

DECEDENTS' ESTATES QUESTION

Last year, a patient, age 80, was diagnosed with cancer. Shortly after receiving the cancer diagnosis, the patient signed a durable health-care power of attorney (POA) designating her son as her “agent to make all health-care decisions on my behalf when I lack capacity to make them myself.” The POA contained no other provisions relevant to the commencement or duration of the agent’s authority. The patient thereafter underwent several cancer therapies which were so successful that, two months ago, the patient’s doctor said that, in his opinion, the patient’s cancer was in “complete remission.”

Last week, the patient was struck by an automobile, suffered serious injuries to her head and neck, and underwent emergency surgery for those injuries. Following surgery, the patient’s doctor explained to her son that there was a more than 50% risk that the patient would not regain consciousness and would need to be maintained on life-support systems to provide her with food, hydration, and respiration. The doctor also noted that, during the next few days, there was a large risk of a stroke or cardiac arrest, which would substantially increase the risk that the patient would never regain consciousness, and which could be fatal.

The patient’s son was confident that his mother would not want to be kept on life support if she were permanently unconscious but believed that she would want to be maintained on life support until her status was clear. He thus instructed the doctor to put the patient on life support but not to resuscitate her if she were to experience a stroke or cardiac arrest. The son issued these instructions after conferring with the doctor and with his two sisters. The sisters disagreed with their brother’s decision and told the doctor to ignore the instructions “because we have as much right to say what happens to Mom as he does, and we want her resuscitated in all events.” Nonetheless, the doctor thereafter placed a “do not resuscitate” (DNR) order in the patient’s chart.

Four days ago, the patient, who had not regained consciousness, suffered a cardiac arrest. Following the DNR order, the nursing staff did not attempt to resuscitate the patient, and she died.

The patient’s valid will devised her estate to her three children in equal shares. All three children survived the patient.

This jurisdiction has a typical statute authorizing durable health-care powers of attorney. This jurisdiction also has a statute providing that “[n]o person shall share in the estate of a decedent when he or she intentionally caused the decedent’s death.”

The patient’s two daughters have consulted an attorney, who has advised them that (1) the patient’s son had no authority to instruct the doctor to write the DNR order; (2) in a wrongful death action, the son would be liable for the patient’s death; and (3) the son is barred from taking under the patient’s will because his actions intentionally caused her death.

Is the attorney correct? Explain.