

Montana Q and A

Ten commonly asked questions about PAD's for Montana

Please note: the following 10 FAQs are designed to provide a quick and accessible guide to what your state's Statutes say – or do not say – about PADs. The FAQs do not attempt to provide a complete picture of the law in your state, nor can they take the place of legal advice. The answers were accurate when written in November 2006.

1. Can I write a legally-binding psychiatric advance directive (PAD)?

Yes. Sections 72-5-501 and 72-5-502 of the Montana Code allow you to appoint an agent to make decisions for you in the event that you are unable to make them for yourself. In Montana, this person is known as an "Attorney in Fact" and the document naming the attorney in fact is known as a "Durable Power of Attorney". There is no mandatory form for the Durable Power of Attorney as long as it is made clear that it remains valid in the event that you cannot make decisions for yourself. However, a recommended standard form is available [here](#).

2. Can I write advance instructions regarding psychiatric medications and/or hospitalization?

It is not currently possible to write legally binding instructions as a freestanding document. However, if you appoint an Attorney in Fact, you may document the decisions you wish your Attorney in Fact to make on your behalf. The recommended standard form allows you to write instructions at item 9.

3. Does anyone have to approve my advance instructions at the time I make them?

No. However, your Power of Attorney must be notarized.

4. Can I appoint an agent to make mental health decisions for me if I become incompetent?

Yes, as outlined above.

5. If I become incompetent, can my agent make decisions for me about medications, and/or hospitalization?

Yes. The general rule is that your agent can make any decision that you could have made if you were able to, including a decision to refuse treatment. This rule is subject to limitations, however – see question 9 below.

6. Does my agent have to make decisions as he/she thinks I would make them (known as "substituted judgment"), or does he/she have to make them in my "best interests"?

The statute does not specify how your agent must act.

7. Is there any rule that says that I can only make advanced instructions, only appoint an agent, or that I must do both?

As set out above, you may not create freestanding instructions. To create a PAD, you must appoint an Attorney in Fact, although it is up to you whether or not to document instructions in addition.

8. Before following my PAD, would my mental health care providers need a court to determine I am not competent to make a certain decision?

No. The statute does not say how it is determined that a person is "incompetent". In practice, a person is likely to be "incompetent" under the statute when the treating physician decides that he/she cannot understand and/or communicate a decision.

9. Does the statute say anything about when my mental health providers may decline to follow my PAD?

No. The statute is silent on this question. However, a provider may generally "override" a PAD when a person becomes subject to involuntary treatment (civil commitment) law, or otherwise in an emergency. Further, a provider may be justified in not following a Power of Attorney where it is not in accordance with his/her own professional standards.

10. How long does my PAD remain valid?

Your Power of Attorney remains valid until revoked by you.