over the age of 55 who sells his principal residence. This exclusion is obtainable even when the title to the home is held in a revocable trust. PLR 8007050.

I. "Flower" bonds may be held by a revocable trust. Certain outstanding U.S. government bonds are eligible for redemption at par for the payment of the federal estate tax. When such bonds are held in a revocable trust, either (1) the trust instrument must require the trustee to pay all or a pro rata portion of the estate tax or (2) statutes in the decedent's domicile must require the trustee to pay the tax or the proportionate share of the tax that is attributable to the trust assets. While MCA § 72-16-603 is such an apportionment statute, it is preferable that the trust instrument require the trustee to pay such taxes. Any tax apportionment provisions of a pour over will should be consistent with the trust instrument.

J. The trust instrument and a durable power of attorney should be drafted so that the trustee could make similar distributions to an agent who in turn could make gifts to third parties.

K. Generally trusts must have their own identification numbers and file their own income tax returns, unless they have under $600 in gross income. IRC §6012(a)(4). Most grantor trusts are subject to these same requirements, although all of the items of income, deduction, and credit are included in the computation of the trustor's personal income tax liability. Regs. §§1.6019-3(a)(1), 3(a)(9).

However, if the trustor or the trustor's spouse is a trustee or a co-trustee of a revocable trust, such a trust does not need its own identification number and no trust income tax return need be filed. Regs. §§1.671-4 and 301.6109-1(a)(2).

V. THE REVOCABLE TRUST AFTER THE TRUSTOR'S DEATH

A. Transfer of assets. The trust instrument may provide for trust termination upon the death of the trustor. If the trustor is also the trustee, a successor trustee would serve. Typically that successor is designated in the trust instrument. However, if no practical method of appointment is included in the trust instrument, a co-trustee or a beneficiary may petition to court to fill the vacancy. The court is to give consideration to the wishes of trust beneficiaries who are 14 years of age or older. MCA §72-33-621.

The successor trustee will need to present proof to third parties with whom the trustee must deal that he or she is properly acting as trustee. If the successor trustee is court appointed, a copy of the trustor's death certificate and a certified copy of the court order should suffice.

If the successor trustee is not court appointed, the procedure is less certain and will likely vary from third party to third party. Perhaps a copy of the trustor's death certificate and a verified copy of the trust instrument will satisfy the requirements of most third parties. If a third party requires the copy of the trust instrument be certified by a public official (clerk and recorder or clerk of court), the revocable trust's advantage of privacy in disposition of assets would be lost.

In the case of Montana real property, the identity of any successor trustee may be established by a recorded affidavit of the successor trustee specifying: (1) his name, (2) his address, (3) the date of his succession, (4) the circumstances of his succession, and (5) confirming that he is currently lawfully serving as trustee. MCA §72-36-206(6).

B. Corporation stock. After the trustor's death, the trust becomes irrevocable. The irrevocable trust may continue to hold S stock for two years after the trustor's death. IRC §136(c)(2) (A)(ii). Unless the continuing trust provisions satisfy the requirements of a "qualified Subchapter S trust" as specified in IRC §1361 (d)(3), the corporation will lose its S status.

Advance Directives

ADVANCE MEDICAL DIRECTIVES

The **"Montana Rights of the Terminally Ill Act"** (also known as the Montana Living Will Act") allows individuals the maximum possible control over their own medical care and inevitable death. The law allows you to declare your intent not to have life sustaining treatment which only prolongs the process of dying. This Declaration of Living Will only becomes effective if your attending physician determines you have an incurable or irreversible condition that will result in death in a relatively short time.

The law provides immunity for physicians and facilities which carry out the provisions of the living will. It also provides a procedure which requires the physician who will not honor your living will to so notify you, and transfer you to another physician who will comply with your wishes. You have the ability to revoke this Declaration of Living Will at any time and in any manner. There are also provisions allowing you the option of designating another to make the decisions regarding withholding or withdrawal of life sustaining treatment.

If you do not write a living will, or you do not designate another to make these decisions, the law provides a list of individuals who will be allowed to make the decision for you, in the following order:

1) spouse;
2) adult child or majority of your adult children;
3) parents;
4) adult sibling or majority of your adult siblings;
5) nearest other adult relative.

Living wills have no effect on life insurance or on annuities.

Before considering a "living will" there are three important points to bear in mind.

1. First, a "living will" is only used when you can no longer participate in the decision making process surrounding your treatment and you have been diagnosed with a terminal condition which will result in death in a short period of time. As long as you remain competent you may refuse or accept treatment, regardless of the existence of a living will.

2. Second, the living will is a personal statement which should reflect your end of life treatment desires. It should be developed by you, with consultation with your attorney if you wish to use one. You may wish to discuss this topic with loved ones and your personal doctor or health nurse. Any generic or standardized form of a living will should be examined to ensure that it reflects your wishes.

3. Third, the validity and composition of living wills may vary from state to state. If you anticipate spending a substantial amount of time in another state, you should research that state's law.

If you have decided to exercise your right to a living will, please consider the following steps:

A. Do the research. Materials and other samples may be obtained from a variety of sources (for example: Montana Senior Citizens' Association; American Lung Association of Montana; or Montana Code Annotated). Be positive that your ideas concerning the nature of incompetency which triggers the use of the will, the severity of the medical condition necessary to withhold treatment, and the types of treatment to be withheld are expressed in the document.

B. Consider carefully who will serve as witnesses. Although Montana law has little to say concerning witnesses, other states have set out more specific requirements. As a general rule, your attending physician or other medical personnel who may be attending to you in time of illness should not act as witnesses. In some states relatives may not act as witnesses.

C. The living will should be easily accessible to those likely to be involved in a time of emergency. Copies of the executed document should be in your medical records, and family members and your personal physician should also have a copy. You may also want to carry a card in your wallet or purse stating the existence of your living will and how it may be located.

D. A living will should be re-executed, or rewritten, at relatively frequent intervals. This will add to the perception that the document truly reflects your wishes.

E. Remember, you have the ability to revoke the living will at anytime and in any manner.

F. Montana law does not specify whether food and water are considered "life sustaining treatment. Therefore your living will should be specific as to whether you wish food and water to be provided or not.

Like a testamentary will, the living will allows you to maintain your right to self-determination. It is a document of great significance which requires research and reflection before drafting. Contact your local Area Agency on Aging for additional information if you feel it is necessary.

Use the form on the following page if you want to appoint someone else (who is of sound mind and 18 years of age or older) to make the decisions for you about withholding or withdrawing life-sustaining treatment. If your appointee is unavailable or unwilling to serve as your designee, your doctor will make the determination. If you use the form, check with the people you want to be designees to make sure they are willing to so serve.

DECLARATION OF LIVING WILL APPOINTMENT

If I should have an incurable and irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of my attending physician or my attending advanced practice registered nurse, cause my death within a relatively short time and I am no longer able to make decisions regarding my medical treatment, I appoint _____, or if he or she is not reasonably available or is unwilling to serve I appoint _____ in the alternative, to make decisions on my behalf regarding withholding or withdrawal of treatment that only prolongs the process of dying and is not necessary for my comfort or to alleviate pain, pursuant to the Montana Rights of the Terminally Ill Act.

If the individual(s) I have appointed are not reasonably available or are unwilling to serve, I direct my attending physician or my attending advanced practice registered nurse, pursuant to the Montana Rights of the Terminally Ill Act, to withhold or withdraw treatment that only prolongs the process of dying and is not necessary for my comfort or to alleviate pain.

Signed this____ day of _____, 20___.

_____
Signature

The declarant voluntarily signed this document in my presence.

_____	_____
Witness Signature	Witness Signature
_____	_____
(Printed Name)	(Printed Name)
_____	_____
_____	_____
(Address)	(Address)

DECLARATION OF LIVING WILL

If I should have an incurable or irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of my attending physician or my attending advanced practice registered nurse, cause my death within a relatively short time and I am no longer able to make decisions regarding my medical treatment, I direct my attending physician or my attending advanced practice registered nurse, pursuant to the Montana Rights of the Terminally III Act, to withhold or withdraw treatment that only prolongs the process of dying and is not necessary to my comfort or to alleviate pain.

Signed this_____ day of _____,20____.

_____
Signature

_____
Printed name

_____
Address

The declarant voluntarily signed this document in my presence:

_____
Witness Address

_____
Witness Address

REVOCATION OF DECLARATION OF LIVING WILL

I, _____ hereby revoke my Declaration (Living Will) regarding withholding or withdrawal of life-sustaining treatment in the event I am in a terminal condition which will result in my death in a short period of time.

This revocation is effective immediately and must be communicated to my attending physician and other health care providers as soon as possible.

Dated this _____ day of _____, 20___.

_____
(Signature)

RIGHTS OF THE TERMINALLY ILL ACT

Excerpts from Montana Codes Annotated
Title 50, Chapter **9**

50-9-102. Definitions. As used in this chapter, the following definitions apply:

(1) “Advanced practice registered nurse” means an individual who is licensed under Title 37, Chapter 8, to practice professional nursing in this state and who has fulfilled the requirements of the Board of Nursing pursuant to 37-8-202 and 37-8-409

(3) "Attending physician" means the physician selected by or assigned to the patient, who has primary responsibility for the treatment and care of the patient.

(4) "Board" means the Montana state board of medical examiners.

(5) "Declaration" means a document executed in accordance with the requirements of 50-9-103.

(7) "Emergency medical services personnel" means paid or volunteer firefighters, law enforcement officers, first responders, emergency medical technicians, or other emergency services personnel acting within the ordinary course of their professions.

(8) "Health care provider" means a person who is licensed, certified, or otherwise authorized by the laws of this state to administer health care in the ordinary course of business or practice of a profession.

(9) "Life-sustaining treatment" means any medical procedure or intervention that, when administered to a qualified patient, serves only to prolong the dying process.

(13) "Qualified patient" means a patient 18 years of age or older who has executed a declaration in accordance with this chapter and who has been determined by the attending physician to be in a terminal condition

(16) "Terminal condition" means an incurable or irreversible condition that, without the administration of life-sustaining treatment will, in the opinion of the attending physician or attending advanced practice registered nurse, result in death within a relatively short time.

50-9-103. Declaration relating to use of life-sustaining treatment -designee. (1) An individual of sound mind and 18 or more years of age may execute at any time a declaration governing the withholding or withdrawal of life-sustaining treatment. The declarant may designate another individual of sound mind and 18 of age or older to make decisions governing the withholding or withdrawal of life-sustaining treatment. The declaration must be signed by the declarant or another at the declarant's direction and must

be witnessed by two individuals. A health care provider may presume, in the absence of actual notice to the contrary, that the declaration complies with this chapter and is valid.

(2) A declaration directing a physician or advanced practice registered nurse to withhold or withdraw life-sustaining treatment may but need not be in the following form:

DECLARATION

If I should have an incurable or irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of my attending physician or my attending advanced practice registered nurse, cause my death within a relatively short time and I am no longer able to make decisions regarding my medical treatment, I direct my attending physician or my attending advanced practice registered nurse, pursuant to the Montana Rights of the Terminally Ill Act, to withhold or withdraw treatment that only prolongs the process of dying and is not necessary to my comfort or to alleviate pain.

Signed this _____ day of _____, _____.

Signature _____
City, County, and State of Residence _____

The declarant voluntarily signed this document in my presence.

Witness _____
Address _____

Witness _____
Address _____

(3) A declaration that designates another individual to make decisions governing the withholding or withdrawal of life-sustaining treatment may but need not be in the following form:

DECLARATION

If I should have an incurable and irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of my attending physician or my attending advanced practice registered nurse, cause my death within a relatively short time and I am no longer able to make decisions regarding
my medical treatment, I appoint _____or, if that person is not reasonably available or is unwilling to serve,_____, to make decisions on my behalf regarding withholding or withdrawal of treatment that only prolongs the process of dying and is not necessary for my comfort or to alleviate pain, pursuant to the Montana Rights of the Terminally Ill Act.

If the individual I have appointed is not reasonably available or is unwilling to serve, I direct my attending physician or my attending advanced practice registered nurse, pursuant to the Montana Rights of the Terminally Ill Act, to withhold or withdraw treatment that only prolongs the process of dying and is not necessary for my comfort or to alleviate pain.

Signed this _____ day of _____, _____.
Signature _____
City, County, and State of Residence_____

The declarant voluntarily signed this document in my presence.

Witness _____
Address _____

Witness _____
Address _____

Name and address of designee.

Name _____
Address _____

(4) If the designation of an attorney-in-fact pursuant to 72-5-501 and 72-5-502 or the judicial appointment of an individual contains written authorization to make decisions regarding the withholding or withdrawal of life-sustaining treatment, that designation or appointment constitutes, for the purposes of this part, a declaration designating another individual to act for the declarant pursuant to subsection (1).

(5) A health care provider who is furnished a copy of the declaration shall make it a part of the declarant's medical record and, if unwilling to comply with the declaration, shall advise the declarant and any individual designated to act for the declarant promptly.

50-9-104. Revocation of declaration.

(1) A declarant may revoke a declaration at any time and in any manner, without regard to mental or physical condition. A revocation is effective upon its communication to the attending physician, attending advanced practice registered nurse, or other health care provider by the declarant or a witness to the revocation. A health care provider or emergency medical services personnel witnessing a revocation shall act upon the revocation and shall communicate the revocation to the attending physician or the attending advanced practice registered nurse at the earliest opportunity. A revocation communicated to a person other than the attending physician, attending advanced practice registered nurse, emergency medical services personnel, or a health care provider is not effective unless the attending physician or the attending advanced practice registered nurse is informed of it before the qualified patient is in need of life-sustaining treatment.

(2) The attending physician, attending advanced practice registered nurse, or other health care provider shall make the revocation a part of the declarant's medical record.

50-9-105. When declaration operative.

(1) A declaration becomes operative when:

(a) it is communicated to the attending physician or the attending advanced practice registered nurse; and

(b) the declarant is determined by the attending physician or the attending advanced practice registered nurse to be in a terminal condition and no longer able to make decisions regarding administration of life-sustaining treatment.

(2) Except as provided in 72-17-216, when the declaration becomes operative, the attending physician or attending advanced practice registered nurse and other health care providers shall act in accordance with its provisions and with the instructions of a designee under 50-9-103(1) or comply with the transfer requirements of 50-9-203.

50-9-106. Consent by others to withholding or withdrawal of treatment. (1) If a written consent to the withholding or withdrawal of the treatment, witnessed by two individuals, is given to the attending physician or the attending advanced practice registered nurse, the physician or attending advanced practice registered nurse may withhold or withdraw life-sustaining treatment from an individual who:

(a) has been determined by the attending physician or attending advanced practice registered nurse to be in a terminal condition and no longer able to make decisions regarding the administration of life-sustaining treatment; and

(b) has no effective declaration.

(2) The authority to consent or to withhold consent under subsection (1) may be exercised by the following individuals, in order of priority:

(a) the spouse of the individual;

(b) an adult child of the individual or, if there is more than one adult child, a majority of the adult children who are reasonably available for consultation;

(c) the parents of the individual;

(d) an adult sibling of the individual or, if there is more than one adult sibling, a majority of the adult siblings who are reasonably available for consultation; or

(e) the nearest other adult relative of the individual by blood or adoption who is reasonably available for consultation.

(3) A full guardian may consent or withhold consent under subsection (1) as provided in 72-5-321.

(4) If a class entitled to decide whether to consent is not reasonably available for consultation and competent to decide or if it declines to decide, the next class is authorized to decide. However, an equal division in a class does not authorize the next class to decide.

(5) A decision to grant or withhold consent must be made in good faith. A consent is not valid if it conflicts with the expressed intention of the individual.

(6) A decision of the attending physician or attending advanced practice registered nurse acting in good faith that a consent is valid or invalid is conclusive.

(7) Life-sustaining treatment cannot be withheld or withdrawn pursuant to this section from an individual known to the attending physician or the attending advanced practice registered nurse to be pregnant so long as it is probable that the fetus will develop to the point of live birth with continued application of life-sustaining treatment.

50-9-107. When health care provider may presume validity of declaration. In the absence of knowledge to the contrary, a health care provider may assume that a declaration complies with this chapter and is valid.

50-9-108. Effect of previous declaration. An instrument executed before October 1, 1991, that substantially complies with 50-9-103(1) is effective under this chapter.

50-9-109. Reserved.

50-9-110. Authority to adopt rules. The department may adopt rules to implement this chapter.

50-9-111. Recognition of declarations executed in other states. A declaration executed in a manner substantially similar to 50-9-103 in another state and in compliance with the law of that state is effective for purposes of this chapter.

PART 2
Effect on Health Care -- Rights and Duties

50-9-201. Recording determination of terminal condition and content of declaration. Upon determining that a declarant is in a terminal condition, the attending physician or attending advanced practice registered nurse who knows of a declaration shall record that determination and the terms of the declaration in the declarant's medical record.

50-9-202. Treatment of qualified patients.
(1) A qualified patient may make decisions regarding life-sustaining treatment so long as the patient is able to do so.
(2) This chapter does not affect the responsibility of the attending physician, attending advanced practice registered nurse or other health care provider to provide treatment, including nutrition and hydration, for a patient's comfort care or alleviation of pain.
(3) Life-sustaining treatment cannot be withheld or withdrawn pursuant to a declaration from an individual known to the attending physician or attending advanced practice registered nurse to be pregnant so long as it is probable that the fetus will develop to the point of live birth with continued application of life-sustaining treatment.

50-9-203 Transfer of patients. An attending physician, attending advanced practice registered nurse, or other health care provider who is unwilling to comply with this chapter shall take all reasonable steps as promptly as practicable to transfer care of the declarant to another physician, advanced practice registered nurse, or health care provider who is willing to do so. If the policies of a health care facility preclude compliance with the declaration of a qualified patient under this chapter, that facility shall take all reasonable steps to transfer the patient to a facility in which the provisions of this chapter can be carried out.

50-9-204. Immunities.
(1) In the absence of actual notice of the revocation of a declaration, the following, while acting in accordance with the requirements of this chapter, are not subject to civil or criminal liability or guilty of unprofessional conduct:
(a) a physician or advanced practice registered nurse who causes the withholding or withdrawal of life-sustaining treatment from a qualified patient;

(b) a person who participates in the withholding or withdrawal of life-sustaining treatment under the direction or with the authorization of a physician or advanced practice registered nurse;

(c) emergency medical services personnel who cause or participate in the withholding or withdrawal of life-sustaining treatment under the direction of or with the authorization of a physician or advanced practice registered nurse or who on receipt of reliable documentation follow a living will protocol;

(d) emergency medical services personnel who proceed to provide life-sustaining treatment to a qualified patient pursuant to a revocation communicated to them; and

(e) a health care facility in which withholding or withdrawal occurs. **(2)** A health care provider whose action under this chapter is in accord with reasonable medical standards is not subject to civil or criminal liability or discipline for unprofessional conduct with respect to that decision.

(3) A .health care provider whose decision about the validity of consent under 50-9-106 is made in good faith is not subject to criminal or civil liability or discipline for unprofessional conduct with respect to that decision.

(4) An individual designated pursuant to 50-9-103(l) or an individual authorized to consent pursuant to 50-9-106, whose decision is made or consent is given in good faith pursuant to this chapter, is not subject to criminal or civil liability or discipline for unprofessional conduct with respect to that decision.

50-9-205. Effect on insurance -- patient's decision.

(1) Death resulting from the withholding or withdrawal of life-sustaining treatment in accordance with this chapter does not constitute, for any purpose, a suicide or homicide.

(2) The making of a declaration pursuant to 50-9-103 does not affect the sale, procurement, or issuance of any policy of life insurance or annuity, nor does it affect, impair, or modify the terms of an existing policy of life insurance. A policy of life insurance is not legally impaired or invalidated by the withholding or withdrawal of life-sustaining treatment from an insured, notwithstanding any term of the policy to the contrary.

(3) A person may not prohibit or require the execution of a declaration as a condition for being insured for or receiving health care services.

(4) This chapter does not create a presumption concerning the intention of an individual who has revoked or has not executed a declaration with respect to the use, withholding, or withdrawal of life-sustaining treatment in the event of a terminal condition.

(5) This chapter does not affect the right of a patient to make decisions

regarding use of life-sustaining treatment, so long as the patient is able to do so, or impair or supersede a right or responsibility that any person has to affect the withholding or withdrawal of medical care.

(6) This chapter does not require a health care provider to take action contrary to reasonable medical standards.

(7) This chapter does not condone, authorize, or approve mercy killing or euthanasia.

DO NOT RESUSCITATE -- NOTIFICATION
Part 1 General

50-10-101. Definitions. As used in this part, unless the context clearly requires otherwise, the following definitions apply:

(1) “Advanced practice registered nurse” means an individual who is licensed under Title 37, Chapter 8, to practice professional nursing in this state and who has fulfilled the requirements of the board of nursing pursuant to 37-8-202 and 37-8- 409

(2) “Attending advanced practice registered nurse” means the advanced practice registered nurse who is selected by or assigned to the patient and who has primary responsibility for the treatment and care of the patient.

(3) "Attending physician" has the meaning provided in 50-9-102.

(4) "Board" means the state board of medical examiners.

(5) "Department" means the department of public health and human services provided for in 2-15-2201.

(6) “DNR identification" means a standardized identification card, form, necklace, or bracelet of uniform size and design, approved by the department, which signifies that the possessor is a qualified patient, as defined in 50-9-102, or that the possessor's attending physician or attending advanced practice registerednurse has issued a do not resuscitate order for the possessor and has documented the grounds for the order in the possessor's medical file.

(7) "Do not resuscitate order" means a directive from a licensed physician or advanced practice registered nurse that emergency life-sustaining procedures should not be administered to a particular person.

(8) "Do not resuscitate protocol" means a standardized method of procedure, approved by the board and adopted in the rules of the department, for the withholding of emergency life-sustaining procedures by physicians, advanced practice registered nurses, and emergency medical services personnel.

(9) "Emergency medical services personnel" has the meaning provided in 50-9-102.

(11) "Life-sustaining procedure" means cardiopulmonary resuscitation or a component of cardiopulmonary resuscitation.

(10) "Physician" means a person licensed under Title 37, chapter 3, to Practice medicine in this state.

50-10-102. Immunities.

(1) The following are not subject to civil or criminal liability and are not guilty of unprofessional conduct upon discovery of DNR identification upon a person:

(a) a physician or advanced practice registered nurse who causes the withholding or withdrawal of life-sustaining procedures from that person;

(b) a person who participates in the withholding or withdrawal of life-sustaining procedures under the direction or with the authorization of a physician or advanced practice registered nurse;

(c) emergency medical services personnel who cause or participate in the withholding or withdrawal of life-sustaining procedures from that person;

(d) a health care facility in which withholding or withdrawal of life-sustaining procedures from that person occurs;

(e) physicians, advanced practice registered nurses, persons under the direction or authorization of a physician or advanced practice registered nurse, emergency medical services personnel, or health care facilities that provide life-sustaining procedures pursuant to an oral or written request communicated to them by a person who possesses DNR identification.

(2) The provisions of subsections (1)(a) through (1)(d) apply when a life-sustaining procedure is withheld or withdrawn in accordance with the do not resuscitate protocol.

(3) Emergency medical services personnel who follow a do not resuscitate order from a licensed physician or an advanced practice registered nurse are not subject to civil or criminal liability and are not guilty of unprofessional conduct.

50-10-103. Adherence to do not resuscitate protocol -- transfer of patients. (1) Except as provided in 72-17-216, emergency medical services personnel, other than physicians or advanced practice registered nurses, shall comply with the do not resuscitate protocol when presented with either do not resuscitate identification, an oral do not resuscitate order issued directly by a physician or an advanced practice registered nurse, or a written do not resuscitate order entered on a form prescribed by the department.

(2) An attending physician, an attending advanced practice registered nurse, or a health care facility unwilling or unable to comply with the do not resuscitate protocol shall take all reasonable steps to transfer a person possessing DNR identification to another physician or advanced practice registered nurse or to a health care facility in which the do not resuscitate protocol will be followed

50-10-104. Effect on insurance -- patient's decision.
(1) Death resulting from the withholding or withdrawal of emergency life-sustaining procedures pursuant to the do not resuscitate protocol and in accordance with this part is not, for any purpose, a suicide or homicide.
(2) The possession of DNR identification pursuant to this part, does not affect in any manner the sale, procurement, or issuance of any policy of life insurance, nor does it modify the terms of an existing policy of life insurance. A policy of life insurance is not legally impaired or invalidated in any manner by the withholding or withdrawal of emergency life-sustaining procedures from an insured person possessing DNR identification, notwithstanding any term of the policy to the contrary.
(3) A physician, advanced practice registered nurse, advanced practice registered nurse, health care facility, or other health care provider and a health care service plan, insurer issuing disability insurance, self-insured employee welfare benefit plan, or nonprofit hospital plan may not require a person to possess DNR identification as a condition for being insured for or receiving health care services.
(4) This part does not create a presumption concerning the intention of an individual who does not possess DNR identification with respect to the use, withholding, or withdrawal of life-sustaining procedures.
(5) This part does not increase or decrease the right of a patient to make decisions regarding use of life-sustaining procedures if the patient is able to do so, nor does this part impair or supersede any right or responsibility that a person has to effect the withholding or withdrawal of medical care in any lawful manner. In that respect the provisions of this part are cumulative.
(7) This part does not authorize or approve mercy killing.

50-10-107. DNR form to be readily available. The department shall ensure that the DNR identification form approved by the department is readily available at no cost or at a nominal charge.

Guardianship and Conservatorship

GUARDIANSHIP & CONSERVATORSHIP

If an individual does not plan ahead regarding their personal care, medical care, and financial matters, and that person becomes incapacitated and unable to make decisions for themselves, then a court must step in and appoint a guardian and/or conservator to make those decisions and handle those matters. With proper planning, including talking with family, friends, and physicians, and by utilizing durable powers of attorney and/or living wills, guardianships can almost always be avoided even when someone is completely incapacitated and unable to care for themselves.

Conservatorship A conservatorship is a court-ordered protective relationship whereby an individual is appointed to manage another person's (the ward's) financial affairs after that person has become unable to do so. A petition must be filed with the court and a judge must decide if the assets of the ward are at risk for mismanagement. Under a conservatorship the ward retains their rights such as the right to vote, to marry, or to write a will. The Conservator appointed by the Court must act in the ward's best interests, and is responsible to the court and must make an annual accounting. Upon being appointed, the Conservator must take possession of, protect, and preserve the ward's property. The Conservator must invest the ward's property prudently and account for it. The Conservator's responsibilities and powers may be limited by the court order.

Within 90 days after appointment, a complete inventory must be filed by the conservator with the court. This inventory should include any property in the conservator's possession or of which there is knowledge. The conservator must manage the ward's money and pay all the ward's debts and taxes and the expenses of the guardianship. Annual reports to the court are required. In the annual report, the conservator must give the court a full and correct account of the receipts and disbursements of all the ward's property and a statement of the ward's remaining assets.

Guardianship A guardianship is a court-ordered protective arrangement for a person (called the ward) who has been found by Court to be incapacitated and in need of someone to oversee his or her personal care and decision-making to protect the ward's health and safety. A guardianship may be used only as is necessary to promote and protect the well-being of the incapacitated person.

Montana law defines an incapacitated person as "anyone who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause to the extent he or she lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his/her person." The Court may consider any evidence which pertains to the issue of capacity. Normally the best evidence is the opinion of a qualified doctor who has personally examined the potential ward.

In addition to the full guardianship, the Court may order a limited guardianship instead. A full guardian of an incapacitated person has the same powers, rights, and duties respecting his ward that a parent has respecting his minor child. A limited guardian of an incapacitated person has only those powers and duties that are specifically given to the guardian by the Court.

QUESTIONS and ANSWERS

What is a guardian?
A guardian is a person, institution, or agency appointed by a court to manage the affairs of another, called a ward. The guardian may manage person and/or the estate matters. Each state has specific laws, which govern guardianship proceedings and the guardian's activities. States also separate guardianship for minors and for adults with disabilities in the law. Your local court will be able to direct you to the divisions, which oversee adult guardianship and/or minor guardianships.

Who may have a guardian appointed to manage his/her affairs?
In order to have a guardian appointed a person must be demonstrated by a preponderance of the evidence to lack the capacity to make or communicate rational decisions concerning personal or financial matters. The law presumes that an adult 18 years of age or older is capable of managing, or has the capacity to manage, his/her own affairs. There must also be cause of the lack of capacity identified. Mental illness, developmental disability, physical incapacity, chronic intoxication, and advanced age can be the cause.

How is it determined that a person may need a guardian?
Normally a person's actions harming their own safety or welfare lead to concerns that

the person may need a guardian. Anyone may file a Petition in Court to have a guardian appointed. The Montana Adult Protective Services agency files for guardianships in order to protect adults who may be incapacitated.

Who can act as a guardian?
The guardian must be over the age of 18 and must be capable of caring for the ward. Individuals have priority for appointment as guardian in-the following order: 1) The spouse of the incapacitated person; 2) An adult child of the incapacitated person; 3) A parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent; 4) Any relative of the incapacitated person with whom he has resided for more than 6-months prior to the filing of the petition; 5) A relative or friend who has demonstrated a sincere, longstanding interest in the welfare of the incapacitated person; 6) A private association or nonprofit corporation with a guardianship program for incapacitated persons, a member of such private association or nonprofit corporation; 7) A person nominated by the person who is caring for him or paying benefits to him.

The parent of an unmarried incapacitated person may appoint a guardian of the incapacitated person in his or her will or other writing that is signed by the parent and attested by at least two witnesses. The spouse of a married incapacitated person may appoint a guardian of the incapacitated person by will or other writing signed by the spouse and attested by at least two witnesses. The appointment of a guardian by a spouse has priority over an appointment by a parent.

Who makes the decision to establish a guardianship and/or conservatorship?
Upon the filing of a Guardianship Petition, the Court decides whether to appoint a guardian and who to appoint. The Court also decides how much authority to give to the guardian. The guardianship should be limited to meet the specific needs of the ward.

Should I avoid a guardianship and/or conservatorship?
Guardianship should be a last resort. When a guardian is appointed, you lose your right to make basic decisions about your life and property. The proceeding will be expensive and is emotionally difficult.

What is expected of me if I serve as a guardian/conservator?
If you are appointed as a guardian and/or conservator, the court's order will tell you what decisions you are allowed to make. You may have just a few powers or need

to make most decisions on behalf of your ward. You are required to make decisions and act in the ward's best interest. You must try to make choices based on the ward's values and to involve the ward in making decisions whenever possible. What you can do depends on the court order and state law, but if you have authority over property (i.e. as Conservator) you will at least need to:

- Find and protect the ward's assets
- Set up separate accounts with the ward's funds
- Spend the ward's money only for the ward's care and needs
- Keep detailed records of all expenditures
- Keep the ward's property in good repair and insured
- Carefully invest the ward's resources
- File inventories and accountings with the court
- Get directions from the court before taking major actions

If you have authority over your ward's personal affairs (i.e. as Guardian), the list of responsibilities can be quite long, depending on your ward's needs and the court's order. You may need to:

- Make sure the ward is living in the most appropriate location
- Arrange for caregivers, social activities, transportation
- Consent to medical treatment such as surgeries or medications
- Supervise hygiene, meals, and clothing
- Provide for any physical, speech, or occupational therapies
- Frequently visit the ward and try to improve the ward's quality of life
- Report to the court on the care you are providing

Can guardianship be used in an emergency?

Yes, there is the mechanism for an emergency appointment of a guardian for a specific purpose. They are usually time-limited and not renewable without a full guardianship proceeding. There is usually a cursory hearing about the specific issue and a guardian's authority is only in the areas of the issue presented. Usually this is

not a full finding of incapacity, and a full hearing on the guardianship must be scheduled or the emergency/temporary guardianship expires.

Does guardianship ever end?
Guardianship is normally a long-term relationship. The court may modify, revoke, or terminate the guardianship if the ward's ability to make and communicate decisions is demonstrated to the court.

Are there alternatives to guardianship?
Guardianship is a highly intrusive form of advocacy and should be used only as a last resort when all other alternatives have been examined. Some of the alternatives to guardianship may be Powers of Attorney for health care or financial management, Living Wills, trust, case/care management services, Representative Payee and Health Care Surrogate acts. Individuals may get additional information from the local bar association, and local social service agencies, Legal Services Developer with Aging Services Bureau Senior & Long Term Care.

What is the procedure for pursuing a Guardianship?
The incapacitated person or any person interested in his welfare, including the county attorney, may petition the district court for a finding of incapacity and appointment of a guardian. Upon filing the petition the court will set a date for a hearing on the issues of incapacity. The allegedly incapacitated person may have counsel of his own choice or the court may, in the interest of justice appoint an appropriate official or attorney to represent him in the proceeding who will serve as a guardian ad litem (a person who is appointed by the court to represent a ward in legal proceedings).

The person alleged to be incapacitated will be examined by a physician appointed by the court. The physician will submit his report in writing to the court. A visitor, who is appointed by the court, will interview the examining physician. The visitor will also interview the person who filed the petition and the person who is nominated to serve as guardian and will visit the residence of and the person alleged to be incapacitated and the place it is proposed that he will be detained or reside if the requested appointment is made. The visitor will then submit his report in writing to the court.

The person alleged to be incapacitated is entitled to be present at the hearing in person and to see or hear all evidence bearing upon his condition. He is entitled to be represented by counsel, to present evidence, to cross-examine witnesses,

including the court-appointed physician and the visitor, and is entitled to a trial by jury. However, the issue may be determined at a closed hearing without a jury if the person alleged to be incapacitated or his counsel so requests.

What rights of mine might be affected?
A good guardian will take into account the wishes and desires of the ward when making decisions about residence, medical treatments, and end-of life decisions. The guardianship should affect only those rights that the proposed ward is incapable of handling.

Can someone file a Petition appointing themselves my guardian without my knowledge and consent?
Because establishing guardianship is a legal process that involves the removal of the individual's rights, there are many procedural protections established by the law. They include:

- Notice to the individual of all proceedings.
- Representation of the individual by counsel.
- Attendance of the individual at all hearings/court proceedings.
- Ability of the individual to compel, confront and cross examine all witnesses.
- Allowance of the individual to present evidence.
- Appeal of the individual to the determination of the court.
- Presentation of a clear and convincing standard of proof.
- The right of the individual to a jury trial.

In any type of guardianship the court may limit the guardian's authority. The guiding principle in all guardianship is that of least intrusive measures to assure as much autonomy as possible. The guardian's authority is defined by the court and the guardian may not operate outside that authority. A guardian may be a family member or friend or a public or private entity appointed by the court.

What are the rights of the ward?
In general, the ward keeps all legal and civil rights guaranteed to all residents under the states' and the United States' Constitution, ***except*** **those rights which the court grants to the guardian.**

The court should specifically state which rights it is taking from the ward. The ward keeps all rights that the court has not specifically given to the guardian. The ward,

however, has the right to the **least restrictive** guardianship suitable to his or her needs and conditions. The guardian also has the affirmative duty to advise the ward of his or her rights and to attempt to maximize the ward's self reliance and independence. These rights include, but are not limited to:

1. The right to be treated with dignity and respect.
2. The right to privacy, which includes the right to privacy of the body, and the right to private, and uncensored communication with others by mail, telephone, or personal visits.
3. The right to exercise control over all aspects of life that the court has not delegated to the guardian.
4. The right to appropriate services suited to the ward's needs and conditions, including mental health services.
5. The right to have the guardian consider the ward's personal desires, preferences, and opinions.
6. The right to safe, sanitary, and humane living conditions within the least restrictive environment that meets the ward's needs.
7. The right to procreate.
8. The right to marry.
9. The right to equal treatment under the law, regardless of race, religion, creed, sex, age, marital status, sexual orientation, or political affiliations.
10. The right to have explanations of any medical procedures or treatment. This includes information about the benefits, risks, and side effects of the treatment, and any alternative procedures or medications available.
11. The right to have personal information kept confidential. This may include withholding certain information the ward may not want his or her family to know. The guardian may have to provide personal information to apply for benefits or in emergency situations where the ward or others may be in danger, or if the information is required by law to be shared with agencies or health departments. Personal information may also be contained in the reports the guardian makes to the court, and which may be available for others to see.
12. The right to review personal records, including medical, financial, and treatment records.
13. The right to speak privately with an attorney, ombudsman, or other advocate.

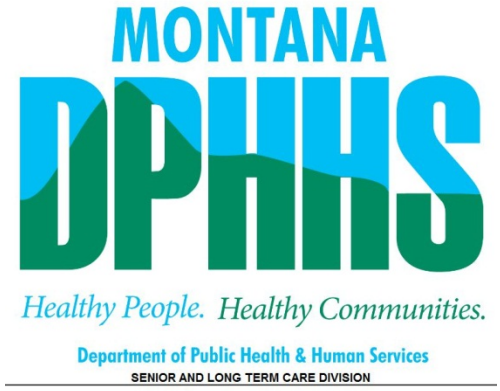
14. The right to petition the court to modify or terminate the guardianship. This includes the right to meet privately with an attorney or other advocate to assist with this legal procedure.
15. The right to bring a grievance against the guardian, request the court to review the guardian's actions, request removal and replacement of the guardian, or request that the court restore rights if it can be shown that the ward has regained capacity to make some or all decisions. The guardian also has a responsibility to request that the ward's rights be restored when there is evidence that the ward has regained capacity.

What is a temporary Guardianship?

If an incapacitated person has no guardian and an emergency exists, the court may appoint a temporary guardian without first holding a complete guardianship hearing. If a temporary guardian is appointed in such a case, a complete hearing following full notice to all interested persons must be held within six months to determine if a permanent guardian should be appointed.

When does a Guardianship terminate?

The authority and responsibility of a guardian for an incapacitated person terminate upon the death of the guardian or ward, the determination of incapacity of the guardian, or upon the removal or resignation of the guardian. The incapacitated person may file a written objection to the appointment of the parental or spousal appointment of guardian. The appointment is then terminated. Regardless of the objection, however, the court may then hold a hearing relative to the ward's incapacity and may appoint the parental or spousal nominee or any other suitable person upon a finding of incapacity. If, the ward, or any person interested in the ward's welfare, petitions the court to remove a guardian, the court will hold a hearing and may remove the guardian if it is in the best interests of the ward. The court may also accept the guardian's resignation after holding a hearing when petitioned to do so by the guardian.



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