State of Idaho
DEPARTMENT OF HEALTH AND WELFARE
Division of Medicaid

PHILIP E. BATT
Governor
LINDA L. CABALLERO
Director
TRESA NEWMAN
Administrator

BUREAU OF FACILITY STANDARDS

Towers Building - 3rd Floor
P.O. Box 83720
Boise, ID 83720-0036
(208) 334-6626
Fax (208) 332-7204

INFORMATIONAL LETTER #97-5

DATE: May 14, 1997

TO: All Idaho Nursing Facilities

FROM: John W. Hathaway, Chief
Bureau of Facility Standards

SUBJECT: **LIVING WILLS, POWER OF ATTORNEY FOR HEALTH CARE DECISIONS, AND RELATED ISSUES REGARDING TREATMENT DECISIONS**

Some legal/ethical questions have come up during survey. The questions were presented to Willard Abbott, our Deputy Attorney General, for his informal opinion. We would like to share the questions and his responses with all facilities.

Mr. Abbott prefaced his responses with the following:

> Living Wills and Durable Powers of Attorney for health care are specified in the Idaho Code at §§39-4501 -- 4509. Please note that of necessity my responses are general in nature and could shift some depending on the specific facts.

1. QUESTION: Can families with power of attorney for health care make decisions that are contrary to the Living Will?

   ANSWER: A family member is NOT empowered to make decisions contrary to the most recent Living Will. The Living Will is intended to implement the desires of a person as expressed in the Living Will (Idaho Code §39-4505). Conceivably, the patient has "communicated" his desires for health care through some means other than the Living Will more recently than the last Living Will. The person with the power would need to demonstrate the effectiveness of that communication, and would need to convince a court that it should take precedence over the Living Will, if it became a legal issue.

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2. QUESTION: Can families with power of attorney for health care make decisions about issues that are not addressed in the Living Will?

   ANSWER: A person with the power of attorney for health care can make decisions regarding health care that are not in the Living Will, IF THE POWER GIVEN SAYS SO. The standard durable power of attorney for health care printed in Idaho Code §39-4505 would permit the holder to make pretty broad decisions, so long as they did not conflict with the patient's expressed desires.

3. QUESTION: Is it OK for the family to decide not to treat medical conditions that are not normally terminal, such as infections? Even when the Living Will addresses only terminal conditions? Most of the time when this occurs, it seems the family has the resident's quality of life and comfort at heart, yet it seems to have a high potential for abuse.

   ANSWER: A family member is never empowered to withhold treatment when a condition is not terminal. I believe we should treat such family requests as possible medical neglect and refer the matter to adult protection services.

4. QUESTION: Does the power of attorney give the family the right to say not to treat the resident, even when the resident is able to say "I want treatment." Sometimes even the cognitively impaired can indicate that they want to live longer.

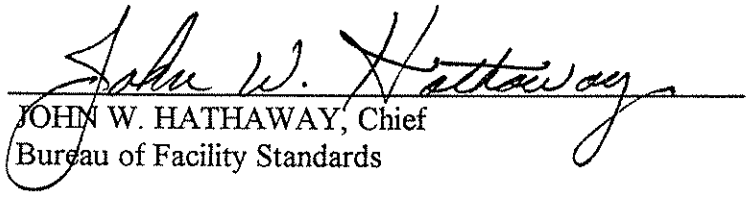
   ANSWER: The durable power of attorney for health care only applies when the individual is unable to communicate rationally (Idaho Code §39-4505). Therefore, if the individual is potentially lucid, their desires are to be followed, which includes revocation of the power of attorney or a change to the Living Will at any time. Therefore, the family cannot countermand the patient's desires.

5. QUESTION: Another case involved a resident with a tube feeding. The family wanted it removed, and the resident's Living Will said she wanted artificial nutrition/hydration, even in the presence of a terminal illness. Is there any kind of liability to the person who pulls the tube out?

   ANSWER: Similar to question 2 and 4, the family member is not empowered to make decisions that run counter to the expressed desires of the patient. Their role as holder of the power is to make the decision the patient would have made if he were competent to do so. A doctor would be taking a very big risk to remove a nutrition/hydration tube where the patient expressly said not to.

This information is a general rule of thumb. There may or may not be mitigating circumstances based on the facts that could affect the outcome of any given situation. We strongly recommend that you consult your attorney when dealing with these issues.

If you have any questions about the information in this Informational Letter, please call Loretta Todd or Debby Ransom in Boise at 334-6626.



JOHN W. HATHAWAY, Chief
Bureau of Facility Standards

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cc: Idaho Health Care Association