March 20, 1996

Ms. Cathy Hart
State Ombudsman for the Elderly
Idaho Commission on Aging
STATEHOUSE MAIL

THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Advance Directives

Dear Ms. Hart:

This letter is in response to your request regarding the relationship between guardianships and advance directives. In your letter you asked for an opinion regarding three issues which I will address in turn.

Certain items require clarification prior to answering your questions. First, any judicially imposed limits upon a guardianship would control over general statements of law contained in this letter. In other words, if the judge imposes restrictions on a guardian—for example, that the guardian may not withhold consent for resuscitation orders—then such judicially imposed conditions on the guardianship must be followed. Second, in referring to guardians generally, I am referring to a guardianship established under the Uniform Probate Code, Idaho Code §§ 15-5-301 *et seq*. Guardianships for the developmentally disabled pursuant to Idaho Code §§ 66-401 *et seq*. have separate procedures and separate substantive powers. In particular, such guardians cannot, without a separate proceeding and court order, withhold consent for lifesaving treatments, or consent to experimental surgeries, or delegate any of the powers granted in the order. Idaho Code § 66-405(7). Therefore, if a guardianship is granted pursuant to the developmentally disabled guardianship statutes, certain portions of this analysis will not apply due to the inherent limitations on the powers of such guardians.

SECTION I

DOES A GUARDIAN HAVE THE POWER TO CHANGE A WARD'S ADVANCE DIRECTIVE?

A. The Agent Exercising a Durable Power of Attorney for Health Care Must Carry Out the Terms of the Living Will

In order to answer this question, a review of Idaho's statutes regarding the creation of an advance directive is required. Idaho Code § 39-4504 sets forth the statutory form for a living will. In a living will, a person states generally what directives should be followed in the event such person suffers from an incurable illness and death is imminent. In conjunction with the living will, under Idaho Code § 39-4505 a person can create a durable power of attorney for health care. The express statutory purpose of the durable power of attorney for health care is to "implement the general desires of a person as expressed in the 'living will.'" With the durable power of attorney for health care, the person granted such power (the agent) may make those health care decisions delineated in the living will when the person who granted the power (the principal) is "unable to communicate rationally." The agent may make the decisions to the same extent and with the same effect as if the principal made such decisions. The agent exercising a durable power of attorney for health care has been appointed precisely to carry out the terms of the advance directive (the living will) and cannot change its terms.

B. A Guardian Must Follow a Ward's Advance Directive in a Living Will and Durable Power of Attorney for Health Care

Your question is whether a person's living will, as their advance directive, may be changed by a later appointed guardian. Idaho Code § 15-5-312 sets forth the general powers and duties of a guardian, one of which is the power to give "any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment or service." Therefore, a person appointed guardian has the power to make all health care decisions for the ward. The essence of your question becomes, how does such guardianship act in conjunction with a ward who has left an advance directive through a living will and durable power of attorney?

In the event a ward has executed a living will and durable power of attorney for health care, such directive and decisions should control as to the ward's health care. Idaho Code §§ 39-4501 *et seq.* are collectively entitled the Natural Death Act. Idaho Code § 39-4502 contains the statement of policy for the Natural Death Act as "the right of a competent person to have his wishes for medical treatment and for the withdrawal of artificial life sustaining procedures carried out even though that person is no longer able to communicate with the physician." This section further states that the legislature, by enacting the Natural Death Act, intends "to establish an effective means for such communication." Although the living will and durable power of attorney for health care are not the only means of providing such communication, they are currently the only statutory means. The Idaho Legislature chose to use the living will and durable power of attorney for health care as the method for expressing advance directives. These specific statutes should control over the general guardianship statutes in the area of health care decisions that fall within the scope of the living will. Ausman v. State, 124 Idaho 839, 864 P.2d 1126 (1993).[1] Most importantly, since the ward was competent at the time of

executing the living will and durable power of attorney for health care, such directive should be honored by a future guardian.

Some states prohibit the appointment of a guardian, or limit the guardian's power in health care decisions, when a principal has executed a living will and durable power of attorney for health care. In the Matter of the Guardianship of Standel, 1995 WL 655934 (Ohio App. 1995); Matter of Guardianship of L. W., 482 N.W.2d 60 (Wis. 1992). New York has statutorily prohibited guardians from changing, revoking or altering advance directives. *See* Matter of Kern, 627 N.Y.S.2d 257 (N.Y. Sup. Ct. 1995). Thus, in those states that have expressly addressed this question, the existence of a living will and durable power of attorney for health care takes precedence over a guardian's authority to make health care decisions for the ward.

We conclude that if a person has executed a valid living will and durable power of attorney for health care, such directives should be followed by the guardian.

C. A Guardian Should Follow the Directive in a Ward's Living Will Unless a Court Approves Otherwise

However, in the event a ward has executed a living will without a durable power of attorney for health care, or if the durable power of attorney for health care has lapsed due to inability or unwillingness of the agent to so act, the question becomes more complicated. As noted, a guardian generally has the authority to make all health care decisions outside the scope of the living will. Idaho Code § 15-5-312(3). Decisions of the guardian regarding items governed by the living will are proper if consistent with the living will. If the guardian's decision is different from that expressed in the advance directive the guardian should seek court approval prior to making such decision.[2] A court petition by the guardian seeking approval for changing the ward's advance directive, or making a decision adverse to the advance directive, is proper to protect the interests of the guardian, the ward, and all other interested parties.

Many other factual situations may arise with combinations of the existence or absence of living wills, durable powers of attorney for health care, general durable powers of attorney and guardianships. Accompanying these situations will undoubtedly be varying factual backgrounds which may affect the situation. A guardian should approach such decisions cautiously to ensure that he or she does not incur liability for breach of his or her duty as guardian. However, certain factual situations, as related above, are clear and a few general rules can be stated.

If a ward has executed a living will and durable power of attorney for health care, a duly appointed guardian should defer to the duly appointed agent for decisions within the scope of the living will and should not make decisions contrary to the terms of the

advance directive. If an advance directive is made but no health care agent is available to make such decisions, the guardian can make decisions consistent with the advance directive but should seek court approval prior to acting contrary to the living will. For medical decisions outside the scope of the living will, the guardian's decision should control.[3]

SECTION II

CAN AN AGENT GRANTED A DURABLE POWER OF ATTORNEY EXECUTE A LIVING WILL FOR THE PRINCIPAL?

The answer to your question requires some analysis of the difference between a general durable power of attorney and a durable power of attorney for health care.[4]

As stated above, a durable power of attorney for health care under Idaho Code § 39-4505 is specifically created "to implement the general desires of a person as expressed in the 'living will.'" Further, under the approved language for a durable power of attorney for health care, the agent has the power to make health care decisions and to carry out the ward's "desires concerning obtaining or refusing or withdrawing life prolonging care, treatment, services, and procedures." Thus, neither a statutory framework nor the approved language creating a durable power of attorney for health care permits the agent to execute a living will for the principal.

Idaho Code §§ 15-5-501 *et seq*. cover general durable powers of attorney. Under Idaho Code § 15-5-502, "all acts done by an attorney in fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his successors in interest as if the principal were competent and not disabled." Thus, if the agent is specifically authorized pursuant to the general durable power of attorney, the agent could theoretically execute a living will for the principal. However, most general durable powers of attorney concern financial and business activities and do not include the execution of living wills. The best choice for a person in this situation is for the principal, instead of granting such authority to the agent, to simply execute his or her own living will.

SECTION III

CAN A PERSON BE A PETITIONER IN A GUARDIANSHIP PROCEEDING AND ALSO PERFORM CASE VISITOR FUNCTIONS FOR THE SAME INDIVIDUAL?

This issue was addressed in the letter issued to your office from the Attorney General's Office on April 5, 1991. Specifically, under Idaho Code § 15-5-308, a visitor in a guardianship proceeding is required to have "no personal interest in the proceedings." If the person acting as a visitor has also filed the petition for guardianship, then, as petitioner, the visitor has some interest or personal concern regarding the outcome of the proceedings. Therefore, it would be improper for a person to be both a petitioner and visitor in the same guardianship proceeding.

I hope this letter adequately answers your inquiries. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

KEVIN D. SATTERLEE
Deputy Attorney General
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[1] Note that the guardian's power to make health care decisions regarding matters outside the scope of the living will and durable power of attorney for health care, if any, will control. For example, decisions regarding the ward's daily care, physical therapy, personal hygiene, pain medication, alternative treatments or other similar matters.

[2] Note, however, that Idaho Code § 39-4303 gives priority for medical consent to a "[P]arent, spouse or guardian." Thus, if the parent or spouse of the person does not agree with the guardian's decisions, the guardian should seek court approval prior to acting.

[3] Once again subject to the potential interaction with Idaho Code § 39-4303.

[4] It should be noted that a general power of attorney could never constitute authority for such decisions because such non-durable powers of attorney lapse on the incapacity of the principal.