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# Regrettably Unfair: Brooke Astor and the Other Elderly in New York

Joseph A. Rosenberg\*

All happy families are alike; each unhappy family is unhappy in its own way.<sup>1</sup>

The “great recession of 2008”<sup>2</sup> has widened the already large economic gap that exists between those that inhabit the various parts of the two New Yorks: the haves and the have-nots, the wealthy and the poor, those with enough money to support themselves and those struggling to make ends meet. The stress of these economic hard times appears related to a record number of cases filed in New York courts,<sup>3</sup> and the abuse and financial exploitation of elders by family members who have fallen on hard times is part of the dismal picture. In her book,<sup>4</sup> Meryl Gordon chronicles the rise and fall of Brooke Astor, an icon of wealth, class, and philanthropy in New York City, and provides a window through which we see how “power

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\* Professor of Law, CUNY School of Law. Thank you to my colleague, Ruthann Robson, for lending a caring and insightful ear that helped crystallize the idea for this article. My interest in using this book as a foundation for an article was sparked by the author, Meryl Gordon, during a conversation we had at the Brookdale Center on Aging Chinese New Year dinner in 2009.

1. LEO TOLSTOY, *ANNA KARENINA* 1 (Richard Pevear & Larissa Volokhonsky trans., Penguin Books 2000) (1877).

2. See Posting of Catherine Rampell to Economixblog, ‘Great Recession’: A Brief Etymology (Mar. 11, 2009, 17:39 EST), <http://economix.blogs.nytimes.com/2009/03/11/great-recession-a-brief-etymology>.

3. See William Glaberson, *The Recession Begins Flooding Into the Courts*, N.Y. TIMES, Dec. 28, 2009, at A1. The connection between a rise in elder abuse in New York and the economic recession was recently noted by Judge Fern Fisher, Deputy Administrative Judge of the City of New York, in her introductory remarks at the First Department Roundtable on Article 81 Guardianships at the Association of the Bar of the City of New York on November 12, 2009.

4. MERYL GORDON, *MRS. ASTOR REGRETS: THE HIDDEN BETRAYALS OF A FAMILY BEYOND REPROACH* (2008).

and greed and corruptible seed”<sup>5</sup> converged to destroy the rarified Astors. “Small family, big problems,”<sup>6</sup> observed Philip Marshall, Mrs. Astor’s grandson and a central protagonist in this sad story. Although the magnitude of the Astor family implosion owes much to the extreme wealth of the family, the depth of the family’s dysfunction is also rooted in destructive relationships that sowed the seeds of the problems that became so acute during the last years of Brooke Astor’s life. This combustible combination, fueled by all the lawyers money could buy, exploded into public view in 2006 with Philip’s petition to appoint a guardian<sup>7</sup> for his grandmother when she was 104 years old. After her death, a criminal trial that lasted five months concluded with multiple convictions against her only child, Anthony Marshall, and one of her lawyers, Francis X. Morrissey, on charges that included scheme to defraud, grand larceny, offering false instruments for filing, forgery, possession of stolen property, and conspiracy. Mr. Marshall received a sentence of one to three years for his conviction on the first degree larceny charge, which he received for giving himself a retroactive raise of \$1 million for managing his mother’s finances, and a concurrent sentence of one year on each of the other thirteen counts on which he was convicted.<sup>8</sup> The sentence for first degree larceny was mandatory, and the one-year sentences he received on each of the other counts are to run concurrently.<sup>9</sup> Mr. Morrissey was also given concurrent sentences of one to three years for his convictions on the charges of scheming to defraud and grand larceny.<sup>10</sup> Still to come, absent a settlement, is a probate proceeding in Surrogate’s Court to determine the validity of Mrs. Astor’s 2002 will and three subsequent codicils and the resolution of the appeals filed by Mar-

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5. BOB DYLAN, *Blind Willie McTell*, on 1-3 THE BOOTLEG SERIES (Columbia Records 1991).

6. GORDON, *supra* note 4, at 276.

7. The guardianship proceeding was brought under Article 81 of the Mental Hygiene Law.

8. James Barron, *Brooke Astor’s Son is Sentenced to Prison*, N.Y. TIMES, Dec. 22, 2009, at A31.

9. *Id.*

10. *Id.* Morrissey was automatically disbarred as a result of his felony convictions pursuant to N.Y. Judiciary Law Section 904(b) and (3), and his name was removed from the roll of attorneys effective October 9, 2009, the date he was convicted. *In re Morrissey*, No. M4807, slip op. 1443, 1443 (N.Y. App. Div. Feb. 18, 2010).

shall and Morrissey.<sup>11</sup>

Meryl Gordon's portrait of the fabulously wealthy and proper Mrs. Astor's decline and exploitation during her final years is part of a larger story of a woman who experienced abuse and hardship in two of her three marriages, had a distant and dysfunctional relationship with her only child, and inherited extraordinary riches that she bestowed generously on many charitable organizations, most of which were located in her beloved New York City. Implicit in the story are broader socio-economic and cultural issues of our time. These issues include the influence of marriage on the plight and exploitation of women, the stark disparities in wealth in the United States, the combustible brew of long-term family dysfunction and greed, and the vulnerability of the frail elderly to neglect and abuse.<sup>12</sup>

This article juxtaposes the damning and cautionary tale of the Astor/Marshall family within the broader context of the plight of vulnerable elders whose lives, in stark contrast to Brooke Astor, are shaped in large part by poverty, powerlessness, and injustice. In the criminal trial, Mrs. Astor's geriatrician, Dr. Howard M. Fillit, testified that her wealth slowed the progression of her incapacity and that she maintained a higher degree of functionality than the average person, by virtue of her ability to afford to pay for a large staff that provided the highest quality of care.<sup>13</sup> This logical, and perhaps obvious, observation nonetheless reflects a stark and disturbing reality with significant implications for vulnerable elders—

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11. Surrogate's Court is the primary court in New York with jurisdiction over wills and estates. N.Y. SURR. CT. PROC. ACT § 201 (McKinney 1998). Both men are free on bail pending the outcome of their respective appeals. See John Eligon, *Astor's Son to Stay Free During Appeal*, N.Y. TIMES, Jan. 1, 2010, at A16.

12. The World Health Organization recognizes that 65 is the generally accepted benchmark, but recommends 50 as the definition of an elderly person in developing nations, specifically in sub-Saharan Africa. World Health Organization, *Definition of an Older or Elderly Person*, <http://www.who.int/healthinfo/survey/ageingdefnolder/en/index.html> (last visited Mar. 24, 2010). The United Nations uses 60 or 65 to define old age. According to the U.S. Census Bureau, in 2006, 35.5 million people in the United States, or about 12% of the population, were 65 or older. U.S. CENSUS BUREAU, *POPULATION BY AGE, SEX, RACE AND HISPANIC ORIGIN: 2006 (2007)*, [http://www.census.gov/population/socdemo/age/2006older\\_table1.1.xls](http://www.census.gov/population/socdemo/age/2006older_table1.1.xls).

13. John Eligon, *Witness Says Astor's Staff Helped Mask Her Decline*, N.Y. TIMES, May 6, 2009, at A25.

particularly for the “unbefriended”<sup>14</sup> elderly, who are those without family or friends, those who lack access to, or depend upon public funding of, resources that are supposed to provide the care and services that were so beneficial to Brooke Astor.

The allegations that first surfaced in the guardianship petition were quite serious. Some of these allegations formed the basis for the criminal indictments of Marshall and Morrissey. For a period of time, the level of care Mrs. Astor received was below the standard to which she was accustomed. Her son made decisions that isolated her from longtime caretakers and exiled her from her residence at Holly Hill in Westchester County. At all times, however, the extent of Mrs. Astor’s hardship was relatively mild and substantially mitigated by her wealth.<sup>15</sup> Without minimizing the difficulties she had to en-

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14. See Naomi Karp & Erica Wood, *Incapacitated and Alone: Health Care Decision Making for the Unbefriended Older People*, HUM. RTS. MAG., Spring 2004, <http://www.abanet.org/irr/hr/spring04/incapacitated.html>.

15. For example, the guardianship petition alleged, *inter alia*, that Mrs. Astor was allowed to sleep on a couch that reeked of dog urine (an allegation never proved) because it was too cold to sleep in the bedroom of her Park Avenue apartment in the winter, her apartment was not kept clean, she was served packaged foods instead of freshly cooked meals expertly prepared with the most expensive ingredients, her staff was reduced, and medication was discontinued or replaced with inadequate substitutes (her doctor later stated that he discontinued the medication). GORDON, *supra* note 4, at 193-95. The alleged financial exploitation (most of which was later proved in the criminal case) included the theft of money and transfers of assets, which reduced Mrs. Astor’s wealth from approximately \$180 million to \$120 million. By any standard these material losses were substantial, perhaps staggering, even relative to Mrs. Astor’s total wealth. And the allegations of personal neglect may have caused mild hardship. Yet the question of relativity in assessing the extent of damages is worth exploring. In a different context, the issue of whether an appropriate standard of living should be assessed with a subjective or objective metric arose in cases that decided the appropriate standard of support to which a community spouse of a Medicaid recipient residing in a nursing home was entitled under the Medicare Catastrophic Coverage Act of 1988, 42 U.S.C. § 1396r-5(d) (2006). The New York Court of Appeals held that the enhanced, but lesser, Medicaid income and resource levels for the community spouse should govern, not the person’s prior standard of living. *Gomprecht v. Gomprecht*, 652 N.E.2d 936 (N.Y. 1995). In Mrs. Astor’s case, a subjective view would consider the problems in care and comfort and the loss of so much money and property within the context of her prior lifestyle. An objective evaluation based on a reasonable standard of living would recognize the impact of the reduced level of care and the value of the property that was stolen or misappropriated, but the level of care and attention Mrs. Astor continued to receive and the extraordinary wealth that remained would be significant mitigating factors in assessing the extent of her personal discomfort and material losses.

dures, they were mild compared to the severe consequences, deprivation, and exploitation truly vulnerable elderly experience. The hardship inflicted on Brooke Astor was cushioned by the financial and social support she had available.

Through the prism of Brooke Astor's story, this article examines developments in New York law that relate to the impact of incapacity and exploitation on truly vulnerable elders. Unfortunately, most elders who have compelling and noteworthy stories of injustice lack the glamour of wealth and celebrity that draw us in, like bystanders stealing a glimpse of the wreckage of an automobile accident. Part I of this article discusses Meryl Gordon's book, a story about wealth, class, and privilege, and the Astor family's epic dysfunction, the phenomenon of elder abuse, and the failures of the cadre of lawyers hired by Brooke Astor. Notably, Astor's lawyers failed to adequately serve her, but always presented her with excessive bills for their services.<sup>16</sup> Part II explores the nature and extent of elder abuse, particularly financial exploitation, both nationally and in New York. This section will focus on the abuse of powers of attorney and the exploitation of elders with diminished capacity to secure benefits under a will and estate plan.<sup>17</sup> This section also covers the new power of attorney statute and the provisions designed to reduce the incidence of abuse by agents. Part III examines the remedies for elder abuse that were utilized in the Astor case—guardianship, criminal charges, and a will contest—and examines how the Astor case implicates recent developments in these areas. Part IV analyzes the conduct of the attorneys who represented Mrs. Astor—the “men in suits” who failed Mrs. Astor and Susan I. Robbins, who was appointed by the court to represent Mrs. Astor in the guardianship case and provided her with high quality representation—within professional norms, best practices, and the provisions of the recently enacted New York Rules of Professional Conduct. This article concludes by reflecting on the relationship among economic class, the availability and quality of support services,

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16. In the guardianship case alone, which was settled without a trial, the judge reduced the total amount of fees requested by the various attorneys from \$3 million to \$2.2 million. *In re Marshall*, 831 N.Y.S.2d 360, 360 (Sup. Ct. 2006); GORDON, *supra* note 4, at 232.

17. A will includes all codicils that modify the will. N.Y. EST. POWERS & TRUSTS LAW § 1-2.1 (McKinney 1998).

guardianship, and elder abuse.

### I. The Rise and Fall of Mrs. Astor and Her Family

Meryl Gordon paints a picture of Brooke Astor that both repels and attracts, but captures the essence of a woman who transcended both her humble beginnings and aristocratic lifestyle to make a mark on New York City that was unique and perhaps unparalleled. The Chinese Courtyard at the Metropolitan Museum of Art, the New York Public Library, the Bronx Zoo, restored Harlem row houses, and low-income neighborhoods in the South Bronx were beneficiaries of the Astor Foundation's largesse under Mrs. Astor's stewardship.<sup>18</sup> Throughout the book, the matter-of-fact descriptions of Brooke Astor's homes, clothes, paintings, privilege, and social calendar breathe new meaning into the phrase "filthy rich." Yet the juxtaposition of the long, grim, and sad history of the Astor/Marshall family dysfunction, the domestic violence Brooke Astor suffered at the hands of her first husband, the almost unimaginably generous, thoughtful, and transformative charitable giving of the Astor Foundation, Brooke's genuine affection for people regardless of their station in life, her intellectual curiosity and passion for life, and the neglect and exploitation she suffered that marred the last years of her life, prevent one from merely dismissing Brooke Astor as a wealthy dilettante. Like a flower that struggles to meet the sun through garbage and debris, Brooke Astor earned respect, empathy, and affection as she used her position and the Astor Foundation to improve the city she loved. Mrs. Astor also endured the humiliation of neglect and exploitation during the last years of her life, a period of steep physical and mental decline.

The foibles, triumphs, tribulations, and downfall of the rich and famous have long fascinated the media and public. *Mrs. Astor Regrets* begins just after Thanksgiving in 2007 with the arraignment of then eighty-three year old Anthony Marshall, Mrs. Astor's only child, on charges of "fraud, conspiracy, and theft" against his mother.<sup>19</sup> The stunning image of this "epi-

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18. GORDON, *supra* note 4, at 6.

19. *Id.* at 4.

tome of WASP rectitude”<sup>20</sup> in handcuffs fed the insatiable appetite of the tabloids.<sup>21</sup> The eighteen-count indictment included charges of grand larceny, falsifying business records, conspiracy, and possession of stolen property.<sup>22</sup>

We quickly discover how the distant past formed the genesis of the shocking downfall of the Astor/Marshall family and shaped the complex nature of the relationship between mother and son. Not surprisingly, considering their extreme wealth, we also learn that the family was no stranger to bitter feuds about money. Anthony Marshall had a childhood of privileged, benign neglect, including an early exile to boarding school. As a young man who was a beneficiary of a trust fund, Mr. Marshall had to fight in court against the unjustified claims of his biological father against the trust.<sup>23</sup> Brooke Astor, following the sudden death of Vincent Astor, her third and final husband after just five and one-half years of marriage, successfully defended a challenge to her inheritance by her husband’s heirs.<sup>24</sup> Meryl Gordon skillfully weaves this background information to illustrate how the Astor family’s past was indeed a prologue to future events.<sup>25</sup>

Brooke Astor was raised in middle class circumstances—comfortable, but by no means wealthy. Her father was a military man and her mother was determined to elevate Brooke’s station in life through marriage.<sup>26</sup> The impact of Mrs. Astor’s three marriages on her life looms large. Her mother arranged Brooke’s first marriage at age 17 to John Dryden Kuser, the heir of a New Jersey fortune.<sup>27</sup> This unhappy relationship was marred by severe physical abuse, and quickly ended in divorce, but not before it produced her only child Anthony.<sup>28</sup> Mrs. Astor then married, the love of her life, Buddie Marshall, whose last

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20. *Id.* at 1.

21. “‘BAD BOY,’ scolded the *News*. ‘CROOK ASTOR,’ snarled the *Post*.” *Id.*

22. *Id.*

23. GORDON, *supra* note 4, at 62.

24. *Id.* at 76-77.

25. “Whereof, what’s past is prologue; what to come, In yours and my discharge . . .” WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 1.

26. GORDON, *supra* note 4, at 7.

27. *Id.*

28. *Id.*



name was assumed by her son.<sup>29</sup> Six months after Buddie died, Vincent Astor proposed to Brooke, having already included her in a new will as his “prospective” wife. His death several years later left Mrs. Astor a widow at age 55 and the beneficiary of a \$60 million trust fund and control over the Astor Foundation.<sup>30</sup> The societal pressure to marry, the upward economic mobility that marriage promised (and ultimately delivered to her), and the scars of domestic violence would prove to be major forces that shaped the life of Brooke Astor.

Brooke Astor was a complex mix of contradictions. She had an incessant need for attention, could not stand to be bored, had a large ego, and embraced the customs and privileges of high society. Mrs. Astor also revitalized the Astor Foundation and used it to give large sums of money away to the Harlem and Bedford-Stuyvesant communities for affordable and elderly housing.<sup>31</sup> Remarkably, but very much in character, Mrs. Astor was an involved presence who insisted on seeing the results of her charitable works on the scene, and traveled to communities a world apart from the one she inhabited.<sup>32</sup> Her interest in people, regardless of their wealth or status, was also reflected in the composition of her dinner parties. She valued guests who were accomplished and engaging more than those who only had pedigree and wealth. This preference was no doubt felt by her son, who could never escape his “silver spoon” pedigree, and whose personal qualities fell short of the standards set by his mother.<sup>33</sup>

A dualistic portrait emerges—one is impressed by the way Mrs. Astor used her wealth for the public good, inspired by her youthful self-image that helped her defy chronological age,<sup>34</sup> and another amused by her social “boldness” that manifested in

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29. *Id.*

30. *Id.*

31. *Id.* at 8.

32. *Id.* On a visit to the South Bronx to inspect affordable homes that were being constructed, Brooke approved of the mustard and “lumpy” Russian dressing in plastic containers provided for their sandwiches. *Id.* at 46-47.

33. *Id.* at 9.

34. Brooke Astor exemplified the limits of defining “old” merely by reference to chronological age. Functional capacity, self-perception, and health are among the significant factors that shape a person’s quality of life.

“provocative and even naughty”<sup>35</sup> flirtations with men. Meryl Gordon notes that “[a]t an age when few people are healthy or even ambulatory, Brooke Astor was still in the thick of high society.”<sup>36</sup> Mrs. Astor, however, often acted in a haughty manner; she could be imperious and harsh,<sup>37</sup> and used her position to seize attention. She did not have a warm relationship with her son, whom she loved, “[b]ut acted like she did not like him.”<sup>38</sup> The enormity of her wealth is shocking and offensive; however, that same wealth allowed her to obtain beautiful objects. These objects included her sweet smelling Park Avenue apartment and her favorite painting, *Up the Avenue from Thirty-Fourth Street* by Childe Hassam,<sup>39</sup> which hung over the apartment’s eighteenth century French marble fireplace in her beloved “red lacquered library.”<sup>40</sup> This painting would play a role in the tragic events that later revealed a vulnerability surrounding Mrs. Astor that could not be fully protected by wealth and privilege.

The key actors in this story emerged at Brooke Astor’s gala 100th birthday party on March 20, 2002. They are literally among the 100 of Mrs. Astor’s “nearest and dearest” with whom she enjoyed a deep personal connection. Mrs. Astor’s demeanor and remarks offered a glimpse of her diminishing capacity, the hardships she suffered in the past, and foreshadowed the problems on the horizon. Foremost among those problems was a secret known only to a few people: in December 2000, more than a year before her 100th birthday party, Brooke Astor had been diagnosed with Alzheimer’s Disease.<sup>41</sup> The visit to the doctor who made the diagnosis was prompted by her son’s concern about an emerging pattern of forgetting names, repeating, and some confusion.<sup>42</sup> These warning signs were also accompanied by an increasingly unsteady gait and a fall, not unusual for a person so old, especially with advancing Alz-

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35. *Id.* at 15.

36. *Id.* at 17.

37. *Id.* at 93.

38. *Id.* at 22.

39. This painting is also known as “*Flags Fifth Avenue.*” *Id.* at 10.

40. *Id.*

41. *Id.* at 19-20.

42. *Id.* at 19.

heimer's Disease.<sup>43</sup> Brooke first became aware of some memory loss in the early 1990s, when she started to feel her age and decided to wind down the Astor Foundation.<sup>44</sup> She broke her hip in 1997 when she fell at the Museum of Natural History.<sup>45</sup> By 2002, conversation was made difficult by her "wandering mind,"<sup>46</sup> and she burst into tears when she was unable to remember her Maine gardener's name, although she had known him for thirty-seven years.<sup>47</sup> Brooke Astor experienced the decline that accompanies age and dementia: a fall, a broken hip, challenges to privacy, dignity, and independence, the onset, progression, and manifestations of dementia, and the need for care at home—fortunately for Mrs. Astor, her money paid for a butler, various aides, cooks, and other household help.

Anthony Marshall had always disapproved of his mother's extravagance. Marshall was aging and experiencing his own health problems, which apparently made him contemplate, with some impatience and anxiety, the prospects for enjoying and controlling the considerable inheritance he expected.<sup>48</sup> As Brooke's capacity declined around her 100th birthday, her son became more involved in "supervising the household."<sup>49</sup> The "business" of family caregiving is admirable but challenging, particularly when money becomes intertwined with the care that previously was incidental to the family relationship, and money is ubiquitous in the Astor family. Yet Brooke had previously purchased an apartment for her son, and in 1999 gave him \$3.9 million to buy it from her.<sup>50</sup> Notably, Mrs. Astor's generosity to her son predated his heightened responsibilities for her care as a result of her diminishing mental and physical capacity.

Another key figure at Mrs. Astor's 100th birthday was Charlene Marshall, Anthony's third wife, whom he met while they were both married to other people (she to the local minister at the church in the Maine town where the Astors had their

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43. *Id.* at 20.

44. *Id.* at 103.

45. *Id.* at 107.

46. *Id.* at 108.

47. *Id.* at 111.

48. *Id.* at 104.

49. *Id.* at 20.

50. *Id.*

summer home). Their subsequent romance, divorces from their respective spouses, and marriage to each other, humiliated and horrified Mrs. Astor, and she never forgave Charlene.<sup>51</sup> The passage of time did not soften her feelings towards Charlene. Mrs. Astor did not want to be escorted to her 100th birthday party by Anthony and Charlene, and shortly before her birthday, she gave her friend Annette de la Renta a \$75,000 necklace, telling Henry Kissinger that she did not want “[C]harlene to get it.”<sup>52</sup> At the party, Charlene and Anthony were not seated at Brooke’s table, and when Anthony arranged to have Charlene deliver flowers sent by Prince Charles to Brooke at her table—“to establish the impression of a relationship”—Brooke’s visible displeasure reverberated throughout the room and humiliated Charlene.<sup>53</sup>

The birthday celebration of Brooke Astor and her “[l]ifetime of meaningful and memorable gestures” also included her lawyer, Henry “Terry” Christensen III. He was the third generation of lawyers to represent Mrs. Astor from the venerable firm of Sullivan & Cromwell, a relationship that began in 1959 when they “fended off” a challenge to Vincent Astor’s will.<sup>54</sup> In recent years, most of the legal work involved updates of Mrs. Astor’s will, increasing and diminishing rewards to friends, family, and charities from her \$120 million estate, plus the \$60 million charitable trust she controlled.<sup>55</sup> Previously, on January 30, 2002, shortly before her 100th birthday party, Mrs. Astor executed a new will under Christensen’s supervision. The will gave Anthony Marshall the Maine property, but included an important request that he would give his son and her grandson Philip an “interest” in the property after Anthony’s death. Although not mandatory, if read together with other language in the will, this “hope” was intended to encourage her son Anthony to leave the “Maine retreat” to his son Phillip, Mrs. Astor’s grandson, rather than leaving it to his wife Charlene.<sup>56</sup> Ominously, we learn that attorney Christensen not only had his own relationship with An-

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51. *Id.* at 113, 120, 122.

52. *Id.* at 24.

53. *Id.* at 31.

54. *Id.* at 26.

55. *Id.* at 27.

56. *Id.* at 126.

thony Marshall, but also knew Francis X. Morrissey, the attorney who was also later convicted for crimes committed against Mrs. Astor, including forging her signature on the third codicil to her 2002 will.

Among these alleged crimes was Anthony's misrepresentation to Brooke that she needed to sell her beloved Childe Hassam painting because she needed the money. Marshall was convicted of the scheme to defraud Mrs. Astor with the sale of the painting, but was not convicted of grand larceny for taking a \$2 million commission from the sale. Unfortunately, the friend to whom Brooke told this story concluded that Brooke, like many elderly widows, worried unnecessarily about money.<sup>57</sup>

Also present at Brooke's 100th birthday party were her forty-nine year old twin grandchildren, Alec and Philip Marshall. The twins did not consider themselves to be part of their grandmother's world, as their parents were divorced when they were nine years old and Brooke was not a particularly affectionate or interested grandmother. However, each had been developing an increasingly close relationship with their grandmother that appeared to be genuine, perhaps because it was not based on money.<sup>58</sup>

Family dysfunction, often the result of disputes over money and property, is a constant theme in the Astor family according to Meryl Gordon's narrative. For Philip, the warming of his relationship with his grandmother coincided with a marked deterioration in his relationship with his father. About two years before Mrs. Astor's 100th birthday party, while Philip was visiting her in Maine with his family, she offered to give him the cottage by the water on the property.<sup>59</sup> Upon hearing of these plans, Anthony prevailed on his mother and son to "maintain the status quo" but the incident created a rift that never healed.<sup>60</sup>

Although the "curtain set" on Mrs. Astor's public life after her 100th birthday, she would live five more years, until her death on August 13, 2007 at age 105. Perhaps due to her

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57. *Id.* at 28.

58. *Id.* at 29.

59. *Id.* at 34.

60. *Id.* at 35.

genes, a comfortable lifestyle only a few could afford, or a combination of other factors, Mrs. Astor lived far beyond age 81, the average life expectancy of a white woman in the United States.<sup>61</sup>

Yet these last years proved to be difficult for Brooke Astor, as they are for so many people. About a year before her death, in the summer of 2006, Brooke was relegated to her New York apartment, as Anthony decided she was not well enough to spend the summer in Maine, although he and Charlene were spending the summer there. In the sweltering July heat, Brooke had to be taken to the hospital, suffering from pneumonia. Around this time, Philip informed his father that he filed a guardianship petition, a move that led to Armageddon.<sup>62</sup>

As the guardianship litigation erupted, the attorneys took center stage and shaped many of the events that occurred, including the criminal indictments and convictions. This process revealed that two years earlier, in 2004, Anthony Marshall fired Brooke's long-time attorney Terry Christensen, and replaced him with Francis X. Morrissey. Morrissey was an attorney with a checkered professional past that included a two-year suspension from the practice of law due to improper use of client funds. Morrissey "immediately presided over two codicils to Brooke Astor's will."<sup>63</sup> These codicils became a central part of the subsequent criminal trial against Marshall and Morrissey. Despite the intent to keep the guardianship proceeding private by sealing the court record, the vagaries of court filing procedures on a late Friday afternoon and a tip received by a Daily News reporter led to the explosive headline on the following Wednesday: "Disaster for Mrs. Astor."<sup>64</sup> The petition al-

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61. See NAT'L CTR. ON HEALTH STATISTICS, U.S. DEPT HEALTH & HUMAN SERVS., HEALTH, UNITED STATES, 2008: WITH SPECIAL FEATURE ON THE HEALTH OF YOUNG ADULTS 203 (2008), available at <http://www.cdc.gov/nchs/data/hus/hus08.pdf>.

62. GORDON, *supra* note 4, at 191. In New York, a guardianship petition may be filed by a broad range of people and entities, including family members, those residing with the person alleged to be incapacitated, and those concerned with the welfare of the person. N.Y. MENTAL HYG. LAW § 81.06 (McKinney 2006).

63. GORDON, *supra* note 4, at 39.

64. *Id.* at 41, 197. The question of privacy in guardianship proceedings, particularly of medical information, social security numbers, bank account numbers, and other sensitive information has not been fully resolved by the courts. In the Astor case, the "right" of the media to attend what are usually

leged that Mrs. Astor “was living in squalor amid peeling paint and was being deprived of medical care,”<sup>65</sup> and could not live in her bedroom in the winter because it was too cold, forcing her to sleep on a couch that reeked of dog urine.<sup>66</sup> The petition requested that Annette de la Renta and Chase Bank be appointed co-guardians. Although the petition did not mention elder abuse, Ira Salzman, Philip’s attorney, used the term in his cover letter to the court accompanying the petition.<sup>67</sup>

The Astor guardianship case prompted a huge media blitz, and the public was fascinated. A Senate Hearing on elder abuse soon followed, during which Senator Gordon Smith of Oregon made the point that abuse is a danger for anybody, regardless of “age, finances, or social status.”<sup>68</sup> Meryl Gordon notes that there is “something spellbinding about a family falling apart in public and there’s a special *schadenfreude*<sup>69</sup> to be had when tens of millions of dollars are at stake.”<sup>70</sup> While her observations about the initial public fascination with the case are true, by the time the interminable criminal case against Marshall and Morrissey ended after five months, there was “[b]arely a whisper of television coverage.”<sup>71</sup> The public appetite for substance beyond the sensational is limited, thus problems such as elder abuse may only grab the attention of politicians if they believe it is a threat to them, to others similarly situated, or that it holds out the promise of political gain.<sup>72</sup>

Upon the death of her second husband, Brooke was left

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public proceedings added an additional dimension to the case.

65. *Id.* at 40.

66. *Id.* at 41.

67. *Id.* at 196.

68. *Id.* at 46.

69. “[E]njoyment attained by the troubles of others.” *Schadenfreude*—Definition and More From the Free Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/schadenfreude> (last visited Mar. 24, 2010).

70. GORDON, *supra* note 4, at 48.

71. Alessandra Stanley, *Cameras on Bedrooms and Ballrooms*, N.Y. TIMES, Sept. 27, 2009, at WK1.

72. For example, the Elder Justice Act, which is the first federal legislation dealing with elder abuse, languished in Congress for almost five years after being introduced in the aftermath of the 2004 Congressional hearings on elder abuse. It was reintroduced as the Elder Justice Act of 2009, and together with the Patient Safety Abuse Prevention Act, was signed into law by President Obama as part of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 6701-6703, 124 Stat. 119, 782 (2010).

with \$525,000, and felt “poverty stricken.”<sup>73</sup> For perhaps the only time in the book, Meryl Gordon provides some much needed context for Mrs. Astor’s upper middle class economic status as a new widow in 1952: the average family earned \$4,500, gasoline was twenty-seven cents per gallon, and bread cost sixteen cents for a loaf.<sup>74</sup> Her third marriage to Vincent Astor moved Brooke from “a social nobody . . . on the edges of aristocracy” to “Mrs. Astor.”<sup>75</sup>

Once freed of the gilded bondage of her last marriage,<sup>76</sup> Mrs. Astor found herself a beneficiary of riches beyond belief.<sup>77</sup> She went on to defy the expectations and disdain of her male colleagues at the Astor Foundation and in the world of philanthropy to make major contributions through the Astor Foundation. In a sense, Brooke Astor’s story is a story of a woman breaking out of a subservient role and asserting her independence. Mrs. Astor’s resilience and (at least public) generosity is admirable—although she married wealthy men and inherited their wealth, she did not completely forget her humble roots and she retained her appreciation for working-class people.<sup>78</sup>

Values, morals, and ethical norms are visited on children by their parents. Greed and emotional distance were the defining standards of behavior set by Mrs. Astor. Anthony Mar-

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73. GORDON, *supra* note 4, at 66.

74. *Id.*

75. *Id.* at 72. Mrs. Astor may have learned how easy it is to change wills to reward and punish people and charities accordingly from her husband Vincent Astor, who “perpetually” changed his own will (the various versions of which apparently filled “several file cabinet drawers” in the Dutchess County Surrogate’s Court) and made a new will shortly after meeting Brooke, in which he gave his “prospective wife” \$5 million and a country home. *Id.* at 71.

76. Mrs. Astor did not want to marry again, saying that she “did not want to wind up pushing an old man in a wheelchair.” *Id.* at 82.

77. Vincent’s will was executed in June 1958, and after his death on February 3, 1959, it “made headlines” as it gave Brooke \$2 million, named her as beneficiary of a \$60 million trust, and gave her their New York City apartment, Dutchess County country home, and houses in Arizona and Maine. *Id.* at 76. Mrs. Astor also was authorized to run the Astor Foundation. *Id.*

78. Mrs. Astor was also a published author of well-received books, including PATCHWORK CHILD: EARLY MEMORIES (1993), THE LAST BLOSSOM ON THE PLUM TREE: A PERIOD PIECE (1986), and FOOTPRINTS, AN AUTOBIOGRAPHY: BROOKE ASTOR (1981).



shall's biological father sued him over a trust fund, and although Marshall prevailed, his father continued to hound him, and Marshall wrote checks to his father for most of his adult life.<sup>79</sup> Perhaps more significantly, Anthony did not experience warmth and love from his mother, who remarried when he was eight years old and shipped him off to boarding school just a couple of years later. Throughout his life, Marshall could not escape the "comma": "Anthony Marshall, Mrs. Vincent Astor's son."<sup>80</sup> To add insult to injury, Vincent Astor was close to Brooke's grandsons, Alec and Philip, and for a time gave them \$100,000 each in his will and nothing to Anthony, although the will in effect at Vincent's death did not include his sons as beneficiaries. Vincent Astor's relationship with the Marshall twins, however, caused Anthony to resent them, a feeling that simmered for many years. Remarkably, as children and then as adults, Marshall's sons learned that if they wanted to see their father, they needed an appointment, which fueled their own feelings of resentment toward him.<sup>81</sup>

The intermingling of money and the family relationship between Brooke and her son was formalized in 1980. After stints of government service in the C.I.A. and as an ambassador to Madagascar and then Trinidad and Tobago in the Nixon administration, Marshall began managing his mother's money, which he continued to do for the next quarter century (Meryl Gordon points out that his returns were less than the Standard & Poor's Index).<sup>82</sup> Although she provided her son with a full-time job managing her assets, Brooke published an autobiography in 1980 that described him in demeaning terms. In subsequent years, she used her influence to obtain appointments for Anthony on prominent boards—although beneficial to him, they lengthened the long shadow Brooke cast over his life.

In 2002, Mrs. Astor sold her favorite painting by Childe Hassam for \$10 million, and Anthony Marshall paid a \$2 million commission to himself (twice the customary amount, although he was not convicted of grand larceny for taking the commission).<sup>83</sup> Brooke told friends that Anthony wanted it sold

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79. GORDON, *supra* note 4, at 61-62.

80. *Id.* at 87.

81. *Id.*

82. *Id.*

83. *Id.* at 129.

because she was running out of money.<sup>84</sup> Brooke purchased the painting in 1971 for \$172,000, and in every will she made from 1992 forward, she gave it to the Metropolitan Museum of Art, subject to the condition that it remain on permanent display.<sup>85</sup> After the sale of the painting, it “vanished” from her will.

Elder abuse is often subtle and intimidation can occur in a myriad of ways. A locked door, hidden eyeglasses, and other subtle deprivations and insults often cause significant harm. For a frail elder, “aging in place”<sup>86</sup> at home often depends on making arrangements for proper care and safety. As Mrs. Astor became increasingly dependent and unsteady in 2002, her son refused to take measures to ensure her safety. Sometimes, Mrs. Astor wandered at night, but her son denied a request from the staff to install a gate at the top of the stairs to prevent her from falling.<sup>87</sup> This was a particularly cruel decision, and foreshadowed the many problems that followed.

During this time, Marshall consolidated his control over Mrs. Astor. He enlisted the services of the enigmatic attorney Francis Morrissey—a man in the shadows of this story and difficult to assess<sup>88</sup>—to escort Brooke. Although Morrissey apparently displayed great care for many of his clients, and could be very attentive, he had been suspended from the practice of law for two years for financial improprieties. These allegations included exercising duress and undue influence to be named the primary beneficiary of a \$15 million estate, taking almost \$927,000 improperly from funds he held in escrow,<sup>89</sup> and benefiting from a will that had a signature that appeared different than the signature on the client’s will of the previous year.<sup>90</sup> Once he returned to practice from his suspension, Morrissey

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84. *Id.* at 130.

85. *Id.* at 129.

86. The report of the United Nations 2002 Madrid Conference on Aging includes the objective of “Promotion of ‘ageing [sic] in place’ in the community with due regard to individual preferences and affordable housing options for older persons.” Second World Assembly on Ageing, Apr. 8-12, 2002, *Report: Madrid International Plan of Action on Ageing*, ¶ 98, U.N. Doc A/CONF.197/9 (May 23, 2002).

87. GORDON, *supra* note 4, at 133.

88. *Id.* at 134.

89. *Id.* at 136-37.

90. *Id.* at 140. See Serge F. Kovaleski & Colin Moynihan, *Many Clients of Astor Lawyer Left Him Bequests in Their Wills*, N.Y. TIMES, Jan. 4, 2008, at B1.

rarely billed his elderly clients, but apparently was named a beneficiary in more than a few estates,<sup>91</sup> something that has always been ethically questionable under prevailing professional norms.<sup>92</sup> Now, as a companion and chaperone for Mrs. Astor, he was elevated to an esteemed role among the elite. This did not prevent Morrissey from including in one of his bills a fee for a dinner he had with Brooke after they left the opening of a play produced by Anthony and Charlene.<sup>93</sup>

Another significant property transaction occurred in 2003 when Brooke, with the assistance of her long-time attorney Terry Christensen, paid more than \$3 million in gift taxes to transfer her main property to Anthony.<sup>94</sup> When Marshall transferred ownership of the Maine property to Charlene six months later, he achieved his goal of providing for Charlene, regardless of whether he predeceased his mother. Considering the hostile relationship between Mrs. Astor and Charlene, this was a particularly dubious decision, although Marshall was not charged with any crime in connection with it.

Meryl Gordon effectively juxtaposes the transactions and decisions in which Anthony was involved that consolidated his power and inured to his benefit, the actions he took that had the effect of isolating his mother, and the mounting evidence of harm that led to the filing of the guardianship petition. For example, around the time Brooke transferred her Maine property to him, Marshall fired her long time social secretary. Shortly after, in a chance dinner with Philip Marshall that lasted five hours, the social secretary expressed numerous concerns about Marshall's treatment of Brooke, a conversation that led directly to the filing of the petition for guardianship.<sup>95</sup>

Another indication of Brooke's frailty was her fall on June 24, 2003, which broke her hip. The subsequent recovery was difficult, Brooke was "depressed and listless," and for the remaining four years of her life she would need the assistance of

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91. GORDON, *supra* note 4, at 139.

92. Generally, an attorney who is not related to the client is required to discourage the client from naming the attorney as a beneficiary under a will without the independent advice of another attorney. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT § 1.8(c) (2002).

93. GORDON, *supra* note 4, at 146.

94. *Id.*

95. *Id.* at 147.

nurses.<sup>96</sup> During her recuperation, she decided to give her son \$5 million, expressly for the purpose of taking care of Charlene. Meryl Gordon reminds us that just the previous year, Mrs. Astor had been so afraid of her finances that she sold her favorite painting, but now was giving money away “in surprising directions.”<sup>97</sup>

The capacity to enter into legal transactions, including making gifts, can be difficult to assess. Attorneys have an important role to play in providing independent counseling and advice, and assuring that a client is making an informed decision. Mostly, conversations between an attorney and client take place in private, and when there is a dispute, it is often a matter of recollection and perception as to what actually occurred, and more specifically, whether the client had sufficient capacity to make a particular decision. Unfortunately for Mrs. Astor’s attorney, the conversation that resulted in the decision to transfer the \$5 million to Anthony, and the execution of a letter confirming this decision and authorizing Anthony to withdraw the funds, was overheard by members of her staff on the baby monitor that had been placed in Brooke’s room. Chris Ely, her trusted butler, was alarmed that a person who was diagnosed with Alzheimer’s Disease twenty months earlier was now making decisions about complex and substantial financial matters.<sup>98</sup> More troubling was the butler’s conversation with the attorney, Terry Christensen, as he left the apartment. Christensen appeared to be trying to get the butler to agree that Mrs. Astor was doing well. Later that day, and the following day, Mrs. Astor had no idea what had occurred and what she had signed, but did say she felt “foolish.”<sup>99</sup>

The pattern of financial improprieties continued. The transfer of the Maine property came to the attention of a housekeeper through a public notice in the local Maine paper, which she sent to Brooke’s butler. The butler told her grandson Philip. Brooke’s nurses became increasingly concerned

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96. *Id.* at 149.

97. *Id.*

98. It is possible that the progression of Alzheimer’s Disease can be sufficiently slow so that a person can make decisions about finances after a diagnosis, but the capacity to make a particular decision depends on a number of factors, including the nature of the decision or transaction, the person’s actual capacity, and the effectiveness or detrimental impact of any medication.

99. GORDON, *supra* note 4, at 150.

about Anthony's actions. At the butler's request, they began keeping notes, eventually filling thirty "voluminous notebooks" over a four-year period documenting Mrs. Astor's diminishing mental capacity.<sup>100</sup>

Against this backdrop, attorney Christensen continued to meet with Mrs. Astor to modify her 2002 will, beginning with the uniquely titled "First and Final Codicil," which was executed on December 18, 2003. After Christensen was replaced, a second codicil dated January 12, 2004, gave Anthony \$60 million at the expense of Brooke's favored charities. The description of the meeting at which Mrs. Astor signed the second codicil is a portrait of lawyers pushing at the boundaries of impropriety with a fragile, elderly, and apparently intimidated woman.<sup>101</sup> Attorney Morrissey supervised a third codicil dated March 3, 2004. In 2006, a handwriting expert in the guardianship proceeding concluded that Brooke Astor's signature was a forgery.<sup>102</sup> In 2009, the jury in the criminal trial agreed and Morrissey was convicted of forging her signature on the third codicil.

The bond between frail elders and their caretakers is often poignant, but also fraught with issues of race, class, culture dissonance, and economic exploitation.<sup>103</sup> Anthony engaged in a pattern of distant control in which he isolated his mother (for example, by firing her longtime butler and close companion), consolidated his power, and increased the property he was getting from his mother during her lifetime and upon her death. Despite this considerable treachery and trauma, the relationship between Mrs. Astor and her caretakers remained close. Mrs. Astor's nurses provided much of the information about the litany of neglect and the "ubiquity" of attorney Morrissey that served as the catalyst for, and shaped the narrative of, the guardianship case and ultimately the criminal convictions.<sup>104</sup>

In the guardianship case, the strategic decisions made by Philip Marshall and his attorney Ira Salzman had significant

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100. *Id.* at 155.

101. *Id.* at 161.

102. See Serge F. Kovaleski, *Expert Says Mrs. Astor's Signature Was Forged*, N.Y. TIMES, Oct. 20, 2006, at B1.

103. See, e.g., Ted Conover, *The Last Best Friends Money Can Buy*, N.Y. TIMES MAG., Nov. 30, 1997, at 132.

104. See GORDON, *supra* note 4, at 185.

consequences. One of the nominated guardians, Annette de la Renta did not realize the enormity of the responsibility and said that she “[d]idn’t know it would be Armageddon.”<sup>105</sup> They decided not to try and resolve the issues with Anthony and Charlene prior to filing the guardianship petition. The petition included everything but the kitchen sink.<sup>106</sup> The allegations about financial exploitation were included for leverage, but the primary purpose of the petition was to address the problems in Brooke’s personal care. For example, the conditions in the apartment were made to seem as if they were life-threatening to Brooke’s health.<sup>107</sup> Fatefully, the allegations of financial exploitation resulted in the subsequent criminal conviction against Anthony Marshall, which his son Philip had not considered or intended.

The book has a happy ending of sorts. In a testament to the power of high quality care and a resilient spirit, Brooke Astor, at age 104, rediscovered her appetite, gained fifteen pounds, and once again was surrounded by her devoted staff back at her Holly Hill estate. Mrs. Astor died on August 13, 2007, holding hands with her beloved butler Chris Ely, the nurses that protected her, and her best friend Annette de la Renta. As expressed by his daughter in an email, Philip Marshall was motivated to help his grandmother by his concern for her health and well-being.<sup>108</sup> As directed in her will, Brooke’s tombstone read, “I had a wonderful life.”<sup>109</sup> Meryl Gordon concludes with the memory of a time when family had finally come first for Mrs. Astor. A visit by her grandson Philip and his family in Maine inspired her to give him her cottage by the sea, a wish that was ultimately thwarted by her son. “Five days in the life of a family,” according to Gordon, “is so little time, but sometimes the memories, and their repercussions, can last forever.”<sup>110</sup>

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105. *Id.* at 191.

106. *Id.* at 194.

107. *Id.* at 195.

108. *Id.* at 271.

109. *Id.* at 275.

110. *Id.* at 281. And true to life, within twenty-four hours of Mrs. Astor’s death, a legal war erupted in Surrogate’s Court over who should administer her estate. Although Chase Manhattan Bank, the co-guardian along with Annette de la Renta, who were both the petitioners in the Surrogate’s Court action, claimed it had no choice but to initiate the Surrogate’s Court

Those who knew the Astors wondered what really happened to set off this firestorm, and Meryl Gordon notes, “[t]ruth is elusive.”<sup>111</sup> The real story of the neglect and exploitation of Brooke Astor may lie not in what happened to her; rather, the story may lie with the experiences of the other elderly in New York who are neglected, exploited, and abused, with far greater consequences to their person and property than those experienced by Mrs. Astor.<sup>112</sup>

## II. Abuse of Vulnerable Elders: Powers of Attorney and Men in Suits as Instruments of Fraud and Exploitation

For the vast majority of people, the consequences of elder abuse are not cushioned by the extreme wealth and comfort enjoyed by Brooke Astor. The facts in many cases of elder abuse are often shocking and provide a sharp counterpoint to Mrs. Astor’s experience of neglect, exploitation, and isolation visited on her by her son.<sup>113</sup> In the most extreme cases, the actions and omissions of family members and caretakers can literally be the kiss of death. Unlike Brooke Astor, most elders who are abused or exploited lack the human and financial resources to limit the damage inflicted. Adult protective services<sup>114</sup> may not be aware of the risk faced by the vulnerable elder, or may fail

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action so quickly, the bank could have received permission to continue as guardian for limited purposes related to Mrs. Astor’s property. Thereafter, the indictments were handed down against Mrs. Astor’s son and one of her attorneys.

111. *Id.* at 48.

112. Philip Marshall now views the increased awareness of elder abuse as an enduring legacy of his grandmother. See Sean Gardiner, *Philip Marshall: Champion for Elder Justice*, AARP BULL. (AARP, Wash., D.C.), Dec. 1, 2009, *available at* [http://bulletin.aarp.org/yourworld/family/articles/wo12\\_astor.html](http://bulletin.aarp.org/yourworld/family/articles/wo12_astor.html).

113. The allegations about financial exploitation were included in the guardianship petition for strategic purposes, and the primary purpose of the guardianship was to improve Mrs. Astor’s living conditions and personal care. GORDON, *supra* note 4, at 194-95.

114. Federal law requires states to provide protective services for adults. See 42 U.S.C. §§ 1397-1397F (2006). In New York, adult protective services provide a variety of support services for vulnerable adults who are at risk of harm, unable to care for themselves, and have no other available sources of assistance. See N.Y. SOC. SERV. LAW § 473(1) (McKinney 2003); DAVID GOLDFARB & JOSEPH ROSENBERG, *NEW YORK ELDER LAW* § 15.04(1) (LexisNexis/Matthew Bender 2009).

to provide appropriate protection. When an elder is isolated, there may not be any person or entity to initiate a guardianship proceeding. Without a formal complaint, the local prosecutor will not investigate or indict.

Elder abuse is generally defined as the mistreatment or exploitation of a person who is at least sixty years of age.<sup>115</sup> The abuse may be physical (including involuntary confinement), sexual, or emotional.<sup>116</sup> Neglect involves the infliction of physical or emotional distress by a caregiver, and may be active (i.e., intentional) or passive (i.e., unintentional).<sup>117</sup> Financial exploitation is defined as the improper use of money, assets, property, or other resources through fraud, false pretenses, embezzlement, conspiracy, forgery, falsified records, coerced property transfers, or denial of access to property.<sup>118</sup>

The National Center on Elder Abuse estimates that between one and two million people over the age of sixty-five have been neglected, abused or exploited by a person whom they depend on for “care or protection.”<sup>119</sup> It is generally acknowledged that although elder abuse is well documented, it is underreported,<sup>120</sup> and one in twenty older Americans may have

115. Although a person is generally considered to be “elderly” at the age of sixty-five (e.g., that is the age requirement for Medicare eligibility), most elder abuse programs use age sixty to categorize a person as elderly. The New York Penal Law uses age sixty as the threshold for defining a “vulnerable elderly person.” N.Y. PENAL LAW § 260.30(3) (McKinney 2008).

116. N.Y. SOC. SERV. LAW § 473(6)(a)-(c) (McKinney 2003).

117. *Id.* § 473(6)(d)-(e).

118. *Id.* § 473(6)(g).

119. NAT’L CTR. ON ELDER ABUSE, ELDER ABUSE PREVALENCE AND INCIDENCE (2005), *available at* [http://www.ncea.aoa.gov/ncearoot/Main\\_Site/pdf/publication/FinalStatistics050331.pdf](http://www.ncea.aoa.gov/ncearoot/Main_Site/pdf/publication/FinalStatistics050331.pdf). It is estimated that about anywhere from 2% to 10% of the elderly population has experienced some form of abuse. *Id.* According to the findings of the Elder Justice Act, each year an estimated 500,000 to 5 million Americans 65 and older are subjected to abuse, neglect, or exploitation. Elder Justice Act of 2008, S. REP. NO. 110-470, § 2(2) (2007). *See also* NAT’L RESEARCH COUNCIL, ELDER MISTREATMENT, ABUSE, NEGLECT AND EXPLOITATION IN AN AGING AMERICA (2003); ERICA WOOD, COMM’N ON LAW & AGING, THE AVAILABILITY AND UTILITY OF INTERDISCIPLINARY DATA IN ELDER ABUSE: A WHITE PAPER FOR THE NATIONAL CENTER ON ELDER ABUSE (2006), *available at* [http://www.ncea.aoa.gov/ncearoot/Main\\_Site/pdf/publication/WhitePaper060404.pdf](http://www.ncea.aoa.gov/ncearoot/Main_Site/pdf/publication/WhitePaper060404.pdf).

120. SENS. GORDON H. SMITH & HERB KOHL, S. SPECIAL COMM. ON AGING, 110TH CONG., GUARDIANSHIP FOR THE ELDERLY: PROTECTING THE RIGHTS AND WELFARE OF SENIORS WITH REDUCED CAPACITY 21 (Comm. Print 2007), *availa-*



been mistreated, abused, or neglected.<sup>121</sup> The 2005 Census in New York State counted approximately 3.2 million adults sixty or older (17.3% of the state's population),<sup>122</sup> suggesting that 161,689 adults sixty years of age or older have been abused or neglected.

As in the Astor case, the vast majority of cases of abuse or neglect of an elder by another person involve neglect by a family member or caregiver.<sup>123</sup> The number of reported elder abuse cases has increased each year in the past decade,<sup>124</sup> although it is not clear if that is the result of an increase in abuse, or greater awareness and more accessible reporting procedures.<sup>125</sup> The vulnerable elderly, especially those with diminished capacity, are at an increased risk of neglect, exploitation, and abuse. Research findings indicate that elders who have been abused may die earlier than those who have not been abused, even in the absence of chronic conditions or life threatening disease.<sup>126</sup>

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*ble at* [http://aging.senate.gov/minority/\\_files/guardianship\\_report.pdf](http://aging.senate.gov/minority/_files/guardianship_report.pdf).

121. See N.Y. CITY DEP'T FOR THE AGING, ELDER ABUSE HURTS IN MORE WAYS THAN ONE (2009), available at [http://www.nyc.gov/html/dfta/downloads/pdf/elder\\_crime\\_vic\\_2009.pdf](http://www.nyc.gov/html/dfta/downloads/pdf/elder_crime_vic_2009.pdf). See also P. Brownell, A. Welty, & Mark Brennan, *Elder Abuse and Neglect*, in PROJECT 2015: THE FUTURE OF AGING IN NEW YORK STATE, ARTICLES FOR DISCUSSION (2000).

122. See N.Y. CITY DEP'T FOR THE AGING, QUICK FACTS ON THE ELDERLY IN NEW YORK CITY 1 (2006), available at <http://www.nyc.gov/html/dfta/downloads/pdf/quickfact1.pdf>. Using the estimate of the New York City Department of the Aging that 1 in 20 adults 60 years of age and older have been abused, in New York City, 64,247 have been abused out of a 60-plus population of 1,284,946; in the United States, 2,387,998 have been abused out of a 60-plus population of 47,759,967.

123. See, e.g., PAMELA B. TEASTER ET AL., NAT'L CTR. ON ELDER ABUSE, 2004 STATE SURVEY OF STATE ADULT PROTECTIVE SERVICES: ABUSE OF ADULTS 60 YEARS OF AGE AND OLDER 20, 22 (2006), available at [http://www.ncea.aoa.gov/NCEARoot/Main\\_Site/pdf/2-14-06%20FINAL%2060+REPORT.pdf](http://www.ncea.aoa.gov/NCEARoot/Main_Site/pdf/2-14-06%20FINAL%2060+REPORT.pdf) (finding that 65.7% of abused elders were women, and 65% of the perpetrators were adult children (32.6%), other family members (21.5%), or a spouse or intimate partner (11.3%)).

124. See ROBERT C. DAVIS & JUANJO MEDINA-ARIZA, NAT'L INST. OF JUSTICE, RESULTS FROM AN ELDER ABUSE PREVENTION EXPERIMENT IN NEW YORK CITY 2-3 (2001), available at <http://www.ncjrs.gov/pdffiles1/nij/188675.pdf>.

125. In an experimental program to prevent elder abuse in New York City, the number of reported incidents of abuse actually increased in households that had received education and intervention from inter-disciplinary teams. *Id.* at 3.

126. See Elder Justice Act of 2008, S. REP. NO. 110-470, § 2(4) (2007).

Financial exploitation of elders is the fastest growing form of elder abuse.<sup>127</sup> The Astor case features some of the most common types of financial exploitation, albeit cloaked in a veneer of white-collar gentility: it involved an elderly woman, the exploiter was a family member, there was financial enmeshment between the exploiter and the elder, and a power of attorney was one of the weapons of exploitation. It is not unusual for the exploiter to be a family member, friend, or recent acquaintance who comes into the life of the elder or begins to assert control at a time when the elder's capacity to make decisions is diminishing. The exercise of power and influence by the exploiter may initially be benign and may arise by the nature of the relationship with the elder, but eventually it is wielded for the exploiter's own benefit and the preferences and best interests of the elder become secondary or ignored altogether.

The following three scenarios illustrate common forms of financial exploitation.<sup>128</sup> The elder may own a home<sup>129</sup> and have a modest bank account that is typically replenished each month by Social Security Retirement income and perhaps a modest pension.<sup>130</sup> The elder may supplement her income with rent from a tenant, and if the tenant moves out or stops paying the rent, the elder may have difficulty staying current with existing mortgage payments and other expenses. In this situa-

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127. It is estimated that the cost of financial exploitation of elders in the United States is \$2.6 billion annually. See METLIFE MATURE MKT. INST. ET AL., *BROKEN TRUST: ELDERS, FAMILY AND FINANCES 7* (2009), available at <http://www.metlife.com/assets/cao/mmi/publications/studies/mmi-study-broken-trust-elders-family-finances.pdf>.

128. There are other forms of financial exploitation that are growing problems, including credit card fraud, identity theft, and telemarketing schemes. See, e.g., Federal Trade Commission, *Telemarketing Fraud Against Older Americans*, <http://www.ftc.gov/reports/Fraud/fraudcon.shtml> (last visited Apr. 3, 2010).

129. Approximately eighty percent of people age sixty-five years and older in the United States own their residence. WAN HE ET AL., U.S. CENSUS BUREAU, *CURRENT POPULATION REPORTS: 65+ IN THE UNITED STATES: 2005*, at 105, 111 (2005), available at <http://www.census.gov/prod/2006pubs/p23-209.pdf>.

130. The median income of the population age sixty-five years of age and older in the United States was \$15,422, while the average income was \$24,418. Ken McDonnell, *Income of the Elderly Population Age 65 and Over, 2005*, EBRI NOTES (Employee Benefit Research Inst., Wash. D.C.) May 2007, at 2, available at [http://www.ebri.org/pdf/notespdf/EBRI\\_Notes\\_05-2007.pdf](http://www.ebri.org/pdf/notespdf/EBRI_Notes_05-2007.pdf).

tion, a reverse mortgage<sup>131</sup> may be an effective tool, as it can be used to pay off the existing mortgage, and provide either monthly income or a line of credit without requiring regular payments. Although the reverse mortgage provides welcome relief in the form of monthly “draws” that supplement income, or serves as an available line of credit, it can also become a source of funds available to the exploiter. Initially, the exploiter may help the elder obtain necessary services such as home care, assist with household finances and bills, and provide care and companionship. As part of this help, the exploiter may induce the elder to sign checks to pay for the expenses of the household, including overdue repairs. Although the checks should be made payable directly to the parties that provide the services, the elder may write the checks to the caretaker, trusting that the caretaker will make the required payments. The checks may be drawn on the elder’s bank account or line of credit (or both) and at first be used for the elder’s benefit, but gradually the caretaker may begin to co-mingle the funds with his own, and use them for his own purposes.

Another exploitative scheme involves fraud, deception, coercion, or forgery that reduces or terminates the elder’s ownership interest in her home. The third party who obtains the ownership interest may be a family member or friend who begins to live in the house. The pretext may be to enable the third party to obtain a mortgage to pay for needed repairs, facilitate estate planning, or some other ruse. In some cases, the third party may coerce by threatening harm if the elder does not transfer ownership of the home. Although the third party may promise to restore the elder’s ownership interest in the future, the elder may have given away all rights to the home, including the right to use, occupy, and sell. A court proceeding is necessary in order to rescind the transaction and restore proper ownership to the elder.<sup>132</sup> Without a court proceeding, the

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131. Reverse mortgages are available to homeowners age sixty-two and older; no payments are required until the home is sold or the borrower dies, although interest accrues and the costs and interest rates are generally higher than a conventional mortgage. See U.S. Department of Housing and Urban Development, HUD FHA Reverse Mortgage for Seniors (HECM), <http://www.hud.gov/offices/hsg/sfh/hecm/hecmhome.cfm> (last visited Apr. 3, 2010).

132. See, e.g., *Campbell v. Campbell*, 854 N.Y.S.2d 543 (App. Div. 2008); *Alston v. Gregory*, 721 N.Y.S.2d 552 (App. Div. 2001) (deed voided based on

elder is at risk of losing everything connected with the home.

A third pattern of harm preys on elders who depend on a fixed income, usually from Social Security Retirement benefits together with a pension, and do not own any substantial assets or property. The exploiter misappropriates monthly income and may gain access to bank accounts using a power of attorney, through a representative payee arrangement with Social Security, or by accompanying the elder when the check is cashed.

In the Astor case, the weapons used by Anthony Marshall to exploit his mother financially were his own (perhaps undue) influence, misrepresentation of facts, veiled warnings of money problems,<sup>133</sup> a power of attorney that he abused to access Mrs. Astor's funds for his own benefit, and a small cadre of men in suits, lawyers who drafted and supervised the execution of Mrs. Astor's 2002 will and three subsequent codicils. During the period of time when she executed the codicils to her will, Mrs. Astor became afraid of men in suits. This was extremely ironic, as she had always valued appearances, particularly proper and formal attire.<sup>134</sup> Her fear was so great that after the guardianship petition was filed, the judge instructed the newly-appointed court evaluator not to wear a suit, but rather jeans, a tee shirt, and sneakers, when he met with Mrs. Astor.<sup>135</sup>

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undue influence and duress).

133. For example, Marshall convinced his mother not to transfer the Maine cottage to his son Philip, and instead prevailed upon her to transfer the entire Maine property to him (not revealing that he intended to, and subsequently did, transfer the property to his wife Charlene). He also caused her to sell her beloved painting, *Up the Avenue from Thirty-Fourth Street* by Childe Hassam, by telling her that she needed the money.

134. In fact, Francis X. Morrissey was the lone attorney for the execution of Mrs. Astor's third and final codicil in March 2004 because the only other available attorney did not have a tie, and Morrissey told him it would be "disrespectful" to appear before Mrs. Astor without one. See Steve Fishman, *Mrs. Astor's Baby*, N.Y. MAG., Nov. 12, 2007, at 22. Morrissey was subsequently convicted of forging Mrs. Astor's signature on this codicil.

135. GORDON, *supra* note 4, at 207. In an Article 81 guardianship, the court usually appoints a court evaluator as a neutral party to serve as the "eyes and ears" of the court. The court evaluator reports on the circumstances of the person who is alleged to be incapacitated and makes recommendations as to whether a guardian should be appointed, and if so, who should serve as guardian and the extent of the powers the court should grant. See N.Y. MENTAL HYG. LAW § 81.09 (McKinney 2006).

As with the neglect of Mrs. Astor's personal needs, the overall impact of this financial exploitation was not catastrophic, as her total wealth was approximately \$180 million, although it involved the loss of perhaps \$60 million.<sup>136</sup> This part of the Astor story suggests the need to examine Brooke Astor's exploitation within the broader context of power of attorney abuse, exploitation of wills and estate plans, available remedies, and the professional norms that govern attorney conduct when representing a client with diminished capacity.

A. *The Power of Attorney Dilemma: An Effective Planning Tool, A License to Steal, and the Aspirations of New York's Revised Statute to Reduce Abuse*

In the Astor case, Anthony Marshall used his authority under a power of attorney to assert control over and deplete his mother's assets for his own benefit.<sup>137</sup> In doing so, he not only apparently violated his obligation as a fiduciary, but also was convicted on criminal charges of scheming to defraud and grand larceny in connection with those actions.<sup>138</sup> The power of attorney, despite important benefits as a planning tool,<sup>139</sup> has also attracted a great deal of notoriety as a "license to steal."<sup>140</sup>

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136. Unless this money is turned back over to the Astor estate and the codicils invalidated, these losses will ultimately be borne primarily by the numerous charitable beneficiaries under Mrs. Astor's 2002 will. These charities include the Metropolitan Museum of Art and the New York Public Library, which each could lose approximately \$10 million.

137. In New York, the substantially revised power of attorney law is titled, "Statutory Short Form and Other Powers of Attorney for Financial Estate Planning." N.Y. GEN. OBLIG. LAW § 5-1501 (McKinney 2010).

138. Marshall abused the power of attorney by using Mrs. Astor's funds for expenses related to the Maine property (that Mrs. Astor previously gave to him, which he then transferred to his wife), the salary of an employee of his production company, his own retroactive increase in salary for managing his mother's assets, and the salary of the captain of his yacht. GORDON, *supra* note 4, at 266.

139. See Linda S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned*, 37 STETSON L. REV. 29 (2007).

140. See, e.g., *M.R. v. H.R.*, 240 N.Y. L.J. 8 (Sup. Ct. July 2, 2008) (court revoked power of attorney pending hearing on incapacity based on allegation that agent, the daughter of the alleged incapacitated person, improperly sold her father's property and used the proceeds for her own benefit); *In re Matter of Bell*, 237 N.Y. L.J. 111 (Sup. Ct. May, 11, 2007) (court revoked power of attorney naming the son of the alleged incapacitated person as agent and set aside transfer of real property for less than fair market value); THOMAS

A power of attorney may enable a person to avoid the need for a costly guardianship proceeding in the event of incapacity by designating an agent with specified powers to make decisions about finances and property.<sup>141</sup> There may be questions, however, as to whether the person had the mental capacity to execute the power of attorney. It is common for a power of attorney to be executed after a person exhibits signs of dementia or is diagnosed with an underlying medical condition such as Alzheimer's Disease.<sup>142</sup> The standard for executing a power of attorney, as with a contract, requires that the principal understand the nature and consequences of the instrument, including the act of creating, modifying, or revoking the document, the powers being conferred on the agent, and the role, duties,

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HILLIARD, SCHUYLER CTR. FOR ANALYSIS & ADVOCACY, POWER FAILURES: POWER OF ATTORNEY AUTHORITY AND THE EXPLOITATION OF ELDERLY NEW YORKERS 1 (2006), *available at* [http://www.scaany.org/resources/documents/power\\_failures.pdf](http://www.scaany.org/resources/documents/power_failures.pdf); Jane A. Black, *The Not-So-Golden Years: Power of Attorney, Elder Abuse, and Why Our Laws Are Failing a Vulnerable Population*, 82 ST. JOHN'S L. REV. 289 (2008); Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses Durable Powers of Attorney*, 59 RUTGERS L. REV. 1 (2006).

141. *See, e.g., In re Mildred M.J.*, 844 N.Y.S.2d 539 (App. Div. 2007) (petition dismissed where AIP had the capacity to execute advance directives and family relationship did not create presumption of undue influence nor a confidential relationship so as to shift burden of proof); *In re Nellie G.*, 831 N.Y.S.2d 473 (App. Div. 2007) (reversing appointment of independent guardian where daughter was agent under springing power of attorney, which was available resource rendering appointment of a guardian unnecessary); *In re Isadora R.*, 773 N.Y.S.2d 96 (App. Div. 2004) (order appointing guardian reversed where agent appointed under health care proxy and power of attorney was properly carrying out plan for care of person and management of property); *In re Guardian for G.S.*, 841 N.Y.S.2d 428 (Sup. Ct. 2007) (dismissing petition where AIP executed power of attorney and health care proxy, no evidence that AIP lacked capacity to execute the advance directives or that the agent had engaged in wrongdoing, and AIP testified that she had confidence in the agent, her son); *In re Guardian for S.K.*, 827 N.Y.S.2d 554 (Sup. Ct. 2006) (petition dismissed where nursing home sought payment of fees despite AIP's prior execution of power of attorney and AIP had capacity to execute power of attorney).

142. *See, e.g., In re Daniel TT.*, 830 N.Y.S.2d 827 (App. Div. 2007) (reversing dismissal of petition and ordering hearing to determine whether AIP had capacity when power of attorney, health care proxy, and irrevocable trust were executed); *In re Susan Jane G.*, 823 N.Y.S.2d 102 (App. Div. 2006) (affirming appointment of daughters as co-guardians and revocation of power of attorney executed when person was incapacitated and health care proxy due to agent's inability and unwillingness to act); *In re Rita R.*, 811 N.Y.S.2d 89 (App. Div. 2006) (affirming revocation of will, trust, and advance directives based on lack of capacity when documents executed).

and obligations of the agent.<sup>143</sup>

Significant litigation involving powers of attorney has arisen when an agent has transferred property or money to himself or others as a gift or for less than fair market value.<sup>144</sup> Except in rare circumstances, an agent may not make gifts or transfers unless the power of attorney specifically grants that authority.<sup>145</sup> Even if granted the power to make gifts to himself, an agent must act in the best interest of his principal, as held by the New York Court of Appeals in *Matter of Ferrara*.<sup>146</sup> In *Ferrara*, the Salvation Army was named as the primary beneficiary of the decedent's will and when it learned that the entire estate (valued at approximately \$800,000) had been depleted, it challenged the gifts made by the agent (the decedent's nephew) to himself. The nephew claimed that his uncle intended to give him all of his money and accordingly granted

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143. Effective September 1, 2009, this standard was codified as a definition in the provisions of the General Obligations Law that govern powers of attorney. N.Y. GEN. OBLIG. LAW § 5-1501(3) (McKinney 2010).

144. See, e.g., *In re Ferrara*, 852 N.E.2d 138 (N.Y. 2006).

145. *In re Culbreth*, 852 N.Y.S.2d 246 (App. Div. 2008) (voiding gifts made by agent to his mother without grant of authority in power of attorney nor evidence that principal intended to make gifts to agent's mother); *Marszal v. Anderson*, 780 N.Y.S.2d 432 (App. Div. 2004) (agent who made gifts to himself without authorization under power of attorney failed to overcome presumption of impropriety and had to return assets to the principal's estate); *Mary B. v. Peggy D.*, 764 N.Y.S.2d 128 (App. Div. 2003) (unauthorized gifts made by agent to herself); *In re Estate of Naumoff*, 754 N.Y.S.2d 70 (App. Div. 2003) (agent surcharged for value of unauthorized gifts to himself and his family, although other gifts found to be authorized, and expenditures for the benefit of the principal were proper); *Wilder v. Tomaino*, 237 N.Y. L.J. 19 (Sur. Ct. Jan. 29, 2007) (gifts made by agent not authorized by power of attorney and not in best interests of principal); *In re Hoerter*, 836 N.Y.S.2d 499 (Sur. Ct. 2007) (agent who did not have gifting authority under power of attorney not authorized to create joint bank account which by definition makes a gift of one-half of the proceeds); *Musacchio v. Romagnoli*, 235 N.Y. L.J. 116 (Sup. Ct. May 18, 2006) (agent who made gifts to himself under a general power of attorney failed to rebut the presumption of impropriety and violated fiduciary obligation); *In re Clinton*, 781 N.Y.S.2d 623 (Sur. Ct. 2004) (court rescinded transfer by agent of individual bank account of principal to account naming agent as beneficiary, holding that the transaction was similar to a gift transaction and required specific authorization in the power of attorney or clear and convincing evidence that transaction was authorized). *But see In re Masterson*, 847 N.Y.S.2d 715 (App. Div. 2007) (upholding gifts made by agent despite absence of authority in power of attorney where clear and convincing evidence of principal's intent to make gifts rebutted presumption of impropriety).

146. *Ferrara*, 852 N.E.2d 138.

him that authority to do so in the power of attorney. The court rescinded the gifts, holding that although the agent had the authority to make gifts, they were not in the best interest of the principal and they were not made for a purpose that was beneficial to the principal.<sup>147</sup> An agent who fails to maintain records is subject to a surcharge for the failure to account for transactions.<sup>148</sup>

Against this backdrop, substantial revisions to the power of attorney provisions in the New York General Obligations Law were enacted, effective September 1, 2009. Many of the revisions were specifically designed to prevent abuse of the powers by the agent, although problems with the new law will likely lead to further amendments. The statute revised the substantive provisions of the power of attorney form, which now includes more detailed “consumer warnings” to both the principal and agent. This is intended to make both principal and agent more aware of the purpose and nature of the document and the scope of the powers that may be granted to the agent. In order to grant the agent the power to make gifts and transfers for less than fair market value, the principal must execute a separate statutory major gifts rider. The principal and agent must each execute the power of attorney before a notary public, and the principal must separately execute the statutory major gifts rider before two witnesses and a notary.<sup>149</sup> The new law increases the level of accountability imposed on the agent, provides the option of appointing a person to monitor the agent’s actions, and creates a special proceeding to obtain an accounting from the agent and remedy any wrongful actions by the agent. The result is a more complicated form and process that may have beneficial effects, but also may discourage the use of powers of attorney as a planning tool due to the increased cost and complexity.

It is questionable whether any of the revised statute’s safeguards would have prevented Anthony Marshall from abusing his authority under the power of attorney. Brooke Astor trusted her son, but perhaps with better counseling by an inde-

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147. *Id.* See also *In re Francis*, 239 N.Y. L.J. 50 (Sur. Ct. Mar. 14, 2008) (court set aside transfers by agent for his own benefit despite authority in power of attorney to make gifts and transfers to himself individually).

148. *In re Gershenoff*, 793 N.Y.S.2d 397 (App. Div. 2005).

149. N.Y. GEN. OBLIG. LAW § 5-1501(B) (McKinney 2009).



pendent attorney, she would have limited the scope of her son's authority, or named monitors to oversee his actions. The statute now requires the agent to acknowledge her legal responsibilities in executing the power of attorney, which also includes a written advisory to the agent that reinforces the nature of the agent's fiduciary obligation. It is unlikely that with these safeguards Anthony Marshall would have refrained from taking actions that violated his fiduciary duty and were the basis of several of the convictions in his criminal trial. Marshall's intelligence and sophistication, and the presence of highly skilled lawyers, presumably provided him with sufficient understanding to assess the prudence and legality of his actions and potential liability. These additional safeguards would not have deterred Marshall, either because he viewed his actions as a permissible exercise of his authority as agent under the power of attorney or, as the jury that convicted him in the criminal trial believed, he had the intent to steal from his mother and was willing to assume the risk of getting caught.

For a less sophisticated exploiter, who lacks access to attorneys willing to go along with and facilitate a nefarious scheme, the revised power of attorney statute may create obstacles that will reduce the ease with which a person can abuse his authority as an agent. The requirements for executing both a power of attorney and statutory major gifts rider are bewildering to a layperson without legal training. Yet this would not prevent the agent from obtaining powers under the power of attorney alone that would enable the agent to access bank accounts, use other property, and engage in a wide range of transactions that could cause considerable financial damage to the principal.

*B. Exploiting a Person's Diminished Capacity to Change a Will and Estate Plan*

Among the central questions in the Astor case are whether Mrs. Astor lacked the mental capacity to execute the 2002 will and three subsequent codicils and whether the documents were the product of fraud and undue influence. Mrs. Astor executed the 2002 will about two years after she was diagnosed with Alzheimer's Disease, during which time she exhibited persistent signs of diminishing capacity. The title of the "First and

Final Codicil” reflected the concerns that the attorney had about Mrs. Astor’s capacity.<sup>150</sup> The second codicil appeared to be executed under some duress, and at a time when her lack of capacity was even more evident.<sup>151</sup> In addition, the jury in the criminal case found that the signature on the third codicil had been forged by attorney Francis Morrissey.

In the criminal trial, Judge Bartley framed the issue as whether Mrs. Astor lacked the capacity to consent to the actions taken by Marshall and Morrissey with respect to the second and third codicils and transfers of her property. The issue of whether Mrs. Astor acted voluntarily was not at issue in the criminal case. Just prior to charging the jury, Judge Bartley advised the jury with respect to the second codicil: “[T]here is no charge that Mrs. Astor’s will was overborne or that she was coerced into signing something that she did not want to sign.”<sup>152</sup>

The probate proceeding to follow (in the absence of a settlement) will address the question of whether Mrs. Astor had testamentary capacity. In addition, the objections to Mrs. Astor’s will and codicils will include claims that they were the product of fraud and undue influence.<sup>153</sup> Testamentary capacity requires that the testator be capable of knowing her family members (traditionally referred to as the “natural objects of bounty”), the nature and extent of her property, and the nature and consequences of making the will.<sup>154</sup> The modern trend in New York is to apply these traditional elements to a “contextualized” functional approach that focuses on the testator’s ability to comprehend the specific tasks at hand by assessing whether:

she was capable of knowing and appreciating that she was making a disposition of what she owned and/or controlled that would take effect upon her death, she was capable of understanding what she had, and what she was giving away,

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150. John Elignon, *Focus on Astor’s Many Wills, and a Lawyer in the Middle*, N.Y. TIMES, May 27, 2009, at A24.

151. *Id.*

152. Transcript of Record at 17151-52, *People v. Marshall*, No. 6044/07 (N.Y. Sup. Ct. 2009).

153. *Id.*

154. *See In re Estate of Kumstar*, 487 N.E.2d 271, 272 (N.Y. 1985).

and she was capable of understanding to whom she was leaving her property, and why such a disposition might or might not comport with social norms and generally understood family values.<sup>155</sup>

A will requires less capacity than any other instrument.<sup>156</sup> The underlying theory for this low standard is twofold. First, it is important to facilitate the execution of wills by people who are elderly, sick, vulnerable, and who may be suffering from diminished capacity. Second, a will is a unilateral transaction that does not involve the possibility of economic loss during a person's lifetime. The extra protection provided by the higher standard of capacity for contracts is neither necessary nor appropriate.<sup>157</sup> As a result, a person may have sufficient capacity to execute a will even if a guardian was appointed based on a finding of incapacity.<sup>158</sup>

Fraud is another method by which a person can be induced to execute a will or codicil contrary to that person's true intent. Fraud requires an intentional misrepresentation, through a false statement or conduct, with the intent to deceive, which induces a person to sign a document.<sup>159</sup> For example, a person may lie about his marital status in order to persuade a lover to name him as beneficiary in the will, an adult child may convince a parent to make him the sole beneficiary under a will by falsely promising to take care of the other child voluntarily, or a person may misrepresent the nature or substance of a document in order to induce the person to execute it.<sup>160</sup> This last

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155. See, e.g., *In re Will of Khazaneh*, 834 N.Y.S.2d 616, 619 (Sur. Ct. 2006).

156. *In re Will of Coddington*, 118 N.Y.S.2d 525 (App. Div. 1952).

157. The person executing a contract must understand the nature and consequences of the transaction, which as applied requires a higher level of capacity than a will. See, e.g., *Ortelere v. Teachers' Ret. Bd. of N.Y.*, 250 N.E.2d 460 (N.Y. 1969) (capacity to designate a beneficiary on a retirement plan).

158. See, e.g., *In re Estate of Gallagher*, 2007 N.Y. Misc. LEXIS 7639 (Sur. Ct. Sept. 26, 2007).

159. WARREN'S HEATON ON SURROGATE'S COURT PRACTICE § 42.07 at 15 (Matthew Bender 2010).

160. See, e.g., *In re Coviello*, 870 N.Y.S.2d 369 (App. Div. 2008) (attorney committed fraud by misrepresenting the terms of a will which named the attorney as a residuary beneficiary, as the structure of the will negated the tes-

kind of fraud may be more difficult to carry out, as it requires a testator who is not examining the contents of the will carefully, if at all. For example, a beneficiary may deceive the testator by saying that the testator's will provides equally for all the testator's children, when in fact it only provides for that particular beneficiary. A more subtle ploy occurs when the relevant terms of the will are not readily apparent, which can result in a will that disproportionately or exclusively benefits the beneficiary, in conflict with the testator's intent.<sup>161</sup>

Coercion is the essential element of a claim that a will is the product of undue influence.<sup>162</sup> The testator must be vulnerable to coercion. Accordingly, the wrongdoer must have the motive and opportunity to exert the influence, and actually exert it in order to invalidate a will.<sup>163</sup> Because human relationships are complex, it is difficult to separate permissible and wrongful influence. Thus, courts will consider events that occurred before and after the execution of the will.<sup>164</sup> The evidence is often subtle and circumstantial.<sup>165</sup> The existence of a confidential relationship between the testator and beneficiary shifts the burden to the beneficiary of proving that the will was not the result of the undue influence.<sup>166</sup> A family relationship alone is not sufficient to shift the burden of proof. When the family member exercises control over the finances or estate planning of the testator, however, courts may find that a fiduciary relationship exists.<sup>167</sup>

In the Astor criminal case, the convictions of Marshall and

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tator's intentions as to the distribution of his property).

161. *Id.*

162. *In re Will of Walther*, 159 N.E.2d 665 (N.Y. 1959).

163. *In re Estate of Pellegrino*, 817 N.Y.S.2d 121 (App. Div. 2006) (codicil denied probate based on intentional, subtle, and pervasive actions that coerced physically frail testator into disinheriting grandson).

164. *See, e.g., In re Estate of Rosen*, 747 N.Y.S.2d 99 (App. Div. 2002).

165. *See In re Estate of Paigo*, 863 N.Y.S.2d 508, 511 (App. Div. 2008) ("Because direct proof of undue influence is rare, it may be demonstrated by circumstantial evidence of motive, opportunity and the actual exercise of such influence.").

166. *See Priervo v. Urbaniak*, 882 N.Y.S.2d 796, 797 (App. Div. 2009).

167. *See, e.g., In re Will of Pennino*, 698 N.Y.S.2d 265 (App. Div. 1999) (evidence that a widow did not disclose marriage to the testator's children was "instrumental" in testator executing a will days after their wedding and a month before testator's death); *In re Estate Antoinette*, 657 N.Y.S.2d 97 (App. Div. 1997) (niece who had substantial involvement in aunt's finances had burden of proof).

Morrissey on charges related to the execution of the codicils to the 2002 will, based on evidence that established guilt beyond a reasonable doubt, foreshadow the probable outcome of the will contest in Surrogate's Court. The convictions involve findings that Marshall and Morrissey intentionally deceived Mrs. Astor, which will certainly be relevant to the question of whether the first and second codicils were the result of fraud. The conviction of attorney Morrissey on the charge of forging Mrs. Astor's signature on the third codicil suggests that that instrument will be invalidated. The issue of Mrs. Astor's capacity to consent to the transactions that gave rise to the criminal trial was central and the significant testimony related to her mental capacity will directly bear on the question of her capacity to execute not only the codicils, but the 2002 will, which was supervised by her attorney Terry Christensen at a time when her capacity was questionable.<sup>168</sup>

### III. Guardianship, Criminal Prosecution, and a Will Contest as Remedies for Elder Abuse and Exploitation

The Astor case included three primary remedies for suspected elder abuse:<sup>169</sup> a formal guardianship proceeding under

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168. If the 2002 will is invalidated, Mrs. Astor's prior will executed in 1997 will control the distribution of her property.

169. One remedy that was not part of the Astor case was intervention by the local adult protective services agency (APS). *See supra* note 114. Problems with the quality of services provided by adult protective services in New York and other states, due to lack of resources, inadequate training, and unlawful actions, have been documented in cases and newspaper articles. *See, e.g.,* Van Cortlandt v. Westchester County, 2007 U.S. Dist. LEXIS 80977 (S.D.N.Y. Oct. 31, 2007) (court denied motion to dismiss elderly petitioner's allegations that APS unlawfully and without justification removed her from her home and involuntarily committed her without justification, finding sufficient claim of unreasonable seizure under the Fourth Amendment); Pam Beluck & Joe Sexton, *Old and Unprotected: A Special Report: Problems of the Aged Overwhelm an Agency*, N.Y. TIMES, July 12, 1996, at 1; Ralph Blumenthal & Barbara Novovitch, *Texas Agency for Elderly Under Fire Over Neglect*, N.Y. TIMES, Apr. 20, 2004, at A12 (describing how APS failed to address problems of elders in rural West Texas, leading to unnecessary suffering and possibly preventable deaths, noting inadequacy of investigation process); Mary Jane Smetanka, *Growing Fear: Elders Swindled by Family*, STAR TRIB. (Minneapolis-St. Paul, Minn.), Feb. 10, 2008, at A1 (describing how Hennepin County APS only investigated 126 of 700 allegations of financial exploitation in 2007, with only twenty substantiated, and fewer than 5% resulting in criminal charges).

Article 81 of the Mental Hygiene Law, criminal prosecution, and a will contest. In this section I describe these remedies and examine how they were applied in the Astor case.

A. *Use of Guardianships to Remedy Elder Abuse*

For elders who lack the capacity to make decisions about property management and personal needs, a court-appointed guardian is a primary remedy to prevent or stop abuse.<sup>170</sup> A person is presumed to have the capacity to make decisions. A person's autonomy is protected as a liberty interest under the U.S. Constitution.<sup>171</sup> A person has the right to make decisions that are not in the person's best interest, even if ill-considered, irresponsible, offensive, and even self-destructive.<sup>172</sup>

The capacity to make decisions depends on the person's cognitive limitations. A 2004 report from the U.S. Senate Special Committee on Aging stated that:

Capacity is situational because different degrees of capacity are required for different tasks and transient because individuals can have both periods of relative lucidity and confusion. At any given point in time, capacity also may be influenced by external forces, such as lack of sleep or

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170. Guardianship is generally based on a finding of incapacity due to dementia, mental illness, or other generally irreversible and progressive cognitive impairments. In 2008, 5.2 million people had been diagnosed with Alzheimer's Disease, the most common form of dementia, the majority of whom are 65 and older. ALZHEIMER'S ASS'N, 2008 ALZHEIMER'S DISEASE FACTS AND FIGURES 9 (2008), available at [http://www.nadsa.org/publications/documents/2008\\_Alzheimers\\_Facts\\_web.pdf](http://www.nadsa.org/publications/documents/2008_Alzheimers_Facts_web.pdf).

171. "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Among the due process safeguards are the use of evidentiary rules that are an essential feature of adversarial litigation. See, e.g., N.Y. MENTAL HYG. LAW § 81.02(b) (McKinney 2006) (determination of incapacity must be based on clear and convincing evidence); *id.* § 81.11(b)(1) (any party has right to present evidence); *In re Kang Yun Yu*, 824 N.Y.S.2d 882 (App. Div. 2006) (medical records protected by physician-patient privilege not admissible in guardianship proceeding). Another important safeguard are provisions requiring the appointment of an attorney for the person alleged to be incapacitated. See, e.g., N.Y. MENTAL HYG. LAW § 81.10.

172. See, e.g., *In re Grinker*, 573 N.E.2d 536 (N.Y. 1991).

medication.<sup>173</sup>

A guardianship is generally necessary if alternative resources are not available (for example, a power of attorney, living will, health care proxy, a representative payee for Social Security benefits, or a trust for property management)<sup>174</sup> or if a previously appointed agent or trustee is violating her fiduciary duty.<sup>175</sup> A court-appointed guardian has formal decision-making authority that is supposed to be used in ways that honor the autonomy of the person, but also provide necessary protection.

Under Article 81 of the New York Mental Hygiene Law, and most modern guardianship statutes,<sup>176</sup> a person who is al-

173. See SMITH & KOHL, *supra* note 120, at 13. See also Hollis E. Clow & Edward B. Allen, *Psychiatric Aspects in the Mental Competency of Aging*, 50 J. AM. GERIATRICS SOC'Y 1879 (2002); Robert P. Roca, *Determining Decisional Capacity: A Medical Perspective*, 62 FORDHAM L. REV. 1177 (1994); Loren H. Roth et al., *Tests of Competency to Consent to Treatment*, AM. J. PSYCHIATRY 134, 279-84 (1977).

174. See, e.g., Charles P. Sabatino, *The Legal and Functional Status of the Medical Proxy: Suggestions for Statutory Reform*, 27 J. L. MED. & ETHICS 52 (1999); Paul F. Stavis, *The Nexum: A Modest Proposal for Self-Guardianship by Contract: A System of Advance Directives and Surrogate Committees-At-Large for the Intermittently Mentally Ill*, 16 J. CONTEMP. HEALTH L. & POL'Y 1 (1999); Linda Whitten, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned*, 37 STETSON L. REV. 7 (2007); Bruce J. Winick, *Foreword: Planning for the Future Through Advance Directive Instruments*, 4 PSYCHOL. PUB. POL'Y & L. 579 (1998).

175. See, e.g., *In re Wingate*, 647 N.Y.S.2d 433 (Sup. Ct. 1996) (in Article 81 guardianship proceeding, court revoked power of attorney after agent failed to sell the incapacitated person's cooperative apartment in order to qualify for Medicaid).

176. State guardianship laws have improved significantly, although problems remain, primarily in the area of monitoring of guardians. See, e.g., Jeff Kelly, Maggie Kowalski, & Candice Novak, *Courts Strip Elders of Independence*, BOSTONGLOBE.COM, Jan. 13, 2008, [http://www.boston.com/news/local/articles/2008/01/13/courts\\_strip\\_elders\\_of\\_their\\_independence/](http://www.boston.com/news/local/articles/2008/01/13/courts_strip_elders_of_their_independence/). See also NAOMI KARP & ERICA WOOD, AARP PUB. POLICY INST., *GUARDING THE GUARDIANS: PROMISING PRACTICES FOR COURT MONITORING* 14-17 (2007); PAMELA B. TEASTER ET AL., *WARDS OF THE STATE: A NATIONAL STUDY OF PUBLIC GUARDIANSHIP* 99-122 (2005), available at <http://www.abanet.org/aging/publications/docs/wardofstatefinal.pdf>; U.S. GOV'T ACCOUNTABILITY OFF., *GUARDIANSHIPS: COLLABORATION NEEDED TO PROTECT INCAPACITATED ELDERLY PEOPLE* (2004), available at <http://www.gao.gov/new.items/d04655.pdf> [hereinafter GAO REPORT] (inadequate monitoring of guardians due to problems implementing existing law and poor training).

leged to be incapacitated<sup>177</sup> is entitled to a hearing to determine whether the two-pronged test under Article 81 is satisfied: first, that the appointment of a guardian is necessary, and second, that the person either consents or is found to be incapacitated.<sup>178</sup> A determination of incapacity is based on clear and convincing evidence that the person is likely to suffer harm because “the person cannot adequately understand and appreciate the nature and consequences of such inability.”<sup>179</sup> A guardian may be appointed to make particular decisions about property management<sup>180</sup> and personal needs.<sup>181</sup> In practice, some judges use the term “person in need of a guardian,” which may be more accurate than the term incapacitated, particularly in cases where a guardianship is used as a means to access necessary social and support services, housing, government benefits, case management, or home care. The lack of these services may be more of a problem than the person’s actual inability to make and understand the consequences of decisions.

A guardianship can be an effective tool for preventing or stopping abuse or neglect, and a court has the authority to revoke transactions entered into when the person lacked capacity

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177. Under Article 81, the term “incapacitated” has replaced “incompetent,” as it does not convey a negative meaning and reflects the reality that capacity diminishes along a continuum and affects particular areas of cognitive functioning and decision-making. The use of a term that is more scientifically accurate and demonstrates sensitivity to the dignity of the person should have a positive impact, as studies have shown that language and terminology shape attitudes. *See, e.g.*, Sik Hung Ng, *Language-Based Discrimination: Blatant and Subtle Forms*, 26 J. LANGUAGE & SOC. PSYCHOL. 106, 117 (2007), available at <http://jls.sagepub.com/cgi/content/abstract/26/2/106> (condescending communication to elders causes reactions that reinforce stereotypes that they are needy or less capable); Kathleen Riach, *‘Othering’ Older Worker Identity in Recruitment*, 60 HUM. REL. 1701 (2007), available at <http://hum.sagepub.com/cgi/content/abstract/60/11/1701> (analyzing how language used to portray workers over age 50 creates negative attributes based on age rather than behavior).

178. N.Y. MENTAL HYG. LAW § 81.02(a) (McKinney 2006).

179. *Id.* § 81.02(b).

180. Property management powers include decisions regarding gifts, support for dependents, contracts, trusts, confidential records, government benefits, paying bills, Medicaid and estate planning, and defending or maintaining lawsuits. *Id.* § 81.21.

181. Personal needs powers include decisions about personal care, social environment and social life, travel, license to drive, confidential records, government and private benefits, education, health care and medical treatment, and place of residence and living arrangements. *Id.* § 81.22.



or that are the result of undue influence.<sup>182</sup> A guardian can also violate a person's liberty interests, invade privacy, destroy autonomy, and misuse and convert property.<sup>183</sup> As a fiduciary, a guardian is held to the highest standard of conduct, and in the immortal words of Justice Cardozo: "Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior."<sup>184</sup> An increasing number of states provide extensive procedures for monitoring<sup>185</sup> the conduct of court-appointed guardians<sup>186</sup> to ensure that they fulfill their responsibilities. Despite the strong framework for post-appointment monitoring of guardians under Article 81 that reflects best practices for monitoring, effective implementation is difficult due to inadequate resources and the challenges of meeting the needs of vulnerable elders who are incapacitated.<sup>187</sup>

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182. N.Y. MENT. HYG. LAW § 81.29(d). See, e.g., *In re Doar*, 243 N.Y. L.J. 42 (Sup. Ct. Dec. 18, 2009) (rescinding reverse mortgages).

183. See, e.g., *In re Phillips*, 867 N.Y.S.2d 20 (Sup. Ct. 2008) (surcharging guardian \$403,148 for extreme violations of fiduciary duties that resulted in extensive misuse of ward's assets). See also REPORT OF THE GRAND JURY OF THE SUPREME COURT, QUEENS COUNTY, ISSUED PURSUANT TO CRIMINAL PROCEDURE LAW § 190.85(1)(C) CONCERNING THEFTS FROM GUARDIANSHIPS (2004), [http://www.queensda.org/newpressreleases/2004/03-03-2004\\_Grand\\_jury.htm](http://www.queensda.org/newpressreleases/2004/03-03-2004_Grand_jury.htm) (documenting financial exploitation by an attorney appointed as a guardian in numerous cases under Article 81, and the systematic failures and inadequacy of the monitoring system). New York subsequently enacted many of the Grand Jury recommendations. See 22 N.Y. COMP. CODES R. & REGS. tit. 22, § 36 (2004).

184. *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928).

185. GAO REPORT, *supra* note 176, at 9. Essential features of a monitoring system include background checks of a guardian and disqualification if a guardian has a criminal conviction, requirements that a guardian attend a training session, visit the incapacitated person a number of times each year, file a bond for property, and file initial, annual, and final reports that are reviewed by the court or a designee. *Id.* at 21 (listing requirements and practices of four courts cited as "exemplary" in their oversight of adult guardianships, each of which included most or all of these oversight mechanisms and court practices that went beyond the requirements of state law, such as periodic visits by court investigators with the incapacitated person). See Joseph A. Rosenberg, *Poverty, Guardianship, and the Vulnerable Elderly: Human Narrative and Statistical Patterns in a Snapshot of Adult Guardianship Cases in New York City*, 16 GEO. J. ON POVERTY L. & POL'Y 315, 320 n.12 (2009) (discussing a report by the Committee on Legal Problems of the Aging of the Association for the Bar of the City of New York, which included comprehensive findings on the need for, and recommendations regarding, guardianship monitoring).

186. See generally Rosenberg, *supra* note 185, at 320 n.13.

187. See, e.g., Beth Baker, *Who Guards the Guardians of the Vulnerable Elderly?*, AARP BULL., (AARP, Wash., D.C.), Apr. 21, 2008

If a guardian is not fulfilling his obligations, New York law provides for a “court examiner” to review the guardian’s initial and annual reports to assure that the guardian is fulfilling his duties or to remove the guardian. Although the annual report is supposed to be comprehensive,<sup>188</sup> it may nevertheless lack in-depth information about the personal needs of the incapacitated person, and may not alert the court examiner that a person is being neglected or mistreated. Primarily, due to an excessive caseload, a court examiner may not promptly review a report or notice that a report has not been filed, and problems in the care of the person or in the management of income and assets might go undetected. The court examiner may also assume, often correctly, that a person should continue living with a certain level of care at home or in a nursing home for life.<sup>189</sup> Without an advocate, the most vulnerable, particularly those without financial resources, may fall through the cracks forever.

Brooke Astor was in no such danger. The guardianship proceeding, however, had significant consequences for Mrs. Astor and her family, some of which were beneficial, and others destructive. On the positive side, it stopped the derivations she suffered due to her son’s acts and omissions. A court order barred her daughter-in-law Charlene from visiting her. The guardianship may have increased public awareness of the problem of elder abuse and neglect. Another benefit was the appointment of Susan Robbins as Mrs. Astor’s attorney in the

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[http://bulletin.aarp.org/yourhealth/caregiving/articles/who\\_guards\\_the\\_guardians.html](http://bulletin.aarp.org/yourhealth/caregiving/articles/who_guards_the_guardians.html).

188. For example, the annual report must include information about changes in the mental and physical condition of the incapacitated person, the nature and extent of the most recent appointment with a physician, an evaluation of the person by a health care professional or social worker, a statement of the suitability of the current residential setting, a summary of professional medical treatment received during the year, and the plan for treatment and services. N.Y. MENTAL HYG. LAW §§ 81.30-81.31 (McKinney 2006).

189. In New York, in order to exercise the power to place a person who is incapacitated in a nursing home without consent, there must be a finding that it is not reasonable to remain or return to the community. N.Y. MENTAL HYG. LAW § 81.21(d)(1). *See also* Eggleston v. Gloria N., 865 N.Y.S.2d 49 (App. Div. 2008) (court reversed order granting guardian the power to place in a facility where it was reasonable to maintain the incapacitated person in the community and her due process rights were violated by the failure to provide adequate notice and a hearing).

guardianship case.<sup>190</sup> Ms. Robbins was a solo practitioner with a public interest practice for elders and people with disabilities. Ms. Robbins emerged as the only attorney who truly fulfilled her professional obligations to Mrs. Astor with empathy, care, and vigorous advocacy. The filing of the guardianship petition also revealed the “smoking gun” of the case in the form of a seven-page letter written by Anthony Marshall to the doctor who diagnosed Mrs. Astor with Alzheimer’s Disease. The letter, dated December 26, 2000, detailed Brooke’s cognitive limitations, more than a year before she executed her 2002 will.<sup>191</sup>

In contrast, the guardianship case essentially destroyed the Astor/Marshall family relationships, at least between Anthony Marshall and his mother and children, and ignited distasteful, excessive publicity,<sup>192</sup> and resulted in astronomical legal fees.<sup>193</sup> The loss of privacy is inherent in a public court proceeding, although in a guardianship case, the person alleged to be incapacitated is often an unwilling or involuntary participant. The assessment of functional and decision-making capacity is often inextricably intertwined with a person’s medical condition, psychological well-being, and family relationships. In the Astor guardianship case, despite Brooke Astor’s position as a public figure, the court mitigated her loss of privacy by ordering that the court evaluator’s report as well as Mrs. Astor’s medical and psychological records be sealed.<sup>194</sup>

The specific impact on Anthony Marshall is less easily categorized. Although not a sympathetic figure, Marshall was initially placed at a severe disadvantage in defending himself in

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190. One of the key due process protections included in New York law is the mandatory appointment of an attorney under specifically enumerated circumstances. N.Y. MENTAL HYG. LAW § 81.10.

191. GORDON, *supra* note 4, at 220.

192. *Id.* at 200, 201, 205.

193. *Id.* at 207. There were a total of 56 lawyers and 65 legal assistants, whose request for \$3.3 million in fees was reduced to \$2.2 million. *In re Marshall*, 831 N.Y.S.2d 360, 360 (Sup. Ct. 2006); GORDON, *supra* note 4, at 232. Meryl Gordon noted that the “[l]awyers wanted every penny.” GORDON, *supra* note 4, at 232. Significantly, the judge ordered that Anthony Marshall be reimbursed for \$409,000 in legal fees from Mrs. Astor’s property (approximately one-half of the fees requested by his attorneys) because although he was not a prevailing party, the allegations of intentional abuse were not substantiated by competent evidence at a trial. *Marshall*, 831 N.Y.S.2d, at 360; GORDON, *supra* note 4, at 232.

194. *Marshall*, 824 N.Y.S.2d at 360.

the guardianship case when the court ordered that his salary be suspended and locked him out of his office.<sup>195</sup> It also led to the successful criminal prosecution of Marshall and his accomplice Morrissey.

The Astor guardianship petition did not culminate in a full hearing to resolve the allegations in the petition. The case was settled when Anthony Marshall agreed to pay \$1.35 million to the Internal Revenue Service in penalties and interest in connection with his mother's income tax liability, return approximately \$11 million worth of cash, jewelry, and artwork, and relinquish authority over her finances and health care. He also agreed that he and his wife would not serve as co-executors of her estate.<sup>196</sup>

The final significant result of the guardianship petition was the court evaluator's finding that there was no physical or medical abuse.<sup>197</sup> This is difficult to categorize as positive or negative. Considering that most experts agree that elder abuse is underreported,<sup>198</sup> it is a somewhat grim irony that in the case of an astronomically rich socialite, the allegations of abuse may have been exaggerated.

#### B. *Criminal Neglect, Abuse, and Exploitation of a Vulnerable Elder*

An elderly, disabled and helpless person is left alone, awash in his or her own human wastes, with resulting bed sores so extensive and severe as to have culminated in life-threatening sepsis, and there is additional evidence that the person was malnourished to the point of starvation, and

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195. GORDON, *supra* note 4, at 202.

196. See Serge F. Kovaleski & Mike McIntire, *Lawyer Advising on Astor Affairs Was Suspended for Two Years*, N.Y. TIMES, Aug. 4, 2006, at B1. The terms of a proposed settlement were agreeable to all the parties, except for Susan Robbins, Mrs. Astor's attorney, who wanted the court to invalidate the 2002 will and all three codicils and rescind Mrs. Astor's transfer of the Maine property and \$5 million in cash to her son. GORDON, *supra* note 4, at 225.

197. GORDON, *supra* note 4, at 233.

198. See SMITH & KOHL, *supra* note 120, at 21; Ron Aciemo et al., *Prevalence and Correlates of Emotional, Physical, Sexual, and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreat Study*, 100 AM. J. PUB. HEALTH 292 (2010).

severely dehydrated, while occupying a room in a house where another adult family member, or members, reside. The result of the culpable neglect is death. A moral duty was clearly breached by the adult family members living in the house where the elderly person suffered such abject neglect, we all agree. But we also think a legal duty was breached . . . .<sup>199</sup>

Lee and James Peterson were brothers who lived in Florida with their elderly mother, but their horrifying story vividly illustrates the most extreme form of elder abuse that transcends jurisdictional boundaries. Because Lee worked long hours, the brothers agreed that James would assume the responsibility for taking care of their mother. Fatally for “Mrs. Peterson,”<sup>200</sup> James did not provide appropriate care and neither did Lee. Neglected, abused, and without the means to save herself, Mrs. Peterson died at age eighty-two and Lee Peterson appealed from his conviction for aggravated manslaughter of an elderly or disabled person.<sup>201</sup> The legal question on appeal was whether Lee should be held criminally responsible, despite the fact that there was no dispute that his brother had agreed to care for their mother. The statute applied to a “care-giver,” defined as a person “[e]ntrusted with or [who] has assumed responsibility for the care or the property of an elderly person,” and whose actions or omissions resulted in a failure to provide for the person’s physical and mental health, resulting in “physical or psychological injury, or substantial risk of death.”<sup>202</sup>

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199. *Peterson v. State*, 765 So. 2d 861, 864 (Fla. Dist. Ct. App. 2000).

200. Remarkably, the victim’s full name was never used in the decision. She was only referred to as “mother” or “Mrs. Peterson.” This may be part of a larger pattern or propensity by judges to marginalize poor, elderly women in their decisions. See, e.g., Ruthann Robson, *A Servant of One’s Own: The Continuing Class Struggle in Feminist Legal Theories and Practices*, 23 BERKELEY J. GEN. L. & JUST. 392 (2008) (noting how the U.S. Supreme Court in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007), only refers to plaintiff Evelyn Coke by name once, then twice more by her last name only, and then she fades into obscurity as “respondent”).

201. *Peterson*, 765 So. 2d at 862.

202. *Id.* at 862-63.

In affirming Lee Peterson's conviction, the court noted that if it failed to apply the statute, it would be providing Mrs. Peterson with less legal protection than is provided for cats and dogs.<sup>203</sup> The allegations of mistreatment, neglect, and isolation in the Astor guardianship case pale in comparison to the actions that resulted in Mrs. Peterson's death. Ironically, although the motivation for filing the guardianship petition was to improve Mrs. Astor's living conditions and not to remedy any financial exploitation, none of these allegations were found to be true by the guardianship court, as the case was settled without any findings of fact on those allegations. The criminal charges only involved financial exploitation, not physical abuse or neglect.<sup>204</sup>

A criminal conviction requires proof beyond a reasonable doubt. This is a far more exacting standard than the clear and convincing standard required to appoint a guardian, or the even lesser preponderance of the evidence standard applied in a will contest. Judge Bartley defined proof beyond a reasonable doubt in his instructions to the Astor jury:

An honest doubt of the defendant's guilt for which a reason exists based upon the nature and quality of the evidence. It is an actual doubt, not an imaginary doubt. It is a doubt that a reasonable person, acting in a manner of this importance, would be likely to entertain because of the evidence that was presented or because of the

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203. *Id.* at 863 n.1. For another case discussing the scope of liability regarding the death of an elderly parent, see *People v. Heitzman*, 886 P.2d 1229 (Cal. 1994). In *Heitzman*, the court held that two sons who lived with the decedent and were his primary caregivers were guilty of criminal neglect, but a daughter who did not live with her father, but who was aware of the neglect, did not owe a legal duty of care to intervene. The court held that the applicable statute was "unconstitutionally vague." *Id.* at 1231.

204. The New York Penal Law includes provisions that specifically address crimes against vulnerable elders. See, e.g., N.Y. PENAL LAW § 120.05(12) (McKinney 2009) (assault of an elderly person over the age of 65 who is at least ten years older than the assailant); *id.* § 260.25 (endangering the welfare of a person unable to care for herself); *id.* § 260.32 (caregiver assault or sexual abuse of a vulnerable elder). Effective May 22, 2010, these crimes will also include a person who is "incompetent or physically disabled." See 2010 N.Y. Laws, ch. 14 (Mar. 23, 2010).

lack of convincing evidence.<sup>205</sup>

Anthony Marshall and Francis X. Morrissey were convicted of numerous crimes involving theft, exploitation, misuse of funds, and fraud. Anthony Marshall received concurrent one-year sentences for each count on which he was convicted. Francis X. Morrissey was sentenced to concurrent sentences of one to three years for convictions on the counts of scheming to defraud and forging the third codicil to Mrs. Astor's 2002 will. Although the proof of intent and egregiousness of the acts (and perhaps the available resources of the prosecutor) are factors in determining whether a person should be charged with a crime, it appears likely that the wealth and celebrity of the Astors might have also played a role.

The charges in the Astor case revolved around the actions of Anthony Marshall and Francis X. Morrissey, individually and together. Their actions resulted in the taking of property from Brooke Astor through a variety of means, including Marshall's use of a power of attorney, theft of property, inducement to her to execute a second codicil, and Morrissey's forgery of Mrs. Astor's signature on the third codicil. The period of time during which the scheme took place was December 1, 2001 through September 11, 2007.

Count One charged both defendants with a scheme to defraud in the first degree, which included the abuse of the power of attorney.<sup>206</sup> This charge related to a variety of actions by both Marshall and Morrissey that exploited Brooke Astor's diminished capacity to obtain property worth more than \$100,000. The judge explained that:

[W]hat is required is a plan to defraud more than one person or to deprive persons of property by false or fraudulent pretenses, representation or promises. A representation is fraudulent when it relates to a material fact that is falsely made with the intent to deceive.<sup>207</sup>

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205. Transcript of Record, *supra* note 152, at 17164-65.

206. These were counts two, five, six, eight, fifteen, sixteen and seventeen. *Id.* at 17173.

207. *Id.* at 17175.

Both Marshall and Morrissey were convicted on the scheme to defraud count.

Several counts charged Mr. Marshall with grand larceny.<sup>208</sup> Count Two alleged that the \$2 million commission resulting from Marshall's sale of the Childe Hassam painting *Up the Avenue from Thirty-Fourth Street* occurred during the time period of December 1, 2001 through November 5, 2002. The conviction on this charge carried a mandatory sentence of one to three years. The prosecution's theory was "larceny by false pretenses."<sup>209</sup> Marshall was found not guilty on this count. The remaining grand larceny counts involved two theories: larceny by embezzlement and larceny by trespassory taking without the owner's consent.<sup>210</sup> The trespassory taking charge required proof that Brooke Astor lacked the mental capacity to consent.<sup>211</sup> The embezzlement theory mandated a finding that Marshall was entrusted to hold property on behalf of the owner, his mother. Marshall was convicted on the following counts of grand larceny:

- Abuse of the power of attorney to use Mrs. Astor's funds for his own benefit;
- Payment of expenses related to the Maine property from November 18, 2003 to July 12, 2006;
- Theft of two paintings owned by Mrs. Astor;
- Payments to manage his production company;
- Payments to his employees, including the captain of his yacht;
- Payment for a retroactive increase in his salary;
- Actions related to the Second and Third Codicils.

Marshall was also convicted of offering a false instrument for filing in the first degree, which was the Verified Answer and Cross Petition dated September 19, 2006 in the Guardianship

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208. *Id.* at 17177. Counts two and fifteen were in the first degree (property in excess of \$1 million), and the others were in the second degree (property in excess of \$50,000).

209. *Id.* at 17180.

210. *Id.* at 17182-89.

211. *Id.* at 17186.



proceeding. Actions relating to the second and third codicils were part of the conspiracy counts on which both Marshall and Morrissey were convicted. The jury also convicted Morrissey of forgery in the first degree for forging Mrs. Astor's signature on the Third Codicil.<sup>212</sup>

Although few cases involve property of such value—approximately \$60 million out of a total estate estimated to be worth \$180 million—the pattern of exploitation was not unusual.

### C. *The Will Contest*

Unless there is a settlement, there will be a trial to determine the validity of Mrs. Astor's 2002 will and the three codicils, in Surrogate's Court, Westchester County (Mrs. Astor's county of residence at the time of her death). Will contests are post-death judicial proceedings that determine the validity of a person's will and, as with the case of Mrs. Astor, codicils to a will.<sup>213</sup> The most common challenges to a will are based on lack of testamentary capacity, fraud, and undue influence.<sup>214</sup> The standard in a civil proceeding such as a will contest is a preponderance of the evidence, which can turn on a slight difference in the persuasiveness of the evidence. However, problems in meeting the burden of proof due to evidentiary obstacles (e.g., the testator is deceased and the "dead man's" statute prohibits testimony by interested witnesses as to conversations and transactions with the decedent)<sup>215</sup> are part of the reason it is difficult for contestants to succeed in a challenge to a will.

A will contest can be anticipated if the will excludes a close family member, treats family members in the same degree of relation differently, or if the will favors a lover, nursing home,

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212. See John Eligon, *Brooke Astor's Son Guilty in Scheme to Defraud Her*, N.Y. TIMES, Oct. 8, 2009 at A1.

213. Proceedings to "turn over" property wrongfully transferred may also be tried as part of an estate administration proceeding. In New York, a judge in a guardianship proceeding no longer has the authority to revoke the will of a person. N.Y. MENTAL HYG. LAW § 81.29(d) (McKinney 2006, Supp. 2010).

214. See, e.g., Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607 (1987) (in a study of will contests in Tennessee, seventy-four percent alleged incapacity, and seventy-three percent claimed undue influence).

215. N.Y. C.P.L.R. § 4519 (McKinney 2007).

or recently acquired caretaker or charity, or if changes are made to the executed will or codicils that depart from prior wills and change the allocation of property. The likelihood of a will contest in any of these scenarios increases if the testator was elderly and suffering from some form of dementia, or other neurological impairment, around the time the will or codicil was executed. Although a high value is placed on testamentary freedom, there is some evidence that judges and juries impose their own values of fairness.<sup>216</sup> Unless a strong countervailing justification exists, this inures to the benefit of the family member who is excluded, or receives a lesser amount than under a prior will or than the relative would receive under the state's intestacy law.

In the Astor case, an additional factor is the "no contest" clause in the 2002 will, which is designed to discourage a challenge to the will by providing that a contestant who is unsuccessful forfeits property given to the person under the will.<sup>217</sup> This is significant because the 2002 will named numerous charities as beneficiaries. These charities were adversely affected by the changes in the codicils that reduced the bequests Mrs. Astor had previously made to them. This provision, however, does not apply to charitable beneficiaries.<sup>218</sup>

#### IV. Let's Kill All the Lawyers: Professional Norms and Betrayal of Clients

Susan I. Robbins, a public interest practitioner appointed by the court in the guardianship proceeding, was the only lawyer who represented Mrs. Astor during her final years that upheld the highest values and standards of the profession. The actions of Mrs. Astor's other lawyers add another dimension to this story, and raise important issues about professional responsibility, the challenges of representing a person with diminished capacity, the obligation to provide independent representation to a clearly-defined client, and the best practices that lawyers should follow to avoid these problems. Although Mrs.

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216. See, e.g., Pamela R. Champine, *Expertise and Instinct in the Assessment of Testamentary Capacity*, 51 VILL. L. REV. 25, 32-33 (2006); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996).

217. N.Y. EST. POWERS & TRUSTS 3-3.5 (McKinney 1998).

218. See *id.*

Astor's estate planning lawyers faced challenges in dealing with a client with diminished capacity, it appears that either they did not follow the best practices for representation, exercised poor judgment, or compromised the integrity of their representation due to their relationship with Anthony Marshall. This relationship created, at the very least, an appearance of impropriety and may have undermined their loyalty to Mrs. Astor.

In sharp contrast to the lawyers who worked "for" Mrs. Astor on her will and codicils, Ms. Robbins proved to be an exemplar of professional responsibility and high-quality representation. In the guardianship proceeding, Ms. Robbins represented Mrs. Astor with zeal and undivided loyalty, but also with sensitivity about the complexities of the family relationships. Ms. Robbins had to make sense of the 2002 will and the three codicils that followed and figure out why at age 100 Mrs. Astor would fire the law firm with which she had a relationship for forty years and dramatically change her estate plan in favor of her son. As a result, she was the most reluctant participant in the settlement of the guardianship case just before trial, as it failed to revoke the 2002 will and left the determination of the validity of the will and its three codicils to a probate proceeding after Mrs. Astor's death.

When the report of the handwriting expert stated that Mrs. Astor could not have produced the signature on the third codicil, Ms. Robbins was faced with an ethical dilemma: her belief that she had an obligation to report that her fellow attorney, Francis X. Morrissey, had possibly committed a criminal act by forging the codicil. She did not, however, want criminal charges filed against Anthony Marshall, knowing that would be anathema to Mrs. Astor.<sup>219</sup> Ms. Robbins ultimately disclosed the information to the New York County District Attorney, which led to the multiple convictions of Marshall and Morrissey, including Morrissey's conviction of forging Mrs. Astor's signature on the third codicil.

A fundamental problem with the role assumed by the lawyers retained by, or on behalf of, Mrs. Astor was their involvement with her son Anthony Marshall. The dominant paradigm of the attorney-client relationship is based on a one-to-one rela-

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219. See GORDON, *supra* note 4, at 227.

tionship in which the attorney is acting zealously on behalf of a single client who is seeking to prevail in adversarial litigation. A parallel model, however, has long been part of the conception of the lawyer's role, in which the lawyer serves as an advisor, counselor, and problem solver, often with the involvement of family members or other interested parties. During the confirmation of Justice Louis Brandeis for the United States Supreme Court, Justice Brandeis was subjected to criticism for the characterization of his role as a "counsel for the situation" in a case that raised questions about the ethics of advising opposing parties in a dispute.<sup>220</sup>

In the practice of estate planning and elder law, lawyers may be asked to represent multiple members of a family, most commonly, spouses.<sup>221</sup> When a lawyer represents multiple clients, or when third parties, such as adult children, are involved with the representation, it is critical for a lawyer to advise the client and other parties about the parameters of confidentiality and any actual or potential conflicts of interest. If there is a conflict of interest that prevents the attorney from representing each client properly, the attorney must withdraw from representation.<sup>222</sup> If a reasonable attorney would believe that the competent and loyal representation of each client would not be compromised, and it is not unlawful, the clients may make an informed decision to waive the conflict of interest, but must do so in writing.<sup>223</sup> If, as in the Astor case, the attorneys were formally representing a single client, but had a significant relationship with a beneficiary who was deeply involved in the client's financial affairs, the appearance that this relationship would adversely affect the representation may require a decision to end the representation.

With respect to confidentiality, the best practice is to explicitly advise clients that no information will be withheld from any client, to avoid even the appearance that information obtained from one client may be used in a way that disadvantag-

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220. See Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445, 1502-11 (1996).

221. See, e.g., Joseph A. Rosenberg, *Adapting Unitary Principles of Professional Responsibility to Unique Practice Contexts: A Reflective Model for Resolving Ethical Dilemmas in Elder Law*, 31 LOY. U. CHI. L.J. 403 (2000).

222. N.Y. RULES OF PROF'L CONDUCT R. 1.7(a) (2009).

223. *Id.* R. 1.7(b).

es another client.<sup>224</sup> This prevents the classic ethical dilemma in which one client privately confides in the attorney and discloses information that may be damaging to the interests of the other client (for example, a spouse who wants a portion of his estate to go to a secret lover). Without clear guidance from the lawyer at the outset of the representation, this poses an untenable ethical dilemma: it may require the lawyer to maintain the confidential information and risk compromising his ethical duty to the “innocent” client; or, the lawyer may withdraw without a true explanation, which risks alerting the other client of the problem. Even when a client impliedly consents to disclosure of information to a third party, as Mrs. Astor apparently did with her son, it may result in shifting the primary focus from the client, especially one whose capacity to provide information is diminished, to the involved third party whose interests may not coincide with the intent of the client.

When a client, who may be an elder, has some degree of diminished capacity, the attorney has the obligation to, “as far as reasonably possible, maintain a conventional relationship with the client.”<sup>225</sup> This may be difficult, and often requires that the attorney assess the client’s capacity to enter into an attorney-client relationship, and thereafter, engage in the decisions essential to the representation. In the Astor situation, the lawyers involved had to determine whether Mrs. Astor retained sufficient capacity to execute the 2002 will and three codicils to the will. Although a will requires less capacity to execute than any other instrument, this ethical conundrum tests the professional judgment of the lawyer.<sup>226</sup>

In the Astor case a number of these factors should have caused Mrs. Astor’s lawyers to approach the representation with extra caution, to avoid even the appearance of improprie-

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224. *Id.* R. 1.6(a).

225. *Id.* R. 1.14.

226. The commentaries of the American College of Trust and Estate Counsel on the Model Rules of Professional Conduct states that a lawyer should not prepare a will, trust, or other dispositive instrument for a client whom the lawyer reasonable believes does not have the necessary capacity, although it is permissible to represent a client with “borderline” capacity. AM. COLL. OF TRUST & ESTATE COUNSEL, ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 132 (2006), available at [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf).

ty:

- The deep involvement in Mrs. Astor's financial affairs by her adult child, albeit an only child, but formally employed as his mother's money manager and armed with a power of attorney;
- The existing relationships between Mrs. Astor's attorneys and her son, one that was incidental to, and the other that began prior to, and independent of, the attorney's representation of Mrs. Astor;
- The substantial degree of incapacity that affected Mrs. Astor's decision-making; and
- The significant changes made by the codicils to her estate plan, specifically the substantially increased amount given to Mrs. Astor's son, at the expense of charities that had been longstanding objects of Mrs. Astor's largesse.

The lawyers retained by Mrs. Astor, or on her behalf by her son, assumed a number of discrete roles.<sup>227</sup> "Mrs. Astor's attorney" was Henry "Terry" Christensen III, a partner in Sullivan & Cromwell, the "white shoe" firm that had a long-term relationship with her, beginning when she retained them to defend a challenge to Vincent Astor's will by his heirs and ending after he drafted and supervised the execution of the "First and Final" Codicil. Mr. Christensen was dismissed by Anthony Marshall in February 2004, although he had previously served as co-agent with Marshall under a power of attorney and as co-trustee of the Astor Foundation with Mrs. Astor and Mr. Marshall.<sup>228</sup> The "wolf in sheep's clothing" was Francis X. Morrissey, the enigmatic lawyer who catered to his elderly clients, but had trouble escaping the shadow of a prior suspension from practice for financial improprieties and was involved in a number of cases in which he was named as beneficiary in his clients' wills.<sup>229</sup> The "hired gun" was G. Warren Whitaker, a

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227. I have assigned these roles descriptive names in order to highlight the nature of each lawyer's involvement.

228. See Kovaleski & McIntire, *supra* note 196. See also GORDON, *supra* note 4, at 160.

229. See Serge F. Kovaleski & Colin Moynihan, *Many Clients of Astor Lawyer Left Him Bequests in Their Wills*, N.Y. TIMES, Jan. 4, 2008, at B1.

top trusts and estates attorney retained by Anthony Marshall, after he fired Mr. Christensen, to draft the second and third codicils that proved so controversial, and who on the surface seemed thorough and professional, but who also appeared tainted by his willingness to follow the directions of Marshall and Morrissey at the expense of Mrs. Astor.<sup>230</sup>

Mrs. Astor's lawyer provided the initial and prophetic warning by giving the first codicil the unusual title of First and Final Codicil for reasons he never stated explicitly. Perhaps, as Meryl Gordon suggests, it was to make a statement to all those who came after him that he was finished stretching Mrs. Astor's capacity beyond its limits in executing testamentary documents. It may be that Mrs. Astor's lawyer compromised his professional judgment, or merely was representing his client zealously by following the legal presumption of capacity, and acting with the knowledge that it takes less capacity to make a will than any other document. That often very difficult judgment is the lawyer's to make.<sup>231</sup> It is possible that if Mrs. Astor's lawyer refused to go through with the creation and execution of the First and Final codicil based on his assessment that she lacked testamentary capacity, there would not have been any subsequent efforts to modify her 2002 will. Instead, Mrs. Astor's lawyer supervised the execution of the First and Final Codicil. When Anthony Marshall fired him, he continued to practice at his law firm, and he emerged later as a key witness for the prosecution in the criminal trial.

The wolf in sheep's clothing stepped into the gap left by the departure of Mrs. Astor's attorney. He was given the opportunity to flatter, dine, comfort, and accompany her, without revealing the true nature of his checkered professional past. The wolf in sheep's clothing appeared to not only represent the interests of Mr. Marshall, rather than Mrs. Astor, but participated in a course of action with Mr. Marshall that culminated in convictions for scheming to defraud Mrs. Astor and forging her signature on the third codicil. The wolf in sheep's clothing

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230. Mr. Whitaker was not charged in the criminal case, although he was called as a witness by the prosecution, and testified that she was lucid when she signed the codicil drafted by Mr. Whitaker for which he also served as a witness. John Eligon & A. G. Sulzberger, *In Closing, Defense Focuses on Changes to Astor Will and 2 Witnesses*, N.Y. TIMES, Sept. 15, 2009, at A29.

231. See AM. COLL. OF TRUST & ESTATE COUNSEL, *supra* note 226.

did not follow the professional norm that requires an attorney to resolve any appearances of impropriety so that conflicts are avoided.<sup>232</sup> When he realized that the proposed changes to the codicils were benefiting the son, and that he, the wolf, was going to be named executor of an estate that would have brought substantial commissions, he should have stepped away. He should have urged Mrs. Astor's son to find another attorney with whom he would not be involved, and who would not benefit even by being named as a fiduciary.<sup>233</sup> Instead, the wolf in sheep's clothing presided over the execution of the second and third codicils, and he was convicted of forging Mrs. Astor's signature on the third codicil—an action clearly beyond the pale of professional conduct.

The hired gun, Whitaker, entered the fray for the second codicil, and all the lessons learned in practice at a prestigious firm, and experience garnered with clients of great wealth and impeccable pedigree, could not overcome a fundamental misstep: he prepared the second (and third) codicils based on the instructions of Anthony Marshall, as conveyed by Francis X. Morrissey, the wolf in sheep's clothing. He never met privately with Mrs. Astor prior to the execution of the second codicil to confirm that she had the intent and capacity to execute the codicil and make substantial changes to her estate plan. In the subsequent criminal trial in which the hired gun testified, his meticulous (and multiple) memoranda to the file<sup>234</sup> were important, albeit contentious, pieces of evidence. The prosecution sought to undermine the hired gun's credibility by highlighting

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232. See N.Y. RULES OF PROF'L CONDUCT R. 1.7 (2009).

233. It is not improper for an attorney to be named as the executor in a client's will, provided the client consents after being fully informed of all relevant information. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.8 (1983); AM. COLL. OF TRUST & ESTATE COUNSEL, *supra* note 226, at 95. See also Lawyer Disciplinary Bd. v. Ball, 633 S.E.2d 241 (W. Va. 2006) (lawyer who collected \$1.6 million in executor's fees under will he drafted disbarred). In New York, a lawyer named as executor in a will must disclose, and obtain a signed written acknowledgment of disclosure, that the lawyer is entitled to both fiduciary commissions and attorney's fees; otherwise the commissions will be reduced by one-half. N.Y. SURR. CT. PROC. ACT § 2307-a (McKinney 2007).

234. This is a recommended practice for attorneys supervising the execution of a will or codicil, especially for a person with diminished capacity and a contest is anticipated. The purpose of this practice is to preserve evidence of the client's capacity and the process leading up to, and including, the execution of the will or other dispositive instrument. See AM. COLL. OF TRUST & ESTATE COUNSEL, *supra* note 226, at 132.



the inconsistent details in the memoranda he drafted after witnessing the execution of the second codicil.<sup>235</sup> These memoranda, in describing the execution ceremony, may have also been self-serving in that it appeared they were carefully crafted to support a finding that Mrs. Astor had the requisite testamentary capacity, when in fact there was considerable evidence to the contrary.

The Astor case is a cautionary tale for lawyers working with clients with diminished capacity, particularly under circumstances in which family members or caretakers who stand to benefit from an estate plan communicate and meet with the lawyer. Perhaps the primary lessons to learn are to clearly understand who the client actually is, to avoid the appearance of impropriety, and to recognize when it may not be appropriate to continue representing a person, either because of divided loyalties, lack of capacity, or the presence of undue influence. When the borderline between capacity and incapacity is murky, as it often is, a close relationship with the client and thoughtful professional judgment are critical. Of course, in the case of Francis Morrissey, an additional lesson goes without saying: do not commit a blatant, unjustifiable, and illegal act such as forgery.

### Conclusion

The public and private worlds of Brooke Astor collided in the twilight of her life, in the waning light of her awareness and capacity. At 105 years of age, Mrs. Astor lived a full and, in her own words, “wonderful” life. A life defined almost exclusively by excessive wealth, privilege, and comfort, was also complex. Mrs. Astor endured severe domestic violence in her first marriage, went on to defy the doubts of many to revitalize the Astor Foundation and give generously, and in her final years, endured financial exploitation and personal neglect.

Meryl Gordon captures the nuanced humanity of Brooke Astor, although more discussion of the broader socio-economic context would have better illuminated the important issues of elder abuse and neglect. For New York elders without the fi-

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235. John Eligion, *Prosecution Finally Rests in Astor Case*, N.Y. TIMES, Aug. 19, 2009, at A21.

nancial resources of Brooke Astor, the consequences of abuse and financial exploitation are severe, life threatening, and result in harsh material deprivation. The scope, quality, and accessibility of support services available to Brooke Astor dwarfed those generally available to people in New York, particularly those who depend on public funding. Access to sufficient services and resources is essential in order to enforce the right to live in the community,<sup>236</sup> reverse patterns of unnecessary and preventable institutionalization of elders,<sup>237</sup> prevent and remedy abuse and financial exploitation of elders, and limit the use of guardianships as a substitute for necessary support services and other less restrictive alternatives.

The stories of these “other” elderly are equally, if not more, compelling than Mrs. Astor’s story, even in the absence of the lure of wealth, fame, and celebrity. When these stories attract the same attention from media, social and legal institutions, the world will have changed significantly, and for the better.

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236. See, e.g., *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) (recognizing right to treatment and services in the community for people with disabilities if reasonable).

237. See, e.g., John Leland, *Helping Aged Leave Nursing Homes for a Home*, N.Y. TIMES, Sept. 19, 2009, at A10 (describing efforts in Philadelphia to relocate nursing home residents back into the community through the “Money Follows the Person” program).