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The *NAELA Journal* Editorial Board invites the submission of manuscripts year-round with the following guidelines:

1. For initial approval of publication, you may submit a one- to two-page outline of the intended manuscript, along with a list of sources. Alternatively, you may submit your final paper for consideration.

2. Articles should include a one-paragraph abstract that summarizes the article’s key points, conclusions, and recommendations.

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4. Please conform text to *AP Stylebook* and citations to *ALWD Citation Manual*.

5. A table of contents will be generated from the main and subheadings in your article, so it is not required to submit a table of contents, but the heading levels should be clearly identified.

6. Please include a cover letter containing the title of your article, your professional affiliation or school, address, telephone, email address, and a short biography with reference to recently published material.

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INTRODUCTION TO FOCUS ON GUARDIANSHIP ISSUE

By Charles P. Golbert, Esq.

This issue of *NAELA Journal* focuses on personal and estate guardianship. I feel privileged to introduce this issue for several reasons. The issue contains thought-provoking articles by outstanding authors, and is of particular interest to me because guardianship has been a primary focus of my practice for nearly the past quarter century at the Office of the Cook County (Illinois) Public Guardian. As reflected in the articles of this issue, guardianship frequently implicates questions of constitutional dimension. Guardianship has the potential to protect people who are vulnerable, but also to intrude excessively on their liberty and autonomy. On a daily basis, guardians are called upon to make a wide variety of complex, interdisciplinary decisions of profound import for their wards. Guardians decide where a ward will live, who may visit the ward, whether to bring or settle a lawsuit on the ward’s behalf, and how the ward’s money will be invested and spent. Every day, guardians are asked to make irreversible medical decisions for their wards, including consents to amputations or other major surgery, and end-of-life decisions such as do-not-resuscitate orders, as well as withdrawal of life support. Guardians often have to address issues of abuse, neglect, and financial exploitation. They are called upon to make decisions for their wards at all hours of the day and night, on weekends, and on holidays. It is challenging but immensely rewarding work.

We at *NAELA Journal* hope that this Focus on Guardianship Issue will help guardians and their attorneys in this important and challenging work. We also hope that this issue will stimulate thought and discussion about how guardianship can best be utilized to protect vulnerable people with disabilities while maximizing their independence, dignity, and autonomy.

VOTING RIGHTS

In the opening article, Michele J. Feinstein, Esq., and David K. Webber, Esq., address guardianship and the right to vote. While this right is fundamental and protected by the Constitution, it is not without limit, and the states have taken different approaches to voting rights for those under guardianship. Some states automatically revoke the right. Other states require an individualized judicial inquiry for each ward. Among the states that take the latter approach, some impose the burden on the person under guardianship to establish voting capacity by varying levels of proof; other states place that burden on those seeking to disenfranchise the ward. Yet other states have no restrictions at all.

Feinstein and Webber explore the constitutional issues implicated by these different approaches. In the process, they discuss the laws in all 50 states, and include an appendix summarizing each state. The authors argue that some states’ laws are antiquated, discriminatory, and may violate due process rights. After endorsing individualized case-by-case determinations, the authors urge guardians to advocate for their wards to vote where a ward can understand the voting process and make informed decisions, and the ward wishes to vote.
CRITIQUE OF GUARDIANSHIP LAWS AND PRACTICES

Joy Solomon, Esq., Deirdre Lok, Esq., and Malya Levin, Esq., use case studies to illustrate shortcomings of guardianship laws and practices in New York, and argue that many of the shortcomings are also found in other states. These problems include inadequate data collection, failure to assess capacity as a sliding scale and as to specific tasks, and poor court oversight. The authors also criticize the fee-for-service model, which creates perverse incentives for private guardians and service providers that are for-profit. To remedy these problems, the authors recommend improved screening of guardian nominees, appointment of not-for-profit institutional guardians, and a shelter model approach to providing services. The authors discuss the shelter model approach, where a single entity holistically addresses all of the complex, wide-ranging, and interdisciplinary issues present in a guardianship case.

THE BROOKE ASTOR CASE AND THE RULES OF PROFESSIONAL CONDUCT

In a compelling article, Professors Roberta K. Flowers and H. Amos Goodall, Jr., demonstrate how three attorneys played a role in enabling Anthony Marshall to financially exploit his mother, the wealthy New York philanthropist Brooke Astor. The case received national media attention.

One of the attorneys was disbarred and criminally convicted of a scheme to defraud, forgery, and conspiracy. Professors Flowers and Goodall’s article focuses on the other two attorneys who, although not motivated by greed, played vital roles in the creation and execution of the documents that allowed the theft to occur. The authors analyze the actions of the two attorneys, how the attorneys strayed from the requirements of the Rules of Professional Conduct, and how compliance with the Rules might have prevented the criminal acts.

It is noteworthy, and sobering, that both lawyers were superbly educated and well respected. One graduated from Harvard Law School; the other from Columbia. Both practiced at established, highly regarded firms. One is a past president of the International Academy of Trust and Estate Counsel; the other a fellow of the American College of Trust and Estate Counsel. The article serves as a reminder for all attorneys of the importance of being ever vigilant in adhering to ethical requirements.

STUDENT ARTICLE: DIVORCE AND GUARDIANSHIP

Should a guardian be able sue for divorce on behalf of a ward? In this issue’s student article, Bella Feinstein, Esq., examines this controversial and evolving area of guardianship law, which is approached differently in various jurisdictions. Feinstein analyzes the various approaches, along with the public policy and due process considerations that justify the approaches. The author explains that several states have liberalized the ability of guardians to sue for divorce as divorce has become more common and less taboo in our society, as other guardianship powers have expanded, and as awareness of elder abuse and financial exploitation have increased. Feinstein proposes statutory reforms to ensure that guardians are able to sue for divorce in appropriate cases while imposing substantial due process protections and judicial review to prevent overreaching.
BOOK REVIEW

Rounding out this Focus on Guardianship Issue is a review of Adult Guardianship Law for the 21st Century: Proceedings of the First World Congress on Adult Guardianship Law, edited by Makoto Arai, Ulrich Becker, and Volker Lipp. The book compiles the papers presented at the First World Congress on Adult Guardianship Law, held in Yokohama, Japan, in 2010. The Congress brought together lawyers, judges, guardians, and academics from around the world.

Countries throughout the world are facing demographic challenges similar to those in the United States, and have taken different approaches to address those challenges in their adult guardianship systems. The papers cover a broad array of guardianship issues, and how the issues are addressed in different parts of the world. Issues range from the extent to which guardianship is utilized in different countries, adjudications and due process, use of limited guardianships, strategies to recruit and compensate guardians, oversight of guardians, voting rights, whether guardianship proceedings should be open to the public, and the status of international conventions relevant to guardianship.

We can learn much from other countries and cultures. As the world gets smaller, issues that guardians face are increasingly global. The book is a fascinating read for lawyers with guardianship practices who seek a global perspective.

ONLINE CASE NOTES

This issue features two case notes. NAELA Journal’s case notes are available online. Go to www.NAELA.org, then go to Knowledgebase > Publications > NAELA Journal, and click on Case Notes.

First, Rene H. Reixach, Esq., and Molly M. Wood, Esq., dissect the decision of the Sixth Circuit Court of Appeals in Hughes v. McCarthy. The Hughes court held that, pre-eligibility, an institutionalized spouse can transfer assets to the community spouse for that spouse’s sole benefit without causing a penalty period of ineligibility under the transfer of assets rules even though the transfer brings the community spouse’s assets over the community spouse resource allowance (CSRA). This was an area of confusion in the state courts and federal district courts. The authors are hopeful that the Hughes decision will put this issue to rest. Of note, NAELA filed an amicus brief in the Sixth Circuit, which brought before the court favorable letters from the Centers for Medicare and Medicaid Services (CMS) addressing the issue that were not in the record. The appellate court relied on these letters in its analysis, finding that they were entitled to respectful deference.

Finally, Professor Kim Dayton discusses the settlement agreement between the U.S. Department of Justice (DOJ) and Camelot Child Development Center, a private company that operates child care centers in Oklahoma. The claims, under the Americans with Disabilities Act (ADA), centered around an after-school day care center’s decision to preclude a school-age girl with Down syndrome from participating in activities, and its threats to expel the child, because she needed assistance using the toilet and wore pull-up diapers. The activities included field trips to the movies, zoo, pool, and restaurants. As part of the settlement, Camelot admitted to the past disability-based discrimination and agreed not to discriminate in the future, to post a statement of nondiscrimination prominently in all of its facilities, to notify DOJ of any future ADA claims against it, and to
provide training to its employees. Camelot also agreed to pay compensatory damages to the girl and her mother of $3,000 plus free tuition for a year at any of its day care centers. Professor Dayton hopes that this case, together with other recent cases brought by DOJ, signals that DOJ will be more aggressive in its enforcement of the ADA.
I. INTRODUCTION

At the time of publication, with the midterm elections only weeks away, the stakes are high and the quest for votes intense. But one segment of the electorate, individuals under guardianship, often face substantial barriers to voting, or worse, they are denied the right to vote. As Elder and Special Needs Law practitioners, we strive to assist clients to lead lives of quality, with the fullest measure of autonomy. We advocate for clients at hearings to determine if antipsychotic medication should be administered or if the person under guardianship is living in the least restrictive setting. We are not typically asked whether a person under guardianship can exercise a fundamental right for which soldiers fight and citizens have rioted. When pivotal elections can be decided by the slimmest of margins and every vote is critical, is every capable citizen allowed to vote?

In late October 2012, our office received a telephone call from a client who has served as a professional guardian for many years. A person under the client’s guardianship wanted to vote in the upcoming presidential election, and the guardian wanted to know if the individual could. We theorized that given the emphasis in the newly adopted Massachusetts Uniform Probate Code on limiting guardianships wherever possible, the answer likely was yes, the individual could vote. We said we would look into the matter and let the client know. Thus began the odyssey that became this examination of voting rights.1

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1 The authors would like to thank Michael A. Fenton, Esq., and Lesley G. Maple, Esq., for their invaluable assistance.
It is clear that the right to vote, while revered in a democracy, is not without limit. The National Voter Registration Act of 1993 authorized states to disenfranchise individuals for criminal conviction or “mental incapacity.” By 1993, many states already had constitutional provisions or laws on the books preventing voting by incapacitated persons.

And because there is no federal definition of “mental incapacity,” each state has taken its own approach. Some states automatically revoke the right to vote when a person is placed under guardianship and do not restore it until the guardianship is removed. Some states mandate a judicial inquiry, either by placing the burden on the person under guardianship to establish voting capacity by varying levels of proof or by placing that burden on those seeking to disenfranchise the person under guardianship. Other states have no restrictions at all.

Given the importance of individuals in a democratic society exercising their right to vote, it seems inconceivable that a person who is able to vote but who is under guardianship would be categorically denied this basic civil right. Our laws should prevent individuals from being wrongly disenfranchised, while protecting the integrity of elections by excluding those incapable of understanding the nature of voting or participating meaningfully in the electoral process. The authors propose that no state should revoke a person under guardianship’s right to vote without an individualized inquiry into whether the person truly lacks the capacity to understand and participate in the electoral process.

This article examines the federal and state constitutional issues implicated in denying or allowing persons under guardianship the right to vote, beginning with the authors’ home state of Massachusetts. States are categorized and sorted from most restrictive to least restrictive. The statutes and cases show that this is by no means a settled issue and is constantly evolving. While this article was being written, Nevada changed its laws and now requires specific judicial findings to revoke the right to vote of a person under guardianship. Advocates should periodically review the law in their jurisdictions, because this area of the law is in flux.

II. MASSACHUSETTS

Can an individual who has been adjudicated as being in need of guardianship in Massachusetts vote in Massachusetts? The Massachusetts Constitution and voter qualifi-
cation statute expressly exclude persons under guardianship from voting. Nevertheless, the Elections Division of the Secretary of the Commonwealth of Massachusetts takes the position that persons under guardianship have the right to vote, unless the guardianship decree specifically prohibits it. In Massachusetts, an administrative agency has, in effect, mandated an individualized inquiry into voting capacity even though the state constitution and statutes do not.

The Massachusetts Constitution grants voting rights to every citizen over 18 years of age, except for “persons under guardianship,” incarcerated felons, and persons disqualified because of corrupt election practices. In 1822, these three exceptions were enacted in the voter qualification statute. That statute also requires the Secretary of the Commonwealth to promulgate affidavits of voter registration.

In Massachusetts, an administrative agency has, in effect, mandated an individualized inquiry into voting capacity even though the state constitution and statutes do not.

In 1975, Massachusetts’ highest court considered the scope of the guardianship exclusion in Boyd v. Board of Registrars of Voters of Belchertown. In Boyd, several individuals who were committed to a state-run residential facility for individuals with developmental disabilities, but who were not under guardianship, sued when the local registrar refused to allow them to register to vote. At that time, the Massachusetts voter registration form required a sworn affirmative statement that voters were not under guardianship. The Massachusetts Supreme Judicial Court narrowly construed the state constitution and voter registration statute, holding that the residents were not “under guardianship” and so were entitled to vote as “a basic right of citizenship.”

A decade later, the disenfranchised plaintiff in a second case, Guardianship of Hurley, was under full guardianship at election time, but a petition to limit his guardianship and allow him to vote was pending. The local election commissioner refused Mr. Hurley’s affidavit of voter registration, because Mr. Hurley could not swear that he was not under guardianship. With his full guardianship still in place, Mr. Hurley successfully obtained a probate court order declaring that he was capable of making informed voting decisions and therefore was not “under guardianship” as the term was used in the constitution and voting statute. The Massachusetts Supreme Judicial Court upheld the probate court’s order and remanded the case for an award of Mr. Hurley’s reasonable attorneys’ fees, holding that because he was “sufficiently competent to warrant a limited guardianship.”

11 Mass. Const. amend. art. III.
14 368 Mass. 631.
15 See id. at 632.
16 See id. at 637.
17 See id.
19 Id. at 556.
20 Id. at 557.
ship … any derogation of his right to vote under [const. amend.] art. 3 and G.L. c. 51, § 1 may have deprived him under color of law of secured rights.”

Relying on the Boyd and Hurley decisions, the Massachusetts Elections Division in 1991 issued an opinion with the self-explanatory title Persons Subject to Guardianships That Do Not Specifically Forbid Voting Are Eligible Voters. In issuing the opinion, the Elections Division consulted with the state’s departments of Mental Health and Mental Retardation and the Attorney General. The Opinion directs local election officials not to deny registration based on guardianship, unless the guardianship decree contains “specific findings that prohibit voting.”

In 2008, the Massachusetts legislature overhauled the guardianship statute and adopted the Massachusetts Uniform Probate Code (MUPC), embodying a legislative intent to limit guardianships wherever possible. The MUPC does not address voting rights specifically, but under the MUPC, as with the Uniform Probate Code generally, courts must limit the scope of guardianships to “encourage the development of maximum self-reliance and independence of the person under guardianship.” The MUPC goes on to say that, once appointed, guardians should “encourage the person under guardianship to participate in decisions, to act on his own behalf, and to develop or regain the capacity to manage personal affairs. A guardian, to the extent known, shall consider the expressed desires and personal values of the person under guardianship when making decisions.”

These aspects of the MUPC are consistent with the Boyd and Hurley decisions and with the opinion of the Elections Division.

With respect to guardianship, the current version of the Massachusetts Official Mail-In Voter Registration Form also reflects the position of the Elections Division. Unlike the 1985 registration form that Mr. Hurley encountered, the current form requires only that the voter swear “I am not a person under a guardianship which prohibits my registering to vote.” And the current guardianship order promulgated by the Massachusetts Probate

21 Id. at 559–560.
22 Sec. of the Cmmw. of Mass., supra n. 10. The opinion states in part:

   The question that has arisen recently is whether general guardianships that do not specifically forbid voting preclude otherwise eligible citizens from voting. In view of the “substantial” doubts expressed by the Supreme Judicial Court in [Boyd and Hurley], federal court decisions, and the views of respected commentators that prohibiting voting by all persons subject to general guardianships would be unconstitutional, we advise you to interpret the words “under guardianship” for voting purposes to refer only to guardianships that contain specific findings that prohibit voting. Therefore, persons subject to limited or general guardianships that do not include such specific findings prohibiting voting are eligible to vote, and need not undertake the significant burden of obtaining court modifications of their guardianships explicitly allowing them to vote. Thus, they may truthfully sign the voter registration affidavit containing the statement that they are “not … under guardianship” for this purpose. (Of course, in any event, local election officials have no discretion to reject properly signed registration affidavits on this basis at the time of registration.)

23 Id.
24 Id.
and Family Court includes an enumerated list of limitations on guardianship, among them the right to vote. While the Massachusetts constitution and voter qualification statute still expressly prohibit voting by persons under guardianship, agency rules and guardianship procedures provide some protection for persons “under guardianship” who want to vote. Where does this place Massachusetts in the federal voting scheme and in relation to other states?

III. Voting as a Fundamental Federal Right

Voting is a fundamental right protected by the Due Process and Equal Protection clauses of the Fourteenth Amendment of the U.S. Constitution. Under traditional due process principles, deprivation of a fundamental right requires notice and an opportunity to be heard. That right may be limited, by state law, for lack of mental capacity, as enumerated in Section 8(a) of the National Voter Registration Act of 1993: “In the administration of voter registration for elections for Federal office, each State shall … provide that the name of a registrant may not be removed from the official list of eligible voters except … as provided by State law, by reason of criminal conviction or mental incapacity” (emphasis added). Thus, the federal government delegated to the states authority to restrict voting based on those criteria. However, the Equal Protection Clause of the Fourteenth Amendment prohibits categorical restrictions on fundamental rights, requiring instead that an individualized inquiry be performed. In the guardianship context, this means that states cannot disenfranchise individuals merely for being under guardianship; instead, they must inquire whether “those who cast a vote have the mental capacity to make their

30 U.S. Const. amend. XIV, § 1 (“No State shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”); Bush v. Gore, 531 U.S. 98, 104 (2000) (holding that a recount would violate equal protection and due process clauses, and noting that “When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.”).
33 The Supreme Court has not directly addressed the application of this provision by the states. However, in dicta, in the context of Title II of the Americans with Disabilities Act, the Court stated: “It is not difficult to perceive the harm that Title II is designed to address. Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights. For example, ‘[a]s of 1979, most States categorically disqualified ‘idiots’ from voting, without regard to individual capacity. …’ The decisions of other courts, too, document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including … voting.” Tennessee v. Lane, 541 U.S. 509, 525 (2004) (emphasis added and footnotes omitted), quoting Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 464 (1985) (Marshall J. concurring in judgement in part and dissenting in part).
34 See infra pt. III.2.
own decision by being able to understand the nature and effect of the voting act itself.\(^{35}\) (punctuation omitted).

### A. Procedural Due Process

Because the right to vote is fundamental and preserves other basic civil and political rights, state laws restricting the right to vote are subject to careful and meticulous constitutional scrutiny.\(^{36}\) At least one federal court has held that infringements on the right to vote may violate the due process principles of “fundamental fairness.”\(^{37}\) Under the Due Process Clause, a state constitutional provision or statute restricting voting must be scrutinized by balancing: 1) the voters’ interest in participating in the electoral process; 2) the risk that the provision will erroneously prevent capable persons from voting; and 3) the state’s interest in protecting the electoral process.\(^{38}\) If the interests of the affected voters outweigh the interest of the state, the provision could violate due process “as applied” or be “facially invalid.”\(^{39}\)

An “as applied” due process violation occurs when a state fails to provide adequate notice and hearing to an incapacitated or protected person before revoking his or her right to vote.\(^ {40}\) “One should not lose a fundamental right without at least having fair warning that the right might be lost.”\(^ {41}\) Such a notice should provide “the same level of notice and opportunity for hearing that is provided for all other aspects of guardianship.”\(^ {42}\) Lack of proper notice increases the risk that otherwise capable voters will be erroneously prevented from voting.\(^ {43}\) Providing specific notice in the course of a guardianship proceeding should not be overly burdensome to the state, because it can be included with any notices already provided to the respondent.\(^ {44}\)

A state constitutional provision or statute is “facially invalid” if there is no set of circumstances under which it could satisfy the due process balancing test.\(^ {45}\) This could result from a lack of uniformity in state procedures — for example, if some people receive notice and a hearing on voting rights, but others do not — or where, for example, as in Massachusetts and Missouri, there is inconsistency among the state’s constitutions, statutes, and probate court procedures.\(^ {46}\)

Some states have begun to address this due process problem. In the seminal case of Doe v. Rowe, the U.S. District Court for the District of Maine in 2001 struck down

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36 See supra n. 30 and accompanying text. See also Mo. Protec. & Advoc. Servs., 499 F.3d at 807–808 (examining Missouri statute).
38 Doe, 156 F. Supp. 2d at 48.
39 Id. at 48–51.
40 Id. at 48, citing Armstrong v. Manzo, 380 U.S. 545, 550 (1965).
41 See In re Guardianship of Erickson, 2012 Minn. Dist Lexis 193 (2012), discussed at infra n. 128 and accompanying text.
42 Doe, 156 F. Supp. 2d at 49.
43 Id. at 48–49.
44 Id. at 49.
45 Id. at 49, n. 17.
46 Id. at 50.
47 See supra pt. II and infra n. 101 (discussing Missouri).
Maine’s constitutional ban on voting for people “under guardianship for mental illness.” The district court held in part that “specific notice” was required that a proposed ward might be disenfranchised.\textsuperscript{48} Virginia, which bans all voting by persons under guardianship, requires a statutory notice to each guardianship respondent that “shall include the following statement in conspicuous, bold print: WARNING. AT THE HEARING YOU MAY LOSE MANY OF YOUR RIGHTS. … THE APPOINTMENT MAY AFFECT … WHETHER YOU ARE ALLOWED TO VOTE.”\textsuperscript{49}

The Virginia provision likely satisfies the “notice and hearing requirements” of due process.\textsuperscript{50} It is certainly clear notice. But a blanket ban on voting for persons under guardianship undoubtedly disenfranchises some voters who do have capacity.\textsuperscript{51} Persons placed under guardianship in a state such as Virginia could be disenfranchised even if their disability does not affect their ability to understand the electoral process and to make individual voting choices.\textsuperscript{52} Such a discrepancy between the ends (excluding those incapable of voting) and the means (blanket disenfranchisement of persons under guardianship) may also violate the Equal Protection Clause of the Fourteenth Amendment.

\textbf{B. Equal Protection Clause}

Under the Equal Protection Clause, a state’s restriction of voting requirements for lack of mental capacity must be closely correlated to the state’s interest in protecting the electoral process.\textsuperscript{53} The statute or constitutional provision must not exclude persons who do, in fact, have the capacity to vote.\textsuperscript{54} Any restriction will be subject to strict scrutiny by the courts.\textsuperscript{55} It must be narrowly tailored to disenfranchise only voters who are unable to understand the nature and effect of voting.\textsuperscript{56} As with procedural due process, a provision may be invalid as applied or be facially invalid.\textsuperscript{57}

A state constitutional provision or statute restricting voting rights because of mental incapacity will be deemed invalid “as applied” unless it is narrowly tailored to protect the electoral process.\textsuperscript{58} It must restrict voting based on actual, relevant incapacity, not on an arbitrary or irrational classification.\textsuperscript{59} A provision will be deemed “facially invalid” if “there are no circumstances under which the State’s voting restriction could be considered

\begin{footnotes}
\item[48] Doe, 156 F. Supp. 2d at 48, citing Armstrong, 380 U.S. at 550.
\item[50] Doe, 156 F. Supp. 2d at 48.
\item[51] See infra pt. IV.A.
\item[53] Doe, 156 F. Supp. 2d at 51–52, citing Dunn v. Blumstein, 405 U.S. 330, 337, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972) (“If a challenged statute grants the right to vote to some citizens and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.”).
\item[54] Doe, 156 F. Supp. 2d at 52.
\item[55] Id. at 51, citing Dunn, 405 U.S. at 337.
\item[56] Doe, 156 F. Supp. 2d at 51.
\item[57] Id. at 51–52.
\item[58] Id. at 51.
\item[59] Id. at 52.
\end{footnotes}
narrowly tailored to meet the State’s compelling interest.”

In *Doe v. Rowe*, the U.S. District Court for the District of Maine ruled that Maine’s constitutional restriction on voting by persons “under guardianship for mental illness” violated the Equal Protection Clause both facially and as applied. Under Maine’s Probate Code, as in the codes of other states that have adopted § 5-304 of the Uniform Probate Code, guardianship restrictions must be limited to those “necessitated by the incapacitated person’s actual mental and adaptive limitations.” The provision arbitrarily denied the vote to mentally ill persons under guardianship while allowing other persons under guardianship to vote. In addition, the provision conflicted with Maine’s guardianship and voting statutes that attempted to expand the definition of “mental illness” to include all mental incapacities. Neither guardianship nor mental illness could “serve as a proxy for mental incapacity with regards to voting” the court reasoned in striking down the provision. Under this reasoning, other state constitutions and statutes that rely on terms other than “mental incapacity” could be challenged as violating the Equal Protection Clause.

Many other states have statutes and constitutions that fail to provide equal protection with respect to voting, and not just for using vague or inaccurate terminology. A conflict between a state’s constitution and its statutes could implicate the Equal Protection Clause. In Minnesota, for example, the constitution bars voting by “a person under guardianship, or a person who is insane or not mentally competent.” However, Minnesota’s guardianship statute provides that “unless otherwise ordered by the court, the ward retains the right to vote.” In Massachusetts, as noted previously, an administrative agency has issued a directive in response to the Supreme Judicial Court’s rulings, which purports to allow voting by persons under guardianship despite an express constitutional prohibition. Other examples of states with conflicting provisions include Arizona, Oklahoma, Louisiana, and Texas, where persons under limited guardianship may be able to vote, while those under plenary guardianship cannot. All these laws identify some incompetent voters, but due to artificial distinctions or inconsistent application by local officials and judges, they may be ineffective for their intended purpose. The laws also may improperly exclude voters

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60 *Id.*
61 *Id.* at 56.
63 *Doe*, 156 F. Supp. 2d at 56 (finding that “the probability of a mentally ill person under guardianship having the right to vote reserved depend[ed] more on the individual probate judge hearing the case than on the ward’s actual capacity to understand the nature and effect of voting”).
64 *Id.* at 55.
65 *Id.*, citing *St. George v. Biddeford*, 76 Me. 593, 596 (1885) (a person “may be of unsound mind in one respect, and not in all respects”).
66 E.g. Miss. Const. art. XII, § 241 (“idiots and insane persons”); Mont. Const. art. IV, § 2 (“unsound mind”); Neb. Const. art. VI, § 2 (“*non compos mentis*”).
67 Minn. Const. art. VII, § 1.
68 Minn. Stat. § 524.5-313 (2013).
69 Sec. of the Cmmw. of Mass., *supra* n. 10; Mass. Const. amend. art. III.
70 See infra pt. IV.2.
71 See e.g. *Doe*, 156 F. Supp. 2d at 52 (one probate judge granted voting rights, while another refused); *Mo. Protec. & Advoc. Servs.*, 499 F.3d at 809 n. 5 and accompanying text (despite constitutional ban, certain local courts preserved voting rights in full guardianships).
who are actually capable of understanding and participating in the electoral process.\textsuperscript{72}

IV. STATE LAWS AND CONSTITUTIONS

Unfortunately, many states may be overstepping federal constitutional boundaries by restricting participation in the electoral process for reasons beyond actual mental incapacity. Some state constitutions contain categorical exclusions prohibiting individuals under guardianship from voting, yet statutes and court rulings in those same states often seem to overrule them. In some states, constitutional restrictions are strictly applied and, in other states, completely ignored. State-specific guides to capacity and guardianship requirements have been completed by many organizations.\textsuperscript{73} The Uniform Probate Code has been adopted by 17 states and incorporates a number of provisions with respect to guardianships.\textsuperscript{74} However, even the Uniform Probate Code, with its emphasis on individual autonomy, is silent as to voting rights.

Appendix A contains a table summarizing the voting laws of the 50 states with respect to guardianships and the right of incapacitated individuals to vote. In an attempt to categorize the varied requirements, the authors divided the states into five groups, sorted from most restrictive to least restrictive: Automatic Revocation, Limited Guardianship Only, Automatic Revocation with Reinstatement, Revocation after Individual Inquiry, and No Restrictions.

A. Automatic Revocation

Eleven states automatically revoke the right to vote upon adjudication of mental

\textsuperscript{72} See e.g. Doe, 156 F. Supp. 2d at 55, n. 31 (distinguishing physical versus mental bases for guardianship).


incapacity or guardianship, with no individualized inquiry: Alabama,\textsuperscript{75} Mississippi,\textsuperscript{76} Montana,\textsuperscript{77} Nebraska,\textsuperscript{78} New Mexico,\textsuperscript{79} New York,\textsuperscript{80} Rhode Island,\textsuperscript{81} South Carolina,\textsuperscript{82} Virginia,\textsuperscript{83} West Virginia,\textsuperscript{84} and Wyoming.\textsuperscript{85} The laws of these states do not require any individualized inquiry into capacity to vote, beyond the issue of whether a guardianship is needed. There do not appear to be any reported cases on this issue in these states. Except for Virginia, none appear to satisfy the procedural due process requirement for notice to the proposed ward that they may lose their right to vote.\textsuperscript{86} And because many people under guardianship actually have the mental capacity to vote, these states are likely disenfranchising many voters who are fully capable of understanding the electoral process and making informed decisions about voting.\textsuperscript{87} Individuals not under guardianship do not have to evidence such understanding. Accordingly, the voting procedures of these states are likely invalid under equal protection analysis as well. Advocates in these states may consider them ripe for challenge.

\textbf{B. Limited Guardianship Only}

Four states automatically revoke the right to vote upon adjudication of \textit{full} mental incapacity or guardianship; however, upon adjudication of \textit{limited} guardianship or incapacity, an individualized inquiry into voting capacity may be performed. Of these states,

\begin{itemize}
  \item \textsuperscript{75} Ala. Const. art. VIII, § 177(b) (“no person who is mentally incompetent shall be qualified to vote, unless the disability has been removed”); Ala. Code § 17-3-30 (2014). \textit{But see} Ala. Code § 26-2A-105 (2014) (persons under limited guardianship retain all rights not specifically delegated).
  \item \textsuperscript{76} Miss. Const. art. XII, § 241 (“idiots and insane persons”); Miss. Code § 23-15-11 (2012) (ineligible if \textit{“non compos mentis”}).
  \item \textsuperscript{77} Mont. Const. art. IV, § 2 (“unsound mind”); Mont. Code Ann. § 13-1-111 (Lexis 2013) (cannot vote until restored to capacity).
  \item \textsuperscript{78} Neb. Const. art. VI, § 2 (“\textit{non compos mentis}”); Neb. Rev. Stat. § 32-313 (2013) (“No person is qualified to vote or to register to vote who is non compos mentis or who has been convicted of treason … unless restored to civil rights”).
  \item \textsuperscript{79} N.M. Const. art. VII, § 1 (excluding “idiots, insane persons and persons convicted of a felonious or infamous crime unless restored to political rights”); N.M. Stat. Ann. § 1-4-26 (Lexis 2013) (revoking registration of persons who are “legally insane … as that term is used in the constitution of New Mexico”).
  \item \textsuperscript{80} N.Y. Elec. Law § 5-106 (“adjudicated an incompetent”), § 5-400 (voter registration cancelled upon adjudication of incompetency) (Consol. 2014). \textit{No constitutional restriction}.
  \item \textsuperscript{81} R.I. Const. art. II, § 1 (\textit{“non compos mentis”}).
  \item \textsuperscript{82} S.C. Const. art. II, § 7 (“The General Assembly shall establish disqualifications for voting by reason of mental incompetence or conviction of serious crime, and may provide for the removal of such disqualifications”); S.C. Code Ann. § 7-5-120 (Lexis 2013) (“A person is disqualified from being registered or voting if … mentally incompetent as adjudicated by a court of competent jurisdiction”).
  \item \textsuperscript{84} W. Va. Const. art. IV, § 1 (“mentally incompetent”); W. Va. Code § 3-2-2(b) (Lexis 2014).
  \item \textsuperscript{86} \textit{See supra} nn. 45–47 and accompanying text.
  \item \textsuperscript{87} \textit{See} Mathis, \textit{supra} n. 52, at 293.
\end{itemize}
Louisiana, Oklahoma, and Texas bar voting by persons under full guardianship, but partially incapacitated persons retain the right to vote unless a court specifically revokes it. The fourth state, Arizona, is more restrictive and places the burden of proving voting capacity on the partially incapacitated respondent by clear and convincing evidence.

The default law in Arizona until 2012 was that individuals under guardianship were categorically barred from voting under Arizona’s constitution and voter qualification statute. While voting is still prohibited under plenary guardianships, the law with respect to limited guardianships changed with the passage of Arizona House Bill 2377, which became effective April 10, 2012. Bill 2377 amended Arizona’s limited guardianship statute by adding the following language:

In cases of limited guardianship only, a person is not deemed an incapacitated person for purposes of voting if the person files a petition, has a hearing and the judge determines by clear and convincing evidence that the person retains sufficient understanding to exercise the right to vote.

The new statute might never have been enacted except for the courage of one individual who actively sought the right to vote despite being under guardianship. This individual, Clint Gode, who has Down syndrome, assisted by the Arizona Center for Disability Law, successfully lobbied the Arizona legislature to pass the bill.

But despite Arizona’s limited success in this matter, its law is still far more restrictive than those in many states. A person placed under limited guardianship in Arizona will

88 La. Const. art. I, § 10 (“interdicted and declared mentally incompetent”); La. Rev. Stat. Ann. § 18:102 (2013) (“No person shall be permitted to register or vote who is: … (2) Interdicted after being judicially declared to be mentally incompetent as a result of a full interdiction proceeding pursuant to Civil Code Article 389. A person subject to a limited interdiction pursuant to Civil Code Article 390 shall be permitted to register and vote unless the court in that proceeding specifically suspends the interdicted person’s right to vote in the judgment of interdiction”).
89 Okla. Stat. tit. 26, § 4-101 (2013) (“Any person who has been adjudged to be an incapacitated person … shall be ineligible to register to vote … . The provisions of this paragraph shall not prohibit any person adjudged to be a partially incapacitated person … from being eligible to register to vote unless the order adjudging the person to be partially incapacitated restricts such persons from being eligible to register to vote”). No constitutional restriction.
90 Tex. Const. art. VI, § 2 (“mentally incompetent”); Tex. Election Code Ann. § 11.002 (2014) (eligible if person “has not been determined by a final judgment of a court exercising probate jurisdiction to be: (A) totally mentally incapacitated; or (B) partially mentally incapacitated without the right to vote”).
91 See infra pt. IV.D regarding revocation after individualized inquiry.
95 Watkins, supra n. 93.
automatically have his or her right to vote revoked.\textsuperscript{96} The individual may petition the court to have the right to vote reinstated, but must meet a high burden — “clear and convincing evidence” of capacity to vote.\textsuperscript{97} Delaware’s law is the reverse; there is a presumption of capacity to vote, which can be revoked only by “clear and convincing evidence that the individual has a severe cognitive impairment which precludes exercise of basic voting judgment.”\textsuperscript{98}

In the four states that allow voting only for individuals under limited guardianship, but not under full guardianship, special care must be taken in preparing the initial guardianship petition. If the advocate anticipates the protected person may wish to vote and has the capacity to do so, the petitioner should seek a limited guardianship to preserve the possibility that the incapacitated individual will retain his or her voting rights.

C. Automatic Revocation with Reinstatement

Four states — Arkansas,\textsuperscript{99} Connecticut,\textsuperscript{100} Missouri,\textsuperscript{101} and Wisconsin\textsuperscript{102} — automatically revoke the right to vote upon adjudication of mental incapacity or guardianship, but that right may be retained or restored by means of an individualized judicial inquiry. Automatic revocation is not ideal, because it places the burden on the respondent to show that he or she has the capacity to vote. However, it may still prove adequate under constitutional analysis, provided that the proposed ward receives proper notice and a hearing.\textsuperscript{103}

As noted above, if a guardianship will automatically revoke voting rights, due pro-

\textsuperscript{97} Ariz. Rev. Stat. § 14-5304.02 (2014).
\textsuperscript{98} Del. Code tit. 15, § 1701 (2014).
\textsuperscript{99} Ark. Const. amend. 51, § 11(a)(6) (“It shall be the duty of the permanent registrar to cancel the registration of voters … adjudged mentally incompetent by a court of competent jurisdiction”); Ark. Code Ann. § 28-65-302(2) (Lexis2014) (“No guardian appointed on or after October 1, 2001, shall [authorize a person under guardianship to vote] without filing a petition and receiving express court approval”).
\textsuperscript{100} Conn. Gen. Stat. § 9-12 (“No mentally incompetent person shall be admitted as an elector”), § 45a-703 (“The guardian or conservator of an individual may file a petition in probate court to determine such individual’s competency to vote in a primary, referendum or election”) (2014). No constitutional restriction.
\textsuperscript{101} Missouri’s status is nebulous because the constitution and voter qualification statute have outright prohibitions, while the Eighth Circuit Court of Appeals has recognized that some courts have allowed persons under full guardianships to retain their voting rights. Mo. Const. art. VIII, § 2 (no voting where court appoints “guardian … by reason of mental incapacity”); Mo. Rev. Stat. § 115.133 (2014) (“adjudged incapacitated”). \textit{See Missouri Voter Registration Application}, http://dss.mo.gov/fsd/voter_registration.pdf (accessed June 3, 2014) (requiring registrants to certify they “have not been adjudged incapacitated by any court of law”). \textit{But see} Mo. Protec. & Advoc. Servs., 499 F.3d at 809 n. 5 and accompanying text, citing \textit{Estate of Werner}, 133 S.W.3d 108, 109 2004 Mo. App. Lexis 138 (2004) (finding no violation of equal protection clause because “Missouri wards under full guardianships have … had their voting rights specifically preserved”).
\textsuperscript{102} Wis. Const. art. III, § 2 (b) (“Adjudged by a court to be incompetent or partially incompetent, unless the judgment specifies that the person is capable of understanding the objective of the elective process or the judgment is set aside”); Wis. Stat. § 6.03(a) (2014) (“Any person who is incapable of understanding the objective of the elective process or who is under guardianship, unless the court has determined that the person is competent to exercise the right to vote”).
cess demands sufficient notice to the protected person and an opportunity for that person to be heard. In Arkansas and Connecticut, respondents must file a special petition in order to restore their voting rights. In Missouri, there is no established process; Missouri probate courts allow voting on a case-by-case basis. Wisconsin preserves the right to vote where the guardianship judgment contains a judicial finding that the respondent can understand the electoral process.

D. Revocation After Individual Inquiry

Eighteen states do not automatically place voting restrictions upon an individual after adjudication of mental incapacity or guardianship, but voting rights may be revoked after an individualized inquiry: California, Delaware, Florida, Georgia,

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104 See supra pt. II.
105 Conn. Gen. Stat. § 45a-703 (2014). In 2009, Arkansas voters amended the State constitution to change the ban on voting by “idiots and insane persons.” Until then, Article III, § 5, of the Arkansas Constitution provided that “[n]o idiot or insane person shall be entitled to the privileges of an elector.” Now, pursuant to Amendment 51 to the Arkansas Constitution, a voter’s registration will be cancelled if he or she is “adjudged incompetent by a court of competent jurisdiction.” Among other technical changes, Amendment 51 also removed the unconstitutional requirement of a poll tax. The amendment was overwhelmingly adopted in the 2008 general election by a vote of 714,128 for and 267,326 against. Although Arkansas’ scheme is not perfect, it does provide at least the possibility of due process and equal protection.

106 See Mo. Protec. & Advoc. Servs., 499 F.3d at 809 n. 5 and accompanying text, citing Estate of Werner, 133 S.W.3d at 109.

107 Wis. Const. art. III, § 2(b); Wis. Stat. § 6.03(a) (2014).

108 Cal. Const. art. II, § 4 (“mentally incompetent”); Cal. Elec. Code §§ 2208–2211 (Deering Lexis 2013) (mentally incompetent means “not capable of completing an affidavit of voter registration”). While California requires a judge to make a determination on voting capacity after an individualized inquiry, as of the date this article was going to press a complaint seeking intervention was filed with the U.S. Department of Justice. Advocates with the Disability and Abuse Project of Spectrum Institute claim that California judges are routinely restricting the voting rights of adults under disability who are under limited conservatorship (California’s term for guardianship). The complaint alleges, among other issues, that judges are using literary tests to determine whether or not an individual should be allowed to vote in violation of the Voting Rights Act of 1965. See Heasley, Voters With Special Needs Allegedly Disenfranchised, http://www.disabilityscoop.com/2014/07/11/voters-disenfranchised/19502/ (accessed Jul. 28, 2014).

109 Del. Const. art. V, § 2 (“mentally incompetent or incapacitated”); Del. Code tit. 15, § 1701 (2013) (“specific finding in a judicial guardianship or equivalent proceeding, based on clear and convincing evidence that the individual has a severe cognitive impairment which precludes exercise of basic voting judgment”).


Hawaii, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, New Jersey, Nevada, North Dakota, Ohio, South Dakota, Tennessee, and Washington. This compromise between protecting the electoral process from unquali-

112 Haw. Const. art. II, § 2 ("non compos mentis"); Haw. Rev. Stat. Ann. § 11-23 (Lexis 2013) (appointment of guardian triggers investigation; revocation only if “the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning voting”).

113 Iowa Const. art. II, § 5 (“mentally incompetent to vote”); Iowa Code § 48A.6 (2013) (“incompetent to vote”), § 48A.2 (“Person who is incompetent to vote’ means a person with an intellectual disability who has been found to lack the mental capacity to vote in a [guardianship] proceeding”).

114 Ky. Const. § 145(3) (“Idiots and insane persons”); Ky. Rev. Stat. § 387.590 (10) (2013) (“A ward shall only be deprived of the right to vote if the court separately and specifically makes a finding on the record”).

115 Me. Const. art. II, § 1 (“under guardianship for mental illness”), ruled unconstitutional by Doe, 156 F. Supp. 2d at 59 (“The Court finds that Article II, Section I of the Maine Constitution, along with its implementing statute found in [Me. Rev. Stat. Ann. § 115(1) (2000), repealed, 2001 Me. Laws p. 516, violate both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Thus, the State’s disenfranchisement of those persons under guardianship by reason of mental illness is unconstitutional”).

116 No constitutional restriction; Md. Election Code § 3-102(b)(2) (2014) (“under guardianship for mental disability and a court of competent jurisdiction has specifically found by clear and convincing evidence that the individual cannot communicate, with or without accommodations, a desire to participate in the voting process”).

117 Mass. Const. amend. art. III (“under guardianship”); Sec. of the Cmmw. of Mass., supra n. 10 (“under guardianship” means “under guardianship with specific findings that prohibit voting”).

118 Minn. Const. art. VII, § 1 (“a person under guardianship, or a person who is insane or not mentally competent”); Minn. Stat. § 524.5-313 (2014) (“unless otherwise ordered by the court, the ward retains the right to vote”). See In re Guardianship of Erickson, 2012 Minn. Dist. LEXIS 193 (2012). See infra nn. 126-143 and accompanying text.


121 N.D. Const. art. II, § 2 (“mentally incompetent”); N.D. Cent. Code § 30.1-28-04 (2013) (“Except upon specific findings of the court, no ward may be deprived of any of the following legal rights: to vote …”).


124 Tenn. Code Ann. § 34-3-104(8) (Lexis 2014) (court may revoke right to vote upon appointment of conservator). No constitutional restriction.

125 Wash. Const. art. VI, § 3 (“mentally incompetent”); Wash. Rev. Code § 11.88.010(5) (2013) (“Imposition of a guardianship for an incapacitated person shall not result in the loss of the right to vote unless the court determines that the person is incompetent for purposes of rationally exercising the franchise in that the individual lacks the capacity to understand the nature and effect of voting such that she or he cannot make an individual choice. The court order establishing guardianship shall specify whether or not the individual retains voting rights. When a court determines that the person is incompetent for the purpose of rationally exercising the right to vote, the court shall notify the appropriate county auditor”). See Wash. Rev. Code § 11.88.010, nn. (2005) (legislative findings “that the right to vote is a fundamental liberty and that this liberty should not be confiscated without due process. When the state chooses to use guardianship proceedings as the basis for the denial of a fundamental liberty, an individual is entitled to basic procedural protections that will ensure fundamental fairness. These basic procedural protections
fied voters and preventing potentially qualified, disabled voters from participating in the electoral process likely strikes the appropriate constitutional balance. Due process could be satisfied by grafting clear notice procedures into the guardianship procedures already in place to notify a respondent of hearings. Equal protection is provided because only those persons actually incapable of voting are excluded from doing so.

Among these states, Minnesota continues to struggle with its conflicting constitution and guardianship statute. Under the Minnesota constitution, a “person under guardianship” cannot vote. In contrast, the guardianship statute says a protected person’s right to vote can only be specifically revoked by decree. In the 2012 case of Brian Erickson, one probate court judge decided to resolve the controversy in her own way. She determined that Minnesota’s constitutional ban violated the U.S. Constitution and ruled that each case in her court would receive an independent determination of voter competency.

Brian Erickson suffered from schizophrenia and dysthymia with psychotic tendencies. On occasion, he exhibited agitation and poor sleep. He needed reminders to accomplish many of his daily activities. He did not understand his medical and psychiatric diagnoses, and he exhibited paranoia, especially with respect to food. In 2009, the court appointed Alternate Decision Makers, Inc. (ADMI), a “professional fiduciary organization,” as Erickson’s guardian. The guardianship decree noted that Erickson retained the right to vote. In 2011, ADMI filed a petition on Erickson’s behalf, seeking “a declaratory judgment determining that individuals placed under guardianship have the presumptive right to vote until and unless a court orders that right taken away” and “a specific determination that he retains the right to vote.”

The court observed that Minnesota’s guardianship statute clearly provides that a ward retains the right to vote unless that right is specifically restricted by the court. The court also noted that Minnesota’s constitution expressly prohibits a “person under guardianship” from voting. Erickson, trying to finesse the dichotomy between the statute and constitution, contended that there was no conflict because the state legislature had the “constitutional authority to define and regulate” who is subject to the term “guardianship.” The court rejected Erickson’s argument: “[e]ven if the Constitution allows the Legislature to determine who may be placed under a guardianship, no amount should include clear notice and a meaningful opportunity to be heard. The legislature further finds that the state has a compelling interest in ensuring that those who cast a ballot understand the nature and effect of voting is an individual decision, and that any restriction of voting rights imposed through guardianship proceedings should be narrowly tailored to meet this compelling interest”).

126 Minn. Const. art. VII, § 1 (“a person under guardianship, or a person who is insane or not mentally competent”).
127 Minn. Stat. § 524.5-313 (2014) (“unless otherwise ordered by the court, the ward retains the right to vote”).
129 Id. at *3.
130 Id.
131 Id.
132 Id. at *2.
133 Id. at *5, citing Minn. Stat. § 524.5-313 (2014), § 524.5-120 (2014).
134 Id. at *6, citing Minn. const. art. VII.
135 Id. at *8.
of statutory finagling can preserve for those placed under a guardianship a right that the Constitution says they cannot have.”

The court observed that the Minnesota constitution’s blanket ban conflicted with the U.S. Constitution on the three separate grounds identified in *Doe v. Rowe*.

Based on its own analysis and the U.S. District Court’s decision in *Doe v. Rowe*, the court concluded that it had a duty in Erickson’s and future cases “to independently evaluate the voting capacity of each ward at the time of the hearing on a petition for guardianship, and on subsequent occasions as needed or requested” by the ward or guardian. The court also addressed the due process issue by instituting a standing order in future cases, requiring notice to proposed wards that they could lose their right to vote and requiring that voting rights be addressed at each guardianship hearing that could result in a loss of voting rights.

As for Mr. Erickson, the court ruled that he had “sufficient capacity and understanding to make an informed and intelligent vote. Simply stated, he is the type of informed and dedicated voter that our country needs.”

The court noted that Erickson expressed a desire to vote, articulated which candidates he supported and why, and understood the nature and effect of voting. The court declared that “all wards automatically retain the right to vote absent a court order to the contrary.”

The *Erickson* decision effectively pitted guardian against ward by requiring the guardian to police future voting ability. The court stated:

Those presently under guardianship and within the jurisdiction of this Court will retain the right to vote unless:

a. Future order of this Court removes that right based on the determination that the person under guardianship no longer has the capability to vote; or

b. The guardian believes in good faith that the person under guardianship no longer has the capacity to vote, in which case the guardian shall not permit the ward to vote. If there is disagreement about the guardian’s conclusion, the guardian must promptly bring the matter to court for a hearing and resolution.

Minnesota’s voting laws came under fire in federal court as well as in state court, but the federal action was lodged by individuals seeking to *disenfranchise* people under guardianship. In *Minnesota Voters Alliance et al. v. Ritchie et al.*, the U.S. District Court

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136 Id.
137 Id. at **13–20 (Equal Protection Clause as applied, Equal Protection Clause facially invalid, and Due Process Clause), citing *Doe*, 156 F. Supp. 2d 35.
138 Id. at *21.
139 Id. at **23, 25.
140 Id. at *23.
141 Id. at **23–24.
142 Id. at *26.
143 Id. at *25.
144 Minn. Voters Alliance v. Ritchie, 890 F. Supp. 2d 1106 (D. Minn. 2012), aff’d, 720 F.3d 1029 (8th Cir.
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for the District of Minnesota rejected a challenge to Minnesota’s guardianship voting laws.\(^{145}\) Eight of the nine plaintiffs were prospective candidates for public office.\(^{146}\) The ninth plaintiff was Sharon Stene, legal guardian of James Stene.\(^{147}\) The plaintiffs complained that the defendant election officials had allowed ineligible voters to register in the 2010 elections, diluting the votes of eligible voters.\(^{148}\) They alleged that the “Minnesota Constitution imposes on election officials an ‘affirmative obligation to confirm a person’s entitlement to vote.’”\(^{149}\) The court noted that Stene’s guardianship decree reserved Stene’s right to vote.\(^{150}\) Also, Sharon Stene did not challenge James Stene’s right to vote during the course of those previous proceedings.\(^{151}\) James Stene voted in 2010 and retained this right at the time of decision.\(^{152}\) But the plaintiffs contended in part that “the appointment of a full or unlimited guardian categorically denies an individual of the right to vote because he or she has been ‘adjudged incapacitated,’ absent a ‘specific adjudicated finding showing the ward knows the nature and effect of his or her vote.’”\(^{153}\)

Minnesota had adopted the Uniform Guardianship and Protective Proceedings Act in 2003.\(^{154}\) The federal District Court observed that Minnesota’s constitution expressly prohibits a “person under guardianship” from voting,\(^{155}\) but that the term “person under guardianship” is not defined in the Minnesota Constitution.\(^{156}\) Attempting to reconcile the two, the court ruled on summary judgment that “notwithstanding the state constitution’s apparent categorical ban on the rights of persons ‘under guardianship’ to vote, a ward is presumed to retain the right to vote as set forth by Minnesota statute.”\(^{157}\) The court deferred a bit to the state, noting that Minnesota’s voting restriction for individuals under guardianship was a valid exercise of legislative authority\(^{158}\) and that the Minnesota Supreme Court “held that the regulation of questions of guardianship are left to the legislature.”\(^{159}\)

The federal court undertook a detailed analysis of Minnesota’s guardianship law, which is based on the Uniform Probate Code. The statute requires judicial findings that a person is incapacitated and states that there is no less restrictive means to limit the scope

\(^{145}\) Id.
\(^{146}\) Id. at 1109. The plaintiffs included candidates for the state legislature and a city mayor, among others.
\(^{147}\) Id.
\(^{148}\) Id. at 1111.
\(^{149}\) Id.
\(^{150}\) Id. at 1114, n. 11.
\(^{151}\) Id. at 1118.
\(^{152}\) Id. at 1114, 1118.
\(^{153}\) Id. at 1115–1116.
\(^{154}\) Id. at 1116; Minn. Stat. § 524.5 through 524.5-433 (2014).
\(^{156}\) Id.
\(^{157}\) Id. at 1117.
\(^{158}\) Id. at 1115.
\(^{159}\) Id. See St. of Minn. ex rel. Pearson v. Prob. Ct. of Ramsey Co., 205 Minn. 545, 287 N.W. 297, 299 (Minn. 1939), aff’d sub nom., 309 U.S. 270, 60 S. Ct. 523, 84 L. Ed. 744 (1940) (“The [Minnesota] constitution does not specifically state what class of persons are subject to guardianship but leaves the regulation of that question to the legislature”).
of guardianship.\textsuperscript{160} It contains a Bill of Rights for Wards and Protected Persons, which “identifies the rights retained by persons under guardianship and specifically states that a ward retains the right to vote unless that right is restricted by a court.”\textsuperscript{161} It requires the guardian each year to “send or deliver to the ward and to interested persons of record with the court … notice of the status of the ward’s right to vote.”\textsuperscript{162} The court also noted that under the state voter registration law, the Minnesota Secretary of State receives notice “of relevant changes in guardianship status for those individuals whose right to vote has been revoked or reinstated.”\textsuperscript{163} The court concluded that “the constitutional prohibition against voting based on guardianship status applies only when there has been an individualized judicial finding of incapacity to vote.”\textsuperscript{164} Because there were no constitutional violations, the court dismissed the case for lack of standing.\textsuperscript{165} On appeal, the U.S. Court of Appeals for the Eight Circuit affirmed the district court’s ruling.\textsuperscript{166}

\subsection*{E. No Restrictions}

Thirteen states place no restrictions on a person’s right to vote based on mental incapacity or guardianship and therefore make no individualized inquiries into voting capacity. In nine states, the constitutions and statutes are completely silent: Colorado,\textsuperscript{167} Idaho,\textsuperscript{168} Illinois, Indiana, Kansas, New Hampshire, North Carolina, Pennsylvania, and Vermont. Three additional states — Michigan,\textsuperscript{169} Oregon,\textsuperscript{170} and Utah\textsuperscript{171} — have constitutions that allow or require voting restrictions on grounds of mental incapacity or guardianship but have no statutes enforcing the restrictions, and their voter registration forms do not mention capacity. Finally, Alaska has a constitution that bans wards from voting, but its guardianship statute requires guardians to allow their wards to vote.\textsuperscript{172}

While admirable for not disenfranchising persons under guardianship, the complete failure to address lack of capacity in these 13 states may swing the pendulum too far in the opposite direction. Having no requirement for capacity opens up the possibility of abuse

\begin{itemize}
\item \textsuperscript{160} Ritchie, 890 F. Supp. 2d at 1116, citing Minn. Stat. § 524.5-102, subdiv. 6, § 524.5-410(c) (2014).
\item \textsuperscript{161} Id., n. 13, citing Minn. Stat. § 524.5-120(14) (2014).
\item \textsuperscript{162} Id., citing Minn. Stat. § 524.5-316(a) (2014).
\item \textsuperscript{163} Id. at 1118, citing Minn. Stat. § 201.15 (2014).
\item \textsuperscript{164} Id. at 1117.
\item \textsuperscript{165} Id. at 1118.
\item \textsuperscript{166} Ritchie, 720 F.3d 1029.
\item \textsuperscript{167} Colo. Rev. Stat. § 27-10.5-119 (Lexis 2013) (“all service agencies shall assist [developmentally disabled] persons to register to vote, to obtain applications for mail-in ballots and to obtain mail-in ballots, to comply with other requirements which are prerequisite to voting, and to vote”).
\item \textsuperscript{168} “There is no restriction of voting privileges for persons under guardianship, provided they meet the other qualifications to be eligible to vote. Section 3, Article VI of the Idaho Constitution was amended in 1998 to remove language that previously prohibited people under guardianship from voting.” Idaho Votes, Frequently Asked Questions Regarding Voter Registration, http://www.idahovotes.gov/VoterReg/REG_FAQ.HTM (accessed Mar. 24, 2014).
\item \textsuperscript{169} Mich. Const. art. II, § 2 (“mental incompetence”); no enabling statute.
\item \textsuperscript{170} Or. Const. art. II, § 3 (“adjudicated incompetent to vote (“); no enabling statute.
\item \textsuperscript{171} Utah Const. art. IV, § 6 (“mentally incompetent”); no enabling statute.
\item \textsuperscript{172} Alaska Const. art. II, § 2 (“unsound mind”); Alaska Stat. § 13.26.150(e)(6) (2013) (guardian may not prevent ward from registering or voting).
of the electoral process; it could result in manipulation of votes by those preying on the vulnerable or in opportunistic use of their votes. Clearly, due process and equal protection are not implicated, because there are no restrictions on the fundamental right to vote, the other end of the spectrum requires protecting the electoral process itself.

Restrictions on voting based on an individualized inquiry into mental incapacity, if properly implemented, can protect the electoral process. The states currently without restrictions should consider enacting carefully crafted statutes such as Delaware’s (requiring “specific finding in a judicial guardianship or equivalent proceeding, based on clear and convincing evidence that the individual has a severe cognitive impairment which precludes exercise of basic voting judgment”), Kentucky’s (“ward shall only be deprived of the right to vote if the court separately and specifically makes a finding on the record”), Maryland’s (requiring “clear and convincing evidence that the individual cannot communicate, with or without accommodations, a desire to participate in the voting process”), Nevada’s (requiring a judicial finding of “clear and convincing evidence that the person lacks the mental capacity to vote because he or she cannot communicate, with or without accommodations, a specific desire to participate in the voting process and [including] the finding in a court order”), or Washington’s (determination “that the person is incompetent for purposes of rationally exercising the franchise in that the individual lacks the capacity to understand the nature and effect of voting such that she or he cannot make an individual choice”). Such statutes provide rational limits to protect the integrity of the electoral process without unduly burdening the incapacitated individual who has the ability and desire to participate in the process.

V. CONCLUSION

As elections are increasingly won by narrow margins, the power of each vote is becoming more important than ever. Voting rights for incapacitated persons is becoming a more serious issue as the population ages and more people are placed under guardianship. A recent multistate study estimated that approximately 1.5 million active guardianships exist in the United States, although the actual number may be anywhere between 1 million and 3 million. According to the U.S. Census Bureau, as of 2012, approximately 4,994,000 Americans age 15 and older were living in non-institutional settings and needed assistance with basic activities of daily living such as bathing, eating, and dressing.

Guardianship can become necessary because of physical or mental incapacity, or both.\footnote{See Nat’l Conf. of Comm’rs on Unif. St. Laws, \textit{Unif. Guardianship & Protective Procs. Act} § 102(5) (stating grounds for guardianship); Hurme & Appelbaum, \textit{supra} at 948.}

The need for guardianship does not necessarily correlate with the inability to make informed decisions about voting. For example, a person under guardianship for schizophrenia might still have the mental capacity to make voting decisions and to understand the nature and effect of the act of voting. While a guardian can make decisions about where a protected person should live or the medical care he or she should receive, the guardian cannot decide whether the person should be allowed vote, because that right is personal to the individual.\footnote{See e.g. Wis. Stat. Ann. § 54.25(2)(c) (2014) (identifying the right to vote as one of seven personal rights that can be removed, including the right to consent to marriage, to execute a will, to serve on a jury, to apply for an operator’s license, to consent to sterilization, and to consent to organ, tissue, or bone marrow donation).}

States, as well as the federal government, have a legitimate interest in preserving the integrity of the ballot. It is clear that courts will uphold non-discriminatory voting restrictions, which protect that integrity while also protecting the rights of incapacitated individuals.\footnote{See \textit{Mo. Protec. & Advoc. Servs.}, 499 F.3d at 809 n. 5 and accompanying text citing \textit{San Antonio Indep. Sch. Dist. v. Rodriguez}, 411 U.S. 1, 36, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973).} However, many states still use antiquated voting rights laws that are categorically discriminatory, do nothing to promote intelligent use of the ballot, and may violate due process rights. Judicial inquiry and findings, based upon an individual’s actual capacity to understand the electoral process, protect both interests.

Voting rights under guardianship should be addressed well in advance of the next presidential election. Until there is a national standard, states will remain free to define access to this fundamental right for its most vulnerable citizens. Suffrage is an individual, fundamental right, which should be determined on a case-by-case basis. Every guardian should carefully scrutinize the law in their jurisdiction to determine the legal standard for capacity in voting (if any) and advocate for persons under guardianship to vote if they are capable of understanding the voting process and making informed decisions and they wish to do so. In most cases, if a protected person want to vote, the guardian should advocate for his or her right to do so.
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Changing of the Guardians: A Criticism and Analysis of the New York Guardianship Statute’s Impact on Elder Abuse Victims

By Joy Solomon, Esq., Deirdre Lok, Esq., and Malya Kurzweil Levin, Esq.

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A. Lack of Data .................................................................................................................. 157

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I. INTRODUCTION — MORE ELDERLY, MORE ABUSE

Growing old is a complex business. The elderly are often vulnerable, and vulnerable populations, by definition, require the assistance of the law and the regulatory state. This population is poised to swell dramatically in the coming decades. By 2030, 71.5 million Americans will be over the age of 65. The aging of the Baby Boomer generation, coupled with increased life expectancies, generally means that the number of “old old” will rise most dramatically by 2030, when 9.6 million Americans will be 85 or older. As this demographic grows, so will the complicated needs and problems associated with it.

One of these problems is the incidence of elder abuse. As the number of older Americans grows, studies confirm that occurrences of elder abuse grow as well. According to a study conducted for the National Center on Elder Abuse, there was a 19.7 percent increase in incidents of elder abuse nationwide between 2000 and 2004.2

The term “elder abuse” is used to refer to several types of mistreatment of an older adult, generally perpetrated by someone with a special relationship to that adult. These include physical abuse, sexual abuse, psychological or emotional abuse, neglect, and financial abuse. One out of every 10 people ages 60 and older who live at home suffers abuse, neglect, or exploitation.3

Old age inevitably brings increased vulnerability. There is physical frailty, which, when an individual is no longer able to work and must pay for rising medical costs, is often accompanied by financial precariousness.

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2 Id.
The elderly often face a diminished support system, as friends die, move away, or are consumed by their own age-related problems. These developments are often frightening, and older people who experience them are often at increased risk for anxiety and depression, which compounds their vulnerability. Old age can be accompanied by decreased cognitive capacity, which further inhibits a person’s ability to manage the difficult changes they face.

Elder abusers take advantage of the vulnerabilities of many older adults. In some cases, elder abuse is long-standing abuse that has been quietly perpetrated since long before the victim was elderly, but the increased vulnerability that comes with the victim’s age heightens the severity and potential consequences of the abuse. In other cases, these vulnerabilities create openings for new predators to enter. In either case, elder abuse is rooted in the frailties common to many older adults.

Elder abuse is a deeply entrenched phenomenon, because it perpetuates and exacerbates the very frailties that allowed it to begin. Abuse or neglect can accelerate physical and cognitive decline. An abuser can drain a victim’s finances, diminishing his or her housing, medical, and caretaker options.

Abusers also often isolate their victims, weakening an already depleted support system. A victim’s feelings of guilt, shame, and self-blame can accelerate psychological decline and decrease the likelihood that the victim will come forward and report abuse.4

As this problem has become increasingly visible and prevalent, national as well as New York State government and nongovernmental organizations have issued calls for new models incorporating increased social services, oversight, and interorganizational collaboration to combat elder abuse and care for its victims.

In 2004, the Weinberg Center for Elder Abuse Prevention was established as the first facility in the United States to provide direct services to victims of elder abuse via a shelter model.

The Weinberg Center was conceived as a single entity that would, through its construction, holistically address all of the complex and wide-ranging subissues that every elder abuse case presents. Located on the campus of the Hebrew Home at Riverdale, a long-term geriatric care facility with 24-hour security, each client has access to the Hebrew Home’s full staff of qualified medical and psychiatric professionals. The Weinberg Center staff comprises an interdisciplinary team that collaborates to create a comprehensive plan for each client, including both medical and psychological care as well as the full range of legal remedies and public benefits. The Weinberg Center team immediately begins working with the client to create a discharge plan by evaluating safe options where the client can thrive and receive the best care in the least restrictive environment.5

Some of the many areas in which an elder abuse victim might need legal support and counsel include:

• accessing Medicare and other public welfare funds
• filing for an order of protection against an abuser

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• initiating divorce or annulment proceedings
• pursuing guardianship proceedings
• defending against eviction actions in housing court
• reorganizing financial assets

In the nine years since its inception, the Weinberg Center has seen a diverse cohort of clients and employed a variety of legal tools. This article focuses on New York State guardianship, or Article 81 proceedings, which involve a petition requesting a legal determination that an individual lacks capacity and that a legal guardian be appointed to make decisions on behalf of the incapacitated person (IP).\(^6\) This is an appropriate area of focus for two reasons. First, individuals and organizations working with a case of acute elder abuse will at least consider this form of legal recourse in nearly all cases. Second, this area has been the focus of a good deal of criticism by national and New York-based elder advocacy and watchdog organizations, which claim that the current system is often ineffective, insufficiently conscious of civil rights, and open to abuse.\(^7\)

This article is presented in three parts. Section II provides a brief overview of New York State guardianship proceedings. Section III consists of two case studies, based on an amalgam of several Weinberg Center clients for whom guardianship and capacity were significant issues, and showcases how the shelter model is able to highlight gaps and loopholes in the current guardianship system that might go unnoticed in other contexts. Section IV reviews and critiques the shelter model as well as several alternative models and approaches that have arisen as a result of the flaws highlighted by the case studies. The goal is to construct a microcosm of the difficulties created by the present structure, lay out how the Weinberg Center framework brings these issues into focus, and briefly consider how several models, including that of an elder abuse shelter, attempt to ameliorate these problems.

II. OVERVIEW OF NEW YORK STATE PROCESS FOR ORDERING AND MONITORING GUARDIANS

The governing statute for seeking an adult guardianship in New York State was not created specifically for elder abuse victims, or even specifically for elderly individuals, but rather was drafted based upon the legislature’s finding that “the needs of persons with incapacities are as diverse and complex as they are unique to the individual.”\(^8\) The stated purpose of the statute is to create a uniform procedure to address the full range of scenarios involving an adult in need of guardianship, while affording him or her “the greatest amount of independence and self-determination and participation in all the decisions affecting such person’s life.”\(^9\) Subsequent sections of this article examine whether this purpose is, in fact, achieved. First, we examine the structure set out by the statute to achieve this overarching goal.

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\(^6\) N.Y. Mental Hygiene Law § 81 (McKinney 1993).
\(^7\) Vera Inst. of Just., Guardianship Practice: A Six-Year Perspective, Guardianship Project Issue Brief (Dec. 2011); Wood, supra n. 1; U.S. Govt. Accountability Off., Collaboration Needed to Protect Incapacitated Elderly People, GAO-04-655 (July 13, 2004).
\(^8\) N.Y. Mental Hygiene Law § 81.01.
\(^9\) Id.
A. The Guardianship Petition and the Definition of Legal Capacity

The list of entities that may file an Article 81 petition is fairly extensive and includes the allegedly incapacitated person (AIP), anyone the AIP lives with, anyone who may inherit from the AIP, and any “person otherwise concerned with the welfare of the person alleged to be incapacitated.”

The court must make three findings in order to conclude that an AIP lacks capacity:
1. The court must find that the AIP has some sort of functional impairment and some inability to provide for his or her own personal needs or property management.
2. The court must find that the AIP cannot adequately understand and appreciate the nature and consequences of that inability.
3. The court must find that the AIP is likely to suffer harm as a result of the first two factors.

Only when the court affirms all three findings is a person determined to lack legal capacity and have a guardian assigned to him or her.

B. Deconstructing the Definition of Capacity

This definition differs sharply from previous iterations of the law, which focused on diagnostic labels and required the presence of an underlying “illness, infirmity, mental weakness, alcohol abuse, addiction to drugs or other cause.” By contrast, the modern standard is meant to be essentially functional and focuses on an individual’s actual abilities in the context of everyday life.

When detailing the contours of this new capacity definition, the New York State Law Revision Commission specified that the evaluation of an AIP must consist of an assessment of several specific areas of daily personal and financial management. Borrowing from the medical literature, the Commission divided this functional evaluation into categories that relate to how an individual’s basic needs are met:

a) income adequacy and spending patterns (i.e., physical ability to write checks and manage currency and whether pension checks and disability payments arrive on time);

b) adequacy of food, clothing, and shelter (ability to buy and prepare food; ability to eat and choice of diet; ability to dress and undress; adequacy of laundry facilities; upkeep of shelter; warmth and ventilation; cleanliness of environment; safety of home);

c) physical functioning (ability to walk, climb stairs, reach, and get in and out of chair and tub);

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10 Id. at § 81.06.
11 Id.
12 Id. at §§ 77–78 (repealed 1992). For a more detailed description of the distinctions between Articles 77 and 78 and Article 81, see Matter of Francis E. Maher, 207 A.D.2d 133, 621 N.Y.S.2d 617 (1994).
14 Created by Chapter 597 of the Laws of 1934, the Law Revision Commission is a New York State agency consisting of the chairpersons of the Committees on the Judiciary and Codes of the Senate and Assembly, as well as five members appointed by the governor for a term of five years. Its purpose is to examine the common law and statutes of New York State for defects and anachronisms, to receive and consider proposed changes to laws from a variety of sources, and to periodically recommend modifications. See N.Y. St. L. Rev. Commn., http://www.lawrevision.state.ny.us (accessed Apr. 29, 2013).
d) sensory functioning (ability to see, hear, feel, react in ways that do not endanger health or safety);
e) access to helpful resources such as friends, relatives, physicians, emergency facilities, transportation;
f) satisfaction with present circumstances, desire for change, and specific assistance the person wishes;
g) emotional factors (loneliness and anxiety); and
h) mental status (orientation to reality, memory functioning, reasoning ability). These categories remain the standard by which the court determines whether a functional impairment is present.16

Ideally, a guardianship petition should specifically state what powers should be given to a guardian for a particular AIP.17 The requirement to craft a petition around the specific nature of the individual’s incapacity illustrates that the goal of the law is to produce an individually crafted guardianship order, granting the guardian only the powers that correspond with the impairments of the AIP.

C. Who Is the Court Evaluator?

Upon receipt of a petition for guardianship, the first thing a court does is appoint a court evaluator. This individual can be a member of one of a number of professions, including attorney, social worker, psychologist, nurse, or accountant, provided the individual has knowledge pertinent to the situation, the person’s particular problems, and potential solutions.18 The Law Revision Commission Comments indicate that the court should select an evaluator based on each case’s “unique challenges and needs that cannot always be met by the same type of professional.”19

The court evaluator is required to undergo the same training that all court-appointed guardians must complete.20

D. The Court Evaluator’s Report

The role of the court evaluator is to conduct an investigation on behalf of the court by meeting and interviewing the AIP and, if the AIP lives in a facility, speaking with someone there who is familiar with the AIP’s situation and condition. The evaluator must then present a written report to the court.

The central issue this report must address is “how the AIP is functioning with respect to the activities of daily living and what is the prognosis and reversibility of any physical

17 N.Y. Mental Hygiene Law § 81.08.
18 Id. at § 81.09.
20 *Article 81 Training*, supra n. 16.
or mental disabilities, alcoholism or substance abuse.”  The evaluator is required to base this conclusion on his or her own assessment of the AIP, along with his or her review of assessments by third parties, such as medical and psychiatric professionals.

The statute’s lengthy set of instructions regarding the report’s contents reflects the fact that it is meant to contain the results of a “meaningful independent exploration of all aspects of the life of the allegedly incapacitated person.”

The court evaluator is paid by the AIP’s estate when a guardianship is granted. When a guardianship is not granted, either the AIP, the petitioner, or both pay the evaluator, as the court deems just.

E. Counsel for the AIP

One of the issues a court evaluator’s report must address is whether the AIP would like to retain counsel or have counsel appointed. An AIP is not automatically entitled to counsel, but counsel will be appointed under specific circumstances, such as if the AIP requests it or wishes to contest the petition.

A court evaluator is not required in cases in which counsel is appointed to the AIP. This further indicates that the general role of the court evaluator is to give the fact finder insight into the AIP’s viewpoint, a role that is assumed by the AIP’s counsel. The AIP is required to pay his or her counsel reasonable compensation unless the court determines that the AIP is indigent. If the petition is dismissed, the court may order the petitioner to compensate the AIP’s counsel.

F. Appointing a Guardian

After the court evaluator’s report has been submitted and counsel has been appointed to the AIP, if appropriate, the court holds a hearing at which the AIP must be present unless it has been clearly established that no meaningful participation would result from the AIP’s presence.

If the court finds that the petitioner has met its burden, the court issues an order appointing a guardian. The order must include the functional limitations of the AIP (now simply the IP) that necessitate a guardian as well as the specific powers granted to the guardian, which should constitute the least restrictive form of intervention.

Ideally, a person in the community, such as a family member or friend who knows the IP and his or her values and wishes — or the actual petitioner — is designated as a proposed guardian in the original petition. However, often no such person can be found, in which case the court appoints an agency guardian, usually a private entity that is “reasonably compensated” based on a fee-for-service model.

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21 N.Y. Mental Hygiene Law § 81.09(c)(5)(vii).
23 N.Y. Mental Hygiene Law § 81.09(f).
24 Id. at § 81.10(c).
26 N.Y. Mental Hygiene Law § 81.10(f).
27 Id. at § 81.11, 81.12.
28 Id. at § 81.15.
29 Id. at § 81.28. The court will often include in its guardianship order a “zero NAMI” provision. NAMI, or
G. The Guardian’s Reporting Requirements

Within 90 days of being appointed, a guardian must submit proof of having completed the required educational program as well as an initial report detailing the steps the guardian has taken to fulfill his or her responsibilities. These documents must be filed with the court, with copies sent to the IP’s attorney as well as to the facility in which the IP resides.

If the guardian’s responsibilities include property management, the report must include a full inventory of the IP’s property and resources and the guardian’s plan for the management of such resources. If the guardian’s responsibilities include personal needs management, the guardian must include an account of his or her visit with the IP and his or her plans to provide for those personal needs as well as specific information about the health and social services to be provided for the IP.\(^{30}\)

The guardian is required to file subsequent annual reports detailing the state of the IP as it relates to the guardian’s powers.\(^{31}\) A judge or specially assigned referee examines these reports within thirty days of their submission.\(^{32}\)

H. Other Guardianship Duties

Section 81.20 sets out additional, more amorphous duties of an IP’s guardian. A guardian must only exercise the powers that have been expressly delegated to him or her and must act with care, diligence, trust, loyalty, and fidelity. In addition to the reports described above, the guardian must visit the IP not less than four times a year. If the guardian has been granted property management powers, he or she has additional obligations related to protecting those resources and allowing the IP the greatest degree of independence possible in protecting their use.\(^{33}\) These obligations continue until the individual’s level of capacity changes\(^ {34}\) or until the IP’s death.\(^ {35}\)

III. Pitfalls and Weaknesses in the New York State Guardianship System as Revealed by Weinberg Center Clients

Having reviewed the standard for determining legal incapacity and the judicial process by which a guardian is appointed, we begin a discussion of some of the primary

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\(^{30}\) N.Y. Mental Hygiene Law § 81.30.

\(^{31}\) Id. at § 81.31.

\(^{32}\) Id. at § 81.32.

\(^{33}\) Id. at § 81.20(6).

\(^{34}\) Id. at § 81.36.

\(^{35}\) Id. at § 81.44.
pitfalls and weaknesses of both the legal and administrative structure of Article 81 guardianships. We do this by reviewing two Weinberg Center client case studies. In one case, the Weinberg Center successfully petitioned the court for a legal guardian. In the other, guardianship was considered but ultimately rejected as an inappropriate legal tool. Both case studies illustrate how the values and structure inherent in the multidisciplinary shelter model help illuminate weaknesses in the guardianship system and their effects on the client’s quality of life and civil rights.

The case studies focus on how these systemic weaknesses can particularly disadvantage victims of elder abuse who are the subjects of guardianship proceedings. Though each arena mentioned in this section could be the subject of its own independent article, the goal here is to use the Weinberg Center’s unique lens to bring the current system’s major flaws into focus, to discuss how those flaws are rooted in gaps in the law, and to highlight how the particular confluence of vulnerabilities unique to elder abuse makes its victims particularly susceptible to these flaws.

A. Lack of Data

It is important to note that the Weinberg Center’s case studies are especially important because all analysis of this area of law is limited by a troubling lack of state-level guardianship data. This is true across the country, and New York is no exception. As the U.S. Government Accountability Office (GAO) observed in its 2004 report, “Without better statistical data concerning the size of the incapacitated population or how effectively it is being served, it will be difficult to determine precisely what kinds of efforts may be appropriate to better protect incapacitated elderly people from exploitation, abuse and neglect.”

In response to this report, the American Bar Association (ABA), together with the National Center on Elder Abuse, conducted a short survey on state reporting practices in guardianship cases. While New York indicated an interest in collecting data on this type of case, it did not report adult guardianship cases as a “distinct case type” to the state court administrator’s office, let alone compile any data about distinct case subtypes such as those involving elder abuse. (Specific implications of this lack of data are discussed later in this article.) This absence of hard data means that analyses of the New York system rely more on implication and inference as well as the observations of experienced professionals. Although a large-scale collection of empirical data is ultimately necessary for comprehensive evaluation of the guardianship system, the current dearth of data makes a close dissection of Weinberg Center clients’ experiences particularly valuable.

B. Case Study I: Hilda’s Story

Our first case study illustrates some of the difficulties in determining whether an individual is the proper subject of an Article 81 petition. Hilda’s story reveals how these difficulties, which are attributable to the structure of the proceedings, the precise nature

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36 U.S. Govt. Accountability Off., supra n. 7.
37 Wood, supra n. 1, at 18–27.
38 Names, as well as other major identifiers such as location and gender, have been altered to protect confidentiality.
of the legal standard for incapacity, and the practical realities of court administration can converge in cases of elder abuse and maximize the difficulty of accurately evaluating a victim’s capacity. We will also see how the elder abuse shelter model has been purposefully structured to address some of these complexities.

Hilda was an active and independent woman, maintaining her own home well into her eighties. After she suffered a stroke, however, she could no longer live alone.

Her son Sam had a home large enough to accommodate her. Her daughter, Diana, had a very small apartment.

Sam agreed to allow his mother to move in, on the condition that Hilda sign her car over to him, give him her power of attorney, and put her assets in a joint bank account with him. Physically impaired and with no other housing options, Hilda agreed to move in with Sam.

This new living situation began to deteriorate almost immediately. Sam berated Hilda constantly, degrading her by asking if she was wearing her diapers and if she had gone to the bathroom in her pants. He would inspect the bathroom after she used it and would threaten to throw her out if she did not keep herself and the house clean. Soon, Sam decided that Hilda was no longer permitted to shower at his house. He began dropping Hilda off to shower at her daughter Diana’s small apartment across town. He often left Hilda, who was then 86 years old, alone outside of the apartment at night in the middle of the winter.

Finally, with Diana’s support, Hilda decided that she preferred to move to the Hebrew Home at Riverdale rather than remain with Sam. Upon hearing this, Sam shook Hilda hard, dragged her through the house, and threw her outside on a freezing January night. At some point, Hilda managed to call Diana, who came to get her.

Hilda’s family doctor referred her to the Weinberg Center. The doctor evaluated Hilda immediately after she left Sam’s home and sent a Patient Review Instrument (PRI), with a report on Hilda’s condition, to the Weinberg Center.

The information in the PRI assists the Weinberg Center team in determining whether a potential client meets the Center’s criteria for admission. No single criterion is dispositive; some of the factors considered include current medical status, whether abuse is ongoing, whether there are family members who could provide a suitable housing option, and the victim’s capacity to consent to admission. If necessary, the Weinberg Center investigates further to ensure that the team is fully informed. Once these factors have been assessed, the team decides whether the Weinberg Center is the appropriate option for a particular individual.

39 The Weinberg Center receives referral calls via a hotline number. To ensure that the Weinberg Center receives confirmed and reliable information, the hotline accepts calls from professionals only. Referrals often come from hospitals, adult protective services, visiting nurse services, and local police.

40 A Patient Review Instrument (PRI) is an assessment instrument used by a medical professional to determine the level of care and the type of living facility needed for an older adult. Typical areas of evaluation include an individual’s current medical condition; physical and mental capabilities; impairments such as the inability to eat, walk, and use the bathroom independently; and behavioral traits such as aggressiveness and disruptiveness. A PRI is typically valid for 30 days. The New York State Department of Health requires that a PRI be completed prior to an individual’s admission to a long-term care or rehabilitation facility. See Natl. Resource Ctr. on LGBT Aging, Caregiving Glossary (Apr. 2011), http://www.lgbtagingcenter.org/resources/resource.cfm?r=11#P (accessed Nov. 12, 2012).
In this case, Hilda was approved for admission. Her PRI indicated limited mobility, the need for extensive assistance in eating and using the bathroom, and a diagnosis of significant dementia,\(^{41}\) characteristics that seemed to indicate she lacked legal capacity. Based on this information, she was placed in the unit that provided care for the lowest functioning individuals and provided the most advanced memory care at the Hebrew Home at Riverdale. The Weinberg Center staff initially assumed that Hilda would require a guardian.

Just a few weeks later, Hilda’s level of functioning was dramatically different. As the multidisciplinary team continued to meet regularly to discuss Hilda’s progress, it became apparent that, even though Hilda suffered from severe depression, anxiety, and guilt due to the abuse she had suffered, she was, in fact, perfectly lucid, with no confusion or dementia. The Weinberg Center team changed her placement within the Hebrew Home accordingly, and she began to see a psychologist weekly to process her feelings about the abuse.

Today, Hilda is one of the most independent residents of the Hebrew Home. She uses a cane to walk on her own and is a regular volunteer in the garden. She feeds herself and only needs minimal help showering and using the bathroom. There are still times when it seems difficult for her to articulate reasoned and consistent decisions, especially regarding issues directly related to her abusive son. However, the independent psychiatrist who evaluated her several months after her arrival at the shelter found that she has the capacity to make legal decisions on her own behalf. She continues to engage in therapy to manage and work through emotions surrounding her abuse and its aftermath.

C. Hilda: Capacity As a Sliding Scale

Hilda’s story reveals a significant weakness in New York’s current guardianship system, which begins with the initial decision to file a petition for guardianship. As previously discussed, a determination that an individual is incapacitated requires that a court find, based on clear and convincing evidence, that an AIP has:

a) a functional impairment
b) an inability to understand the nature or consequences of that impairment and therefore

\(^{42}\) is likely to suffer harm.\(^{42}\)

In the case of victims of elder abuse such as Hilda, harm has, by definition, already occurred. It is easy to conduct this capacity evaluation backward and determine that, because the elder abuse victim suffered harm and was either unable or unwilling to take action to stop the harm, the victim must lack capacity. The primary difficulty is in discerning the difference between an elder abuse victim and an elder abuse victim who lacks legal capacity.

\(^{41}\) Dementia describes a group of symptoms affecting intellectual and social abilities severely enough to interfere with an individual’s daily functioning. Memory loss generally occurs in dementia, but memory loss alone does not necessarily indicate dementia. Dementia indicates problems with at least two brain functions, such as memory and judgment or language. Some causes of dementia are treatable and even reversible. See Mayo Clinic, Diseases and Conditions: Dementia (Apr. 16, 2013), http://www.mayoclinic.com/health/dementia/DS01131 (accessed Nov. 12, 2012).

\(^{42}\) N.Y. Mental Hygiene Law at § 81.02.
Part of the difficulty involved in parsing this distinction is the fact that current medical and legal consensus indicate that capacity is not static, but rather exists on a gradient. An individual may have some moments in which he or she possesses total capacity and others in which he or she utterly lacks it. As Hilda’s story illustrates, people’s capacity at any given moment is based on a complex confluence of factors that might include where they are, what types of physical and mental stresses they are experiencing, who they are interacting with, and the goal of that interaction. In this sense, therefore, the entire concept of legal capacity as an objective standard is a “legal fiction.”

This new conception of legal capacity has been integrated into the ABA’s Rules of Professional Conduct, as adopted by the New York State Bar. Rule 1.14(a) states, “When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.”

The implication here is that conceivably a person may have less than perfect legal capacity but will still be able to direct the course of his or her legal representation as though he or she did, in fact, have the ability to do so. As the New York Bar Association states in its Comments on Rule 1.14, “a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being.”

The ABA and American Psychological Association’s joint publication, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, has a chapter, “Techniques Lawyers Can Use to Enhance Client Capacity,” which advises such tactics as gaining client trust and confidence and accommodating for sensory impairments such as vision or hearing loss. The ABA even advises accommodating a certain level of cognitive impairment via the technique of “gradual counseling,” which requires an attorney to “repeatedly refer to the client’s goals and values in assessing each alternative and in discussing the pros and cons of an alternative.”

This process “may assist many clients in thinking through and clearly enunciating a decision. In other cases, the lawyer will be able to summarize the options and the client’s values in a way that will help the client confirm them and choose a course of action.” Beyond the underlying assumption that capacity is far from static, the notion here is that even in cases in which legal decision-making capacity is diminished, an individual’s ar-

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48 *Id.* at 95.
ticulation of his or her own values and wishes are crucial to any legal decisions made by, with, or for him or her.

D. Task-Specific Capacity

Hilda’s capacity to make decisions for herself remains directly correlated to the degree to which those decisions involve her abuser. The idea that legal capacity is not absolute is supported by the task-specific concept of capacity that has been embraced by the legal community and the New York Rules of Professional Conduct. According to the Comments on Rule 1.14, a person’s capacity should be evaluated by examining the following factors as they relate to any given individual decision:

(i) the client’s ability to articulate reasoning leading to a decision
(ii) variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision
(iii) the consistency of a decision with the known long-term commitments and values of the client.

The idea is that the three-part evaluation of capacity can be applied to any substantive decision and that the individual might lack capacity as it relates to some decisions yet possess it for others, depending on the nature of the decision and the other factors at play when the individual is making the decision.

E. Statutory Language Versus Administrative Reality

The law theoretically acknowledges this contextual approach to legal capacity. The Law Revision Commission, as well as New York case law, incorporates this attitude by repeatedly exhorting that guardianship be used exclusively as a “last resort.” The statute explicitly states that its purpose is to provide “the least restrictive form of intervention.”

The procedural structure, which requires proof of specific types of functional impairments affirmed by an independent, specially selected court evaluator, was created to allow courts to issue individualized guardianship orders granting guardians limited powers to correspond with an incapacitated individual’s specific needs.

Complexities inherent in situations of elder abuse, coupled with the gap between a theoretical statute and the realities of its administration, mean that these principles are often stymied. As Hilda’s rapid deterioration while living with Sam reveals, elder abuse can often exacerbate and accelerate cognitive and emotional decline. Given the fragile nature of capacity, it may be difficult, even for trained professionals, to ascertain how much of this decline might prove reversible once a victim receives trauma treatment in a safe environment.

Important and time-sensitive decisions are often the impetus for filing a guardianship petition. In Hilda’s case, immediate decisions had to be made regarding her housing

49 ABA Ctr. for Prof. Resp., supra n. 45, at Comment [6] (scroll down from top of page).
51 N.Y. Mental Hygiene Law § 81.01.
52 Id. at § 81.15(a)(4).
and finances. The parties may not have the luxury of waiting for the cognitive dust to settle. The fact that these decisions often relate to the AIP’s abuse and abuser may also mean that these decisions revolve around the AIP’s feelings of anguish, guilt, and shame — feelings that may present as a lack of decision-making capacity. These factors make it even more likely that, for victims of elder abuse, guardianship petitions may be filed inappropriately.

Hilda’s story illustrates the problems inherent in identifying which individuals are appropriate subjects of Article 81 proceedings. These difficulties stem from both the statutory formulation, as well as the administrative limitations of the proceedings themselves, and are exacerbated by the realities common to many victims of elder abuse. In the next case study, we examine a prototypical scenario in which an elder abuse victim is undoubtedly in need of a guardian but faces the possibility of further victimization within the proceedings themselves. Once again, the shelter model framework serves as an effective tool to pinpoint where systemic weaknesses lie and how they can impact elder abuse victims.

F. Case Study II: Jim’s Story

With Jim’s story, we focus on some of the enhanced risks faced by elder abuse victims once a guardian has been appointed to them. The specifics of the guardianship statute itself and the way in which it is administered coalesce to create significant gaps in oversight and opportunities for negligence, if not outright abuse. As we will see in Jim’s case, the social isolation and financial turmoil that generally characterize elder abuse victims put them at increased risk, which the shelter model tries to offset.

After a series of car accidents in his twenties, Jim was diagnosed with a brain injury and moved back home with his mother, Betty. The injury impaired Jim’s memory and cognitive functioning and caused seizures and a pronounced limp. A wealthy widow, Betty lived with Jim and managed all of his financial and personal needs. Upon Betty’s death, Jim was left alone in the Manhattan apartment they had shared.

Shortly after Betty’s death, Molly introduced herself to Jim on the street near his apartment as he was leaving his bank. Jim and Molly quickly became romantically involved and were married at the courthouse. Several months later, Jim’s doctor was alarmed at his condition when Jim arrived for his checkup. Jim had lost 40 pounds in three months and was dirty and malnourished.

When the doctor questioned Jim about his eating habits, Jim said that his wife brought him food twice a week and that he ate saltines between her visits. Alarmed, the doctor alerted New York City Adult Protective Services (APS).

When visiting Jim’s apartment, APS found the home dirty and the kitchen full of rotting food. Jim was incapable of articulating how he had lost weight or how the apart-

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53 Names, as well as other major identifiers such as location and gender, have been altered to protect confidentiality.

ment’s condition had deteriorated. Over several subsequent APS visits, Jim indicated that he loved his wife and that she was planning a trip for them to go to Disneyland. However, he also said she never stayed in the apartment with him and expressed negative feelings toward her.

APS soon became aware that Jim was more than $15,000 dollars in arrears on his rent and was facing eviction. Furthermore, Jim had given Molly his power of attorney, and she had spent thousands of dollars of his money on personal items such as a television and video games.

An APS psychologist was sent to evaluate Jim and determined that Jim lacked capacity because he did not understand his brain injury, the cause of his weight loss, the reasons for his dirty apartment, the state of his finances, or the eviction proceedings against him. The psychologist concluded that Jim was likely to suffer harm as a result of his inability to understand these functional incapacities.

APS referred Jim to the Weinberg Center, and he was admitted into the shelter. Almost immediately, the Weinberg Center team decided to petition the court to appoint a guardian. The court evaluator’s written report confirmed the APS psychologist’s original assessment.

Jim told the evaluator that he wanted a guardian but also said that a guardian might make it easier for him and his wife to move to Vermont. Recognizing the substantial assets at stake, coupled with Jim’s complicated and conflicted feelings toward his abuser, the court appointed Jim his own counsel. While waiting for Jim’s hearing date, the Weinberg Center continued to investigate the extent of the assets that had been taken from Jim. They tried to locate other friends or relatives who might serve as resources and support for Jim.

Initially, unable to locate any suitable resource, the court appointed a community guardianship agency55 as guardian for Jim at a hearing where Jim was present. The relationship between the Weinberg Center team and the agency quickly grew strained. The court had initially ordered the agency to hire an independent investigator to learn more about the extent of Jim’s abuse and possible charges that might be filed. The agency never did so. The agency was also paying, out of Jim’s estate, for storage spaces that allegedly contained the belongings removed from his apartment. The Weinberg Center team requested that the agency sort through the storage spaces and make decisions, with as much consultation with Jim as possible, about their contents. The agency was not responsive to these requests and continued to spend money on the storage spaces for months before finally sorting through and ultimately disposing of the contents of the storage spaces.

The Weinberg Center continued its own independent investigation and found Debra, a first cousin of Jim’s, who had been close to Jim up until Betty’s death. Jim’s relationship with Molly, and its resulting isolation, had driven Debra away. Debra was eager to reconnect with Jim and agreed to serve as Jim’s guardian. After Jim was consulted and agreed, the petition was amended accordingly.

55 A community guardianship agency is a not-for-profit organization the court may appoint to serve as a personal needs or property management guardian for multiple individuals. Such organizations are generally appointed in cases in which the incapacitated person (IP) will remain in the community as opposed to moving to a long-term residential facility. Such organizations are paid from the IP’s assets. N.Y. Soc. Law § 473-d(1) (McKinney Supp. 1993).
At the close of a second hearing at which Jim was again present, a judge assigned Debra the role of guardian. Debra was happy to visit Jim several times a year and sign off on his treatment plan. The Weinberg Center team would monitor Jim’s care plan, keep Debra informed about any changes, and continue to execute its court-approved legal strategy.

This strategy included entering into a housing court settlement regarding the eviction proceedings against Jim, filing for an annulment of Jim’s marriage, creating a supplemental needs trust for Jim’s remaining assets, obtaining a restraining order against Molly, nullifying various documents Molly had signed on Jim’s behalf, and liaising with the District Attorney’s office regarding possible criminal charges to be filed against Molly. After Debra was appointed guardian, Jim’s court-appointed counsel filed a motion to be added to the court’s decree as a co-guardian. The court granted the Weinberg Center’s cross motion opposing this request as unnecessary, and Jim’s counsel was ultimately relieved of his duties.

Jim ultimately became a long-term resident of the Hebrew Home, where he continues to thrive and is physically healthy with many friends. Jim and Molly’s marriage was annulled, and Molly ultimately received a prison sentence after the District Attorney discovered other similar schemes she had masterminded. The Weinberg Center’s staff attorney was a witness at Molly’s trial. Jim is under regular treatment by a therapist and now clearly and unequivocally articulates anger toward his abuser, a desire to continue living at the Hebrew Home, and other preferences regarding his own treatment. Debra continues to visit Jim regularly and participates with the Weinberg Center team in discussing changes to Jim’s care plan.

G. Jim: Boilerplate Guardianship Orders

Jim’s Article 81 story reveals several gaps between the statutory ideal and the administrative reality of court-ordered guardianships in New York State. First and foremost, the overburdened court system has, in almost all cases, dispensed with the time-intensive process of crafting individual guardianship orders in favor of granting wide-ranging powers to guardians using boilerplate language. Debra, like every guardian appointed for a Weinberg Center client, was given generic powers that were not substantially tailored to his or her individual circumstances.

Beyond undermining the legislature’s stated findings and purpose in enacting Article 81, this practice bodes particularly ill for victims of elder abuse, such as Jim and Hilda, who may have specific gaps in their capacity based on trauma due to long-standing abuse coupled with the upheaval that can accompany judicial intervention. The mental health professional, AIP’s appointed counsel, court evaluator, and judge all meet and evaluate the AIP at a time when he or she does not necessarily demonstrate his or her actual cognitive abilities.

Authorized by N.Y. Ests., Powers & Trusts Law § 7-1.12 (McKinney 1994), a supplemental needs trust allows a trust to be established for the benefit of a person with a severe, chronic, or persistent disability that gives rise to the long-term need for specialized services. The principal or income of the assets placed in trust is not counted as an available resource when the beneficiary’s eligibility for government benefits such as Medicaid is calculated.

N.Y. Mental Hygiene Law § 81.01.
Jim’s decompensated state must also be considered, along with the crucial and time-pressured decisions that he faced, such as finding new housing and moving quickly to cut off Molly’s access to his funds. The pressures on an overburdened court system to free up space on its dockets by issuing extensive boilerplate guardianship orders that last indefinitely further compound these factors. Taken together, this means that an elder abuse victim such as Jim is in serious danger of being stripped of his civil rights when he may, in fact, still be able to exercise them to some degree.  

H. Lack of Judicial Oversight  

Once legal privileges have been taken from an elder abuse victim via the appointment of a guardian to exercise those privileges on his or her behalf, the law creates mechanisms by which they may be partially or wholly reinstated if the individual’s capacity improves. Once a guardian is appointed, he or she is required to file an initial report with the office of court administration, which should include any necessary changes to the guardianship powers ordered by the court. The guardian is also required to file subsequent annual reports, which must include any “facts indicating the need to terminate the appointment of the guardian, or for any alteration in the powers of the guardian and what specific authority is requested or what specific authority of the guardian will be affected.”

The statute requires that each of these reports be examined within 30 days of their submission. A judge or a specially appointed referee can conduct this examination. If a report is not submitted, or is incomplete, an examiner can demand that the report be filed or completed and may reduce or deny compensation to the guardian if the guardian does not comply. Theoretically, an elder abuse victim who regains some capacity, or is actually found to have more capacity than was originally thought, is continuously monitored so that the guardianship order may be adjusted accordingly.

Jim’s story also illustrates how the reality of the overburdened and underfinanced system fails to operate as required by statute. While Debra is a positive presence in Jim’s life, she lives out of state and often does not visit the requisite four times per year. She has no mental health or legal training beyond the seven-hour course required for a guardianship, and she takes little proactive interest in Jim’s treatment plan or current decision-making capabilities. When she is delinquent in filing reports, there are no consequences for Debra and no follow-up by the court.

This anecdotal evidence of insufficient oversight is borne out by New York State’s own statistics. In 2004, the GAO surveyed twelve judicial districts in New York about their guardianship practices. Of the twelve, only six indicated that there was any requirement that they document approval of guardianship reports. Only four districts indicated that they used a computer to track when these reports are due and when they are filed. Lack of oversight is a systemic problem that reaches far beyond the New York City

58 Interview with Jean Callahan, Dir., Hunter College Brookdale Ctr. for Healthy Aging (Jan. 24, 2012).
59 N.Y. Mental Hygiene Law § 81.30(4)(d).
60 Id. at § 81.30(b)(10).
61 Id. at § 81.30(a)(2).
62 Id. at § 81.30(c), (d).
Guardianship Assistance Network (GAN) mandate. According to Jean Callahan, Director of Hunter College’s Brookdale Center for Healthy Aging, it is impossible to determine how many active guardianships there are in New York State, because cases are often left open even after the IP has died.64 This lack of monitoring indicates that the statutory reporting and examination requirements can be ignored with impunity.

This state of affairs in New York is reflective of the state of guardianship cases nationwide. The only data that state court administrative offices receive about guardianship cases is the total number of filings and dispositions made. This partial data blackout makes any sort of meaningful oversight impossible and means that once a guardian is granted powers without any substantive or temporal strictures, they are unlikely to be altered.65 It seems that the capacity standard has become precisely the sort of absolute and permanent pronouncement that the legislature sought to avoid.

I. Incentives Created by a Fee-for-Service Model

Lack of oversight in the context of a fee-for-service model is an invitation to abuse. A fee-for-service model means that a fee is taken from the IP’s estate and paid to private individuals or entities as payment for their services. This model is present in nearly every step of the guardianship process. Once a guardian is appointed, an IP is required to pay the court-appointed evaluator,66 his or her own court-appointed counsel,67 and potentially even the petitioner’s counsel if the court finds it “appropriate.”68

If the court appoints an examiner who is not a member of the court’s staff to examine the guardian’s annual reports, that person will be paid out of the incapacitated individual’s estate if his or her estate exceeds $5,000.69 The court has the authority to establish “reasonable compensation for the guardian for as long as the guardian continues to perform his duties.”70 This compensation is to be paid out of the funds in the IP’s estate.71 Courts generally include the fee structure in the initial guardianship order, usually either a flat monthly fee or an hourly fee, in which the guardian is required to bill for each action taken on the IP’s behalf.72

The opportunities for abuse in such a system are manifold. If an IP does have substantial assets, as in Jim’s case, a private guardian is effectively incentivized to continue the guardianship for as long as possible and not to investigate too thoroughly whether an IP may in fact have the capacity to do all or some of the things the guardian is being paid to do. This was the way Debra behaved throughout the course of Jim’s guardianship. If, on the other hand, an IP is effectively indigent, as Hilda was when she came to the Weinberg Center, there is a profound dearth of guardianship options, and courts often require that a guardian who has been assigned several cases with larger asset pools to take on some

64 Interview with Jean Callahan, supra n. 58.
65 Wood, supra n. 1, at 34.
66 N.Y. Mental Hygiene Law § 81.09(f).
67 Id. at § 81.10(f).
68 Id. at § 81.16(f).
69 Id. at § 81.32(f).
70 Id. at § 81.28.
72 Guardianship Practice: A Six-Year Perspective, supra n. 7.
cases pro bono. \footnote{Report of the Commission on Fiduciary Appointments 25, N.Y. St. Unified Ct. Sys. (Feb. 2005).} In this scenario, the guardian has little incentive to invest in the time-intensive process of ascertaining whether there has been any change in capacity or what might help improve capacity.

Elder abuse victims are particularly susceptible to these systemic flaws. The common element in abuse cases is isolation of the victim from his or her support system. Therefore, by the time an abuse case reaches a stage in which a guardian is being sought, there is:

a) less likely to be a trusted friend or family member to assume the position of guardian; and

b) less likely to be other people who maintain regular significant contact with the incapacitated person once a guardian has been appointed and who might step in if he or she recognizes a need for improvement.

In Jim’s case, it took the Weinberg Center several months to locate Debra, who had distanced herself from the family as a result of Jim’s abuse. Although Jim and his mother once had many friends in the community, Jim was extremely isolated by the time his abuse reached its peak, and it was his doctor who spent sufficient time with him to recognize that he was being victimized.

\section*{J. Guardianship Abuse}

In addition to this more subtle form of systemic inertia, which is the product of inaction and perverse incentives, there is the more obvious danger of out and out abuse, neglect, or fraud perpetrated against an incapacitated person by his or her guardian. Jim’s brief stint with a community guardianship agency as his guardian provides a brief window into the consequences of this phenomenon and indicates the prevalence of such protracted mistreatment. Indeed, the GAO reported that while a lack of guardianship data makes it difficult to determine how widespread this type of abuse is nationwide, there were hundreds of incidences of abuse throughout the country between 1990 and 2010. Common themes in the cases the GAO identified were states’ failure to properly screen guardians initially, failure to monitor them effectively, and failure to share information among state agencies, which prevented timely recognition by authorities of the abuse. \footnote{U.S. Govt. Accountability Off., Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors, GAO-10-1046 (Sept. 30, 2010).}

The GAO report provides detailed descriptions of particularly egregious instances of abuse, such as a court-appointed attorney guardian who misappropriated hundreds of thousands of dollars from the estate of an incapacitated former judge. Over the course of six years, the estate went from containing several million dollars in assets to almost nothing, while accruing a million dollars in taxes, interest, and penalties. \footnote{Id. at 13. Other instances of abuse by New York State court-appointed guardians that have been highlighted by U.S. Government Accountability Office (GAO) reports include an attorney guardian who brought a cake and flowers to a nursing home resident on her birthday and billed her $850 an hour, his usual rate for legal services, and a guardian who charged an incapacitated person $300 to deposit the incapacitated person’s $50 Social Security check in person, rather than using direct deposit. See U.S. Govt. Accountability Off., supra n. 7, at 8.}

As discussed previously, the guardianship process in New York is cloaked in a layer
of bureaucracy and lack of systemic data gathering. Walking through these two case studies, an amalgam of several clients’ experiences, helped us parse out issues inherent in the guardianship system that can thwart the stated purpose of Article 81. These case studies illustrate patterns that have become clear to Weinberg Center staff via their emergence in multiple unique iterations over the nine years the shelter has ushered clients through guardianship proceedings. The shelter model, in which a professional team guides and observes clients throughout the entire guardianship process, provides a unique window into the overarching gaps in that process and demonstrates how victims of elder abuse are likely to fall into those gaps.

While the case studies in this article reflect the Weinberg Center model specifically, the shelter model has been replicated throughout the country, with each organization’s unique structure reflecting its particular perspective and state guardianship statute. For example, one elder abuse shelter in Delaware, operated by APS, is an independent living unit within a large facility that is reserved for victims of elder abuse. This infrastructure, coupled with APS mandatory reporting requirements, ensures that there is no abuse of the clients the shelter accepts. Another shelter, operated by Lifespan Rochester’s Elder Abuse Prevention Program, is a consortium of six long-term care facilities that accept shelter clients on rotation, allowing the shelter to broaden its client capacity. The Center for Elder Abuse Prevention at the Jewish Home in Fairfield, Conn., has operated a successful shelter without attorneys on staff, providing the oversight to ensure that clients are free from abuse. Despite each shelter’s design distinctions, the basic model of providing safe haven via a dedicated staff helps insulate shelter clients from flaws in guardianship structures nationwide.

IV. CLOSING THE GAPS: THE SHELTER MODEL AND BEYOND

We have briefly reviewed the guardianship system as orchestrated in New York State and have used the experiences of Weinberg Center clients to reveal and analyze the problems inherent within that system. Professionals who have encountered New York State’s guardianship proceedings in a variety of different contexts are just beginning to share knowledge and insight and come together to put forth best practices. In November 2011, a daylong conference titled “Guardianship in New York: Developing an Agenda for Change” was held at Cardozo Law School. Participants, including court personnel, academics, and practitioners, formed working groups that put forth recommendations on topics such as streamlining of the guardianship process, monitoring of guardians, problems of poor people within the guardianship system, and alternatives to guardianship.

This conference was part of a growing national dialogue around guardianship. In October 2011, the National Guardianship Network convened the Third National Guard-

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76 Information based on presentations at the first Shelter Partners: Regional. National. Global. (SPRiNG) Alliance Symposium, May 2, 2013. The SPRiNG Alliance was founded, in response to the proliferation of the shelter model, to create a network of elder abuse shelters sharing expertise, technical assistance, and standards of excellence.

77 The New York State version of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act went into effect Apr. 21, 2014. It creates a uniform process to recognize out-of-state guardianships as well as transfer New York State guardianship orders to other jurisdictions.
ianship Summit: Standards of Excellence. The conference focused on post-appointment guardian performance and decision making and included a multidisciplinary group of delegates representing medical, legal, mental health, and government organizations. The group produced a series of recommendations intended to form the basis of nationally recognized standards for guardians. These standards cover issues such as treatment of the incapacitated person, appropriate fees, reporting requirements, and obligations of the appointing court, among others.

We will now discuss ways in which several different entities, the Weinberg Center, the Vera Institute of Justice’s Guardianship Project, the GAO, and New York City’s Office of Court Administration (OCA) have attempted to address some or all of these national problems within their own operational purview. None of these programs or approaches promises wholesale relief for all elder abuse victims, and none is put forward here as an exclusive solution. Rather, the aim is to survey different approaches to the issues revealed by the case studies and analysis above and understand the strengths and limitations of the way in which these approaches address issues that the professional community is only beginning to fully understand.

A. Enhanced Screening and Resources for Guardians

Many of the problems that arise once a guardian is appointed seem to be rooted in the appointee’s failure to meet the expectations of a guardian outlined in § 81.20. The juncture at which expectations and reality diverge seems hard to pinpoint. One point of potential failure, and therefore potential intervention, was revealed by an undercover investigation conducted by the GAO of the New York State courts’ screening process. Using two false identities, one representing a person with extremely poor credit and more than $30,000 of debt and one using the Social Security number of a deceased person, the investigators were successfully certified as guardians in New York State. None of the fictitious professional and educational information they presented was questioned. The GAO was further informed that criminal background checks are not conducted on prospective guardians but that the courts rely entirely on self-disclosure.

This phenomenon exists throughout the country, and Sen. Amy Klobuchar (D-Minn.) sponsored the Guardianship Accountability and Senior Protection Act, which died in the Senate Judiciary Committee on July 12, 2012. The bill would have provided funding for states to gather data that would allow them to assess the “role, responsibility and effectiveness of state courts” in administering their guardianship programs. It also would have allocated funding for a pilot program in five states to be coordinated by the U.S. Attorney General that would implement enhanced background checks for prospective guardians. The U.S. Attorney General’s office would then have received funding to evaluate the program and determine best practices in this area.

This type of bill is a logical method of government intervention, because it focuses

82 Id. at § 202.
on a point in the guardianship process in which the courts are most heavily involved (i.e., the actual appointment and certification of the guardian). This approach also targets the most overtly criminal behavior by weeding out blatantly inappropriate potential guardians. As the case studies above reveal, elder abuse victims are likely to fall prey to such individuals. The victims are often isolated and are less likely to have family or friends who might investigate a suspicious guardian. Moreover, a court that does not mandate background checks is less likely to scrutinize a guardian willing to take on a difficult and complicated case with an indigent incapacitated person. However, even if this type of legislation is implemented, it may not be successful in helping elder abuse victims avoid more subtle forms of guardian neglect or carelessness revealed by Weinberg Center case studies.

New York City’s GAN, formed in 2005, works to address some of those service gaps that result from the combination of minimal training for lay guardians and minimal oversight from courts. Funded by the OCA since 2006, GAN provides support to lay guardians, supplementing their court-mandated training and helping them comply with court requirements. GAN assists guardians in finding resources and public benefits that may help his or her IP as well as assists in crafting a plan that will maximize the IP’s independence. In some sense, GAN is the corollary to increased guardian screenings, because its effectiveness depends entirely on the presence of an active guardian who is willing to invest time in educating himself or herself. OCA’s support for this project signifies the growing recognition of the gulf between the minimal legal requirements for guardianship certification and the extensive set of skills and tools necessary to be a truly effective guardian.

B. Institutional Guardianships

Another potential solution to the lack of investigation, training, and monitoring of guardians in New York State is an institutional guardianship model, in which a not-for-profit organization becomes the guardian for incapacitated individuals, who can then benefit from the resources and expertise of that entire organization and all of its employees.

The Vera Institute of Justice’s Guardianship Project, which began in 2005, maintains a multidisciplinary team divided into three branches: financial, legal, and case management. Each of these employees undergoes extensive background checks. In this way, incapacitated persons have different people with a variety of abilities working to make decisions on their behalf. This could alleviate some of the problems experienced by Weinberg Center clients, which are inherent because guardians often lack professional training and expertise.

The institutional structure also removes some of the perverse economic incentives, ensuring that the goals of the project’s employees are in line with the stated goal of the Article 81 statute: maintaining the incapacitated individual in the least restrictive environment. We have seen in our case studies that the status quo, where vigilance and capacity maximization are disincentivized, is particularly deleterious to elder abuse victims. In

84 Guardianship Practice: A Six-Year Perspective, supra n. 7.
particular, agency guardians operating with a profit motive can stand in the way of optimizing an incapacitated person’s well-being. However, a not-for-profit structure is not, in and of itself, a solution to these problems. As the Weinberg Center saw in Jim’s case, his community guardianship agency, also a non-profit organization, failed to take action on simple property management issues on his behalf, seemed willing to spend his money carelessly and without justification, and blatantly disregarded elements of the court’s orders. This lack of due diligence, at best, and outright neglect, at worst, provoked no consequences or follow-up from the court. For an institutional guardian to overcome the profit motive, its operational structure, internal oversight, and organizational culture must be carefully and consciously structured to guard against the incursion of this temptation. Only if such an institutional guardian is formed and operated successfully will there be fewer incapacitated persons at the mercy of agencies that see them as simply more court-mandated pro bono cases to be handled with the minimum effort possible.

The institutional guardianship model, as operated by institutions such as the Vera Institute of Justice, also promises potential long-term savings in at least two ways. This model will work to maintain more incapacitated people in the community, thus driving down the costs of institutionalized care that, particularly in the case of elder abuse victims, are often borne by the state. Moreover, the more careful and consistent monitoring it promises may result in fewer incapacitated people receiving an intensive degree of care as well as a decrease in the overall number of guardianships in the state. This is particularly promising for victims of elder abuse, who, as we have seen, may recover some of their decision-making capacity once they are no longer in a state of crisis and are receiving treatment. Thus far, however, the requisite economic outlay and constant fundraising necessary to operate an institutional guardianship organization has prevented the model from becoming widespread. Additionally, this model only addresses weaknesses in state infrastructure that arise once a guardian has been appointed. It does not approach the question of how guardianship decisions are made initially or how guardianship petition proceedings are conducted, which we have seen can often be problematic for elder abuse victims.

C. Limitations of the Shelter Model

To avoid the potential for missteps at many junctures in the guardianship process, the shelter model is structured to anticipate and correct many of these issues on behalf of the clients it serves. It is important, however, to acknowledge the limitations of the shelter model in effecting systemic change within the guardianship process. The shelter model operates within an extremely limited scope. It is, by definition, a short-term emergency solution for abuse victims whose situation has reached a crisis level. While shelters can effectively assist clients in navigating the guardianship process and its aftermath, this work only extends until a client’s discharge. This sharply limits the impact the model can have on weaknesses within the guardianship system.

In addition, there are only a handful of elder abuse shelters currently operational throughout the country. Those shelters generally accept cases that meet their individualized criteria, which are dictated by each organization’s mandate, facilities, and funding, among other things. The number of elder abuse victims served by any particular elder abuse shelter compared with the total number of abuse victims in that shelter’s catchment
area is relatively low nationwide. This is another facet of the barrier to shelters serving as a force for systemic change in areas such as guardianship. Therefore, while a shelter client’s experience with guardianship proceedings is helpful in illustrating systemic problems, a shelter’s scope of services is not broad enough to solve those problems in a holistic way.

Recognizing the profound limitations of the shelter model regarding effecting change beyond the limited population it serves, the Weinberg Center has prioritized outreach and advocacy projects that promote education about the tremendous potential for abuse to remain unidentified and even perpetuated within the guardianship arena. For example, the Weinberg Center has partnered with the Vera Institute of Justice’s Guardianship Project to identify and address cases of elder abuse within a guardianship context through the creation of a guide for legal practitioners.

We will address the lessons gleaned from our case studies within the context of the shelter model’s structural limitations. The case studies exemplify the realities of legal capacity as a delicate sliding scale, which the guardianship system does not fully take into account. In so many Weinberg Center cases, physical and psychological deterioration presented as cognitive incapacity. After months of physical, verbal, financial, and emotional abuse, these individuals become trauma victims and present as such. In Hilda’s case, even a medical professional who knew her well was not able to accurately assess the level of capacity she was actually able to reach. This is not due to an oversight by the doctor but to the reality that Hilda may have been functioning at a very low level in the days immediately following her removal from Sam’s home. Immediate provisions for Hilda’s care were necessary, however, and in those initial days, an environment suited for low-functioning individuals fit her needs.

Had Hilda not been receiving treatment via the shelter model, the urgent need to make critical decisions on her behalf might have required immediately filing for guardianship based on the family doctor’s PRI. This is especially true given the fact that, had she not been placed in a facility with a variety of settings and trained professionals, and had she not been monitored by a dedicated team that was intimately familiar with her situation, she may not have received such targeted care and her condition may not have improved as quickly. There are other safeguards to prevent the inappropriate appointment of a guardian (e.g., court-appointed evaluator, court-appointed counsel, hearing at which the presence of the incapacitated person is strongly preferred). However, once there is initial documentation indicating a lack of capacity, it becomes an increasingly uphill battle to reverse the process, especially if urgent decisions need to be made on the incapacitated person’s behalf.

Hilda might very well have been appointed a guardian, or at least, a court might have spent valuable time and resources determining whether she should have one. Had she been appointed a guardian, the broad-ranging and effectively permanent powers granted to a guardian with no real incentive to thoughtfully re-evaluate Hilda’s condition may have proved difficult to undo. However, with some of the urgency removed, Hilda was, for the first time in years, in a safe environment geared toward regaining her capacity. This waiting period allowed the Weinberg Center staff to distinguish her true medical condition from the immediate fallout of a crisis.
In Jim’s case, those months of calm, safety, and regular therapy allowed the Weinberg Center team to help him maximize his capacity so that he could participate in decisions made on his behalf to the fullest extent possible, even if the boilerplate language in his guardianship order did not require that. Clients in the shelter model are able to retain the legal privileges they can, in fact, still exercise. In this way, the shelter model begins to correct problems in the guardianship process before that process has formally begun.

D. Shelter Model Provides Time and Resources for Crucial Investigation

Once a court determines that a guardian is necessary, another common disadvantage for elder abuse victims is that isolation creates a vacuum in their support network. As we saw in Jim’s case, he actually had a family member who wanted to serve as his guardian but had been driven away by Jim’s abuser. If APS had proceeded with the guardianship on its own, it may have asked that an agency or guardian with no connection to Jim be appointed his guardian.

Appointing a paid guardian for an individual with substantial assets is, as we have discussed previously, a scenario that can easily be abused in various ways. In the shelter model, however, one dedicated team oversees all aspects of a case and therefore can use the wait time inherent in all judicial proceedings to investigate the case from various angles and locate an important resource for the incapacitated person who otherwise might not have been found. In cases such as Jim’s, the slow movement of the overburdened justice system, which is part of the same problem that causes a lack of oversight and training for guardians, can actually be used to an incapacitated person’s advantage. When the team working on the guardianship is the same team that will oversee the incapacitated person’s daily care once a guardian is appointed, its members are motivated to locate resources that will be easiest to work with and most suitable for the incapacitated individual.

E. The Shelter Model Helps Streamline the Guardianship Process

Beyond avoidance of the overt abuse suffered by some incapacitated persons at the hands of court-appointed guardians, the shelter model is also structured to reveal more subversive forms of abuse perpetrated by guardians and other professionals. In Jim’s case, for reasons that seemed unsubstantiated, his court-appointed counsel petitioned to become his co-guardian, a request the court ultimately denied. As discussed above, the role of an AIP’s court-appointed counsel in Article 81 proceedings is to advocate for the AIP within the context of the guardianship proceeding. Once a legal guardian is appointed, he or she effectively assumes the role of advocate for the IP, thus obviating the need for the IP to retain his or her own counsel. In Jim’s case, however, his attorney continued to make court appearances and raise frivolous issues once Debra had been appointed guardian, actions that only served to further compound the case’s complexity. The large berth of discretion granted to the AIP’s counsel by Article 81, which provides no structure for determining when his or her role is no longer needed, enabled this state of affairs. Had Jim’s counsel been provided more direction by the statute, this wrinkle in the proceedings might not have developed.

The fact that a single team was coordinating all aspects of Jim’s care made it obvious that the lawyer’s services were no longer needed. However, if the organization
of Jim’s care had been more disjointed, especially with the agency guardian originally appointed, which was only sporadically monitoring Jim’s care, the lawyer might have become another party drawing a check from Jim’s estate indefinitely. Even if there are no overtly evil actors, the economic incentives inherent in the guardianship proceeding make it extremely difficult to preserve the incapacitated person’s assets. With the Weinberg Center acting as an information hub, and not being poised to receive a payout itself, that task becomes substantially easier.

V. Conclusion

Major flaws and weaknesses are inherent in the New York State guardianship system as currently administrated. Furthermore, elder abuse victims are particularly vulnerable to those flaws, and the stated goals of the guardianship process are particularly likely to be thwarted as applied to this population. The elder abuse shelter model’s characteristics are especially conducive to illuminating flaws in every step of the guardianship process from before a guardianship petition is filed until after a guardianship order has been issued.

Several initiatives have been designed to address various pitfalls and problems in the New York State guardianship process. While these issues are complex and multi-faceted, and no one direction represents an all-encompassing solution, the combined institutional knowledge of these initiatives has made it increasingly possible to thoroughly diagnose these problems.
IN FEAR OF SUITS:†
THE ATTORNEY’S ROLE IN FINANCIAL EXPLOITATION

By Professor Roberta K. Flowers and H. Amos Goodall Jr., CELA

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Financial exploitation takes many forms and occurs in many places. It is hard to imagine a public figure, a multimillionaire doyenne of Manhattan’s high society with untold numbers of influential and socially active friends, being an exploitation victim, but the Brooke Astor case demonstrates that no person is safe. A bulwark in the defense should be the elder’s attorney, however, as the Astor case demonstrates, sometimes intentionally and even unintentionally the elder’s attorney may play a part in the exploitation.

Francis Morrissey, a New York attorney, was convicted of one count of a scheme to

† Toward the end of her life, Brooke Astor feared “men in suits.” Her fear of suits was so extreme that during the guardianship proceedings, the judge instructed the court evaluator (Sam Liebowitz) to make sure he did not wear a suit when he visited Mrs. Astor. Meryl Gordon, Mrs. Astor Regrets: The Hidden Betrayals of a Family Beyond Reproach 207 (Houghton Mifflin Harcourt 2008).

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defraud, one count of forgery, and three conspiracy counts for his role in assisting Anthony Marshall in financially exploiting his mother, the wealthy New York philanthropist Brooke Astor. That conviction was affirmed on appeal, and Morrissey was subsequently disbarred.

Morrissey’s part in this disgraceful exhibition of greed is undisputed, but to dismiss this as a simple case of extreme attorney misconduct — forgery and theft — is to miss the lessons that can be learned about the unintended consequences arising from deviations from ethical rules. The more important instruction comes from the actions and inactions of the two other attorneys, who played vital parts in the creation and execution of the documents that assisted Morrissey and Marshall in their crimes. This article will discuss how the actions of these other two attorneys contributed to the financial exploitation and how their adherence to the ABA Model Rules of Professional Conduct and the NAELA Aspirational Standards for the Practice of Elder Law might have prevented the occurrence of these criminal acts. Attorneys can learn much from these attorneys’ mistakes about how to protect future Mrs. Astors from victimization. “In the end, however, a trustworthy lawyer may be the only reliable safeguard.”

Financial exploitation of the elderly, people 65 or older, is a serious problem in the United States. Losses average more than $2.9 billion nationally each year; one out of five elderly Americans — 7.3 million people — have been financially victimized.


4 Of course, there is no guarantee that exploitation will not occur even when attorneys seek to adhere to the rules. As Clifford A. Meirowitz, a trust and estate lawyer in Manhattan notes, “Even lawyers who are ethical and do things right, they make mistakes sometimes.” John Eligon, In Astor Trial, A Lesson for Estate Lawyers, N.Y. Times (Oct. 26, 2009).

5 Id.


Astor was not alone in being exploited by a relative. Although the numbers vary, according to one study “[f]inancial exploitation by a family member was reported by 5 percent of elders.” These losses are not likely to abate anytime soon. Every day, almost 10,000 people turn 65 in the United States; therefore, by the year 2030, 18 percent of the American population will be elderly, increasing dramatically the number of potential victims of elder financial exploitation. Moreover, with people in every generation living longer, the additional years of life increase an elderly person’s vulnerability to abuse. Finally, the “current unemployment rate and severe market losses will no doubt tempt others to try and drain resources from aging parents and family members through abuses of powers of attorney and positions of confidence or otherwise.” America is “in the midst of the largest intergenerational transfer of wealth in history as the ‘Greatest Generation’ transfers a lifetime of savings to their children.” Whether that transfer is through legitimate means or financial exploitation is yet to be seen.

The role that attorneys will play in this potential tsunami of exploitation is problematic. Will attorneys be the protectors of the thousands of vulnerable adults or will they assist, knowingly or unknowingly, in the victimization of the coming generation of elderly?

Brooke Astor’s final years illustrate one possibility. While Mrs. Astor was untypical given her rare wealth, her story can help us understand how financial exploitation can happen and how an attorney can, intentionally or unintentionally, play a role in it. Section I of this article discusses the participants in the Brooke Astor case. Section II discusses the roles of two attorneys in the creation of the documents that enabled Marshall and Morrissey to effect their exploitation and how adherence to the ABA Model Rules of Pro-

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10 Id.

11 Id.


14 Joseph A. Rosenberg, Regrettably Unfair: Brooke Astor and the Other Elderly in New York, 30 Pace L. Rev. 1004 (2010). Mrs. Astor, aside from being unusually wealthy, is quite typical of victims of financial exploitation: female (two-thirds of elder abuse victims are female), over 80 years of age (40 percent of the victims are over 80 years of age), white (three-fourths of the victims are Caucasian), and victimized by an adult child (60 percent of the perpetrators of financial exploitation are adult children of the victim). Caroline K. Craig & Thomas R. Craig, State Mandates for Reporting Financial Abuse of the Elderly, 78 Pract. Tax Strategies 340, 341 (2007); Nat’l Ctr. on Elder Abuse, The National Elder Abuse Incident Study 1–9 (Sept. 1998).
fessional Conduct and NAELA Aspirational Standards for the Practice of Elder Law may protect elderly clients from financial exploitation.

I. THE CAST OF CHARACTERS

Four people, besides Mrs. Astor herself, were central to her financial exploitation:15 Anthony Marshall, Francis X. Morrissey Jr., Henry “Terry” Christensen III, and G. Warren Whitaker.

A. Brooke Russell Astor

Roberta Brooke Russell was born on March 30, 1902, to a family that “had influence but was without money.”16 Brooke, therefore, was married off at the age of 17, the first of three marriages.17 One writer said of these marriages, with more than a touch of drama, that the first marriage was her greatest mistake, the second was to her greatest love — Charles H. Marshall, and the third, to the millionaire Vincent Astor, was her greatest opportunity.18 She was married to Astor for five years and then spent the rest of her life, some five decades, as Mrs. Astor “the White Glove Philanthropist.”19

Mrs. Astor took the reins of the Vincent Astor Foundation shortly after her husband’s death.20 The Astor family had not been known for philanthropy,21 but that changed dramatically when Mrs. Astor took over the foundation. As the story goes, the foundation director, Allan Betts, who had run the foundation for decades, was quite surprised when Mrs. Astor took her place behind the desk of the foundation. He assumed he would continue to run the foundation as he had when Vincent Astor was alive.22 Mrs. Astor began by making small grants to New York charities, primarily because the money had come from New York real estate and Mrs. Astor believed that the money should be returned to New York.

15 The story could include many others, from the rich and famous (Philip Marshall, Mrs. Astor’s grandson; Henry Kissinger; Oscar and Annette de la Renta; Nancy Regan; and Barbara Walters) to the quiet and dutiful (Marciano Amaral, Mrs. Astor’s chauffer; Pearl Noble, Mrs. Astor’s nurse’s aide; Alicia Johnson, Mrs. Astor’s housekeeper; and Chris Ely, Mrs. Astor’s assistant). See Gordon, supra n. 1. This article includes only the actors directly involved in financial exploitation.
16 Gordon, supra n. 1, at 52.
17 Id. at 51 (“But Brooke’s first husband, John Dryden Kuser, cast a long and troubled shadow that haunted her until her dying day.”).
18 Fishkind, supra n. 2, at 34–35.
19 Gordon, supra n. 1, at 78.
20 Id. Mrs. Astor’s inheritance from Vincent Astor was actually the source of controversy, because Vincent’s half-brother, John Jacob Astor V, sued to set aside the Vincent Astor will naming Mrs. Astor the beneficiary. John (known as Jack) was born after his and Vincent’s father was killed in the sinking of the Titanic. “Jack was never recognized as a real Astor.” Id. at 35. The suit was a strange one because none of Vincent’s wills named Jack as a beneficiary. The suit was settled for a mere $250,000, but one must wonder if it is the reason Mrs. Astor drafted some 32 wills in her lifetime. Id. See also Lori A. Stiegel, The Brooke Astor Case: “An Appalling Set of Circumstances” (interview with expert witness Alex Forger) 2, ABA Comm’n on L. & Aging (2011), http://www.americanbar.org/content/dam/aba/administrative/law_aging/2011/2011_aging_mar18_ea_brkastr_mono.authcheckdam.pdf (accessed July 9, 2014).
21 Gordon, supra n. 1, at 79.
22 Id.
York. Over her lifetime, she would give away about $200 million of the Astor money but was still worth $100 million at her death at age 105.

At the age of 98, in 2000, Mrs. Astor was diagnosed with mild dementia/Alzheimer’s type. Mrs. Astor’s son accompanied her to the doctor’s appointment. When Mrs. Astor died on August 13, 2007, Annette de la Renta was guardian of her person and JPMorgan Chase was guardian of her property. The guardianship proceeding was initiated by her grandson, Philip Marshall, one of Anthony Marshall’s two sons. In his petition, Philip alleged that Anthony Marshall refused to “spend money on her care” and that she was “forced to sleep in the TV room in torn nightgowns on a couch that smells, probably from dog urine.” She was never aware of the litigation in which she was the central character.

B. Anthony Marshall

Anthony Marshall was Mrs. Astor’s only child, born to Mrs. Astor and her first husband, J. Dryden Kuser on May 30, 1924. Marshall later changed his name in honor of Mrs. Astor’s second husband, Charles H. Marshall. Marshall and his mother were not close; some suggest this was so because he was the son of the abusive Kuser. Mrs. Astor always seemed to prefer the company of her two dogs. “Through all her marriages, Anthony was left to grow up on his own.” During Mrs. Astor’s marriage to Vincent Astor, she did not appear to have any need for a relationship with her son.

Anthony Marshall had a variety of positions and interests throughout his life. He served in the Marines during World War II and fought at Iwo Jima. He was ambassador to Madagascar and Trinidad and Tobago during the Nixon administration, after which Mrs. Astor hired him to manage her financial portfolio. Marshall would do so from 1979

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23 Id. Over the next several years, Mrs. Astor would give money, for example, to convert a department store into a library, to add parks to low-income housing, and to the Legal Aid Society.
24 Fishkind, supra n. 2, at 40.
25 Id. at 41.
27 Gordon, supra n. 1, at 19.
28 The prosecutor in the Marshall case used a chart to compare the things that Mr. Marshall bought for himself against what he refused to purchase for his mother. A stark example was when he refused to buy a $2,000 safety gate to be placed at the top of the stairs in Mrs. Astor’s apartment but bought a $925,000 yacht for himself. John Eligon, Prosecutor Says Astor’s Son Is Depraved, N.Y. Times (Sept. 17, 2009).
29 Fishkind, supra n. 2, at 42–43.
30 Id. at 34.
31 Id.
32 Stiegel, supra n. 20, at 5.
33 Gordon, supra n. 1, at 51.
34 Fishman, supra n. 26, at 3.
35 Id.
36 Stiegel, supra n. 20, at 5.
37 Gordon, supra n. 1, at 21, based in part, as is often the case, on generous family donations. Mrs. Astor is reported to have noted, “I supported Nixon not because I believed in him but because Mr. Marshall got appointments.” Id.
38 Id. See also Stiegel, supra n. 20, at 5.
to 2006, when his son, Philip, filed the guardianship petition.\textsuperscript{39} Marshall would claim that he increased his mother’s assets from $19 million to $82 million.\textsuperscript{40} For this service, he earned $450,000 a year.\textsuperscript{41} He was also interested in the theater\textsuperscript{42} and wrote seven books.\textsuperscript{43} “Important moments in life often arrive without a change in background music to signify a plot twist.”\textsuperscript{44} If that is true in Anthony Marshall’s life, the beginning of his end can be traced back to a simple “arrangement of place cards.”\textsuperscript{45} In July 1989, Marshall sat next to Charlene Gilbert, the wife of Mrs. Astor’s pastor, at a luncheon given by Mrs. Astor at her home in Maine. Charlene and Marshall carried on an affair while both were married to others, and Ms. Gilbert left her husband and children to marry Marshall,\textsuperscript{46} a fact Mrs. Astor resented for the rest of her life.\textsuperscript{47} The prosecutor in Marshall’s criminal case theorized that Marshall’s concern for Charlene, who was much younger than Marshall, was the reason he felt the need to secure more of his mother’s wealth and led to his financial exploitation of her.\textsuperscript{48} Much of the exploitation for which Marshall was convicted could be tied to his determination to ensure that Charlene would have access to Mrs. Astor’s money if he predeceased her.\textsuperscript{49}

\textbf{C. Francis X. Morrissey Jr.}

Francis Morrissey is described in very different terms by different people. To some he was a “thoughtful and compassionate” lawyer who “treated elderly people and disabled people with professionalism and insight.”\textsuperscript{50} Others believed that he preyed on the weak and frail, profiting from end-of-life estate planning infected with undue influence and fraud.\textsuperscript{51} Although Morrissey referred to himself as a trust and estate lawyer, others considered him no more than an escort for wealthy widows\textsuperscript{52} and giver of “strategic
advice.” 53 One attorney referred to him as a “walker,” someone who befriends elderly people, mostly women, ingratiating himself with them in order to be named a beneficiary in their wills.54

Born in Boston, Morrissey was a son of a municipal court judge who was nominated to a federal judgeship because of his close relationship with Joseph Kennedy.55 He obtained his law degree from the University of California; he was licensed for a time in both California and New York but had trouble with both bars.56 He was suspended from the practice of law for two years by the State of New York in 199557 for paying himself over $900,000 from a client’s escrow account after the client refused to pay him.58 He resigned from the Bar of California in 1996 while disciplinary proceedings were pending.59

Morrissey, when providing estate planning for individuals in the last days of their lives, was involved in an unusual number of troubling incidents.60 He had “developed a particular approach with elderly clients: wining and dining them if they were able, arranging nurses and caregivers if they were not, working on their estate planning, but rarely sending a bill. Appreciative clients often left him substantial bequests in their wills, frequently making major changes in his favor right before they died.”61 Morrissey was accused in several cases of taking advantage of people with diminished capacity and being named as a beneficiary in their wills. Over the years he received “a Park Avenue apartment, a midtown Manhattan apartment, expensive art and hundreds of thousands of dollars in cash.”62 In all of these cases, Morrissey settled under confidential agreements in which he admitted no wrongdoing.63 Morrissey rarely created the documents himself but rather would contact other lawyers on the elder’s behalf and direct the scrivener as to the elder’s desires. Morrissey claimed he had others draft the documents because of his dyslexia.64

Morrissey first met Mrs. Astor in the early 1970s, but they did not become close until

53 Stiegel, supra n. 20, at 5.
54 Kavaleski & Moynihan, supra n. 51 (quoting J. Hayes Kavanaugh, a lawyer who represented several clients in a case similar to the cases brought by beneficiaries against Mr. Morrissey).
55 Stiegel, supra n. 20, at 27. Most agreed that Mr. Morrissey Sr. was not qualified and that his nomination was put forward by the president in deference to his father.
56 Id.
57 Id.
58 Id.
59 Id. With Morrissey’s resignation, the bar would have no jurisdiction to continue its disciplinary proceeding. The nature of those charges remains confidential.
60 Kavaleski & Moynihan, supra n. 51. (“It would seem to be the darkest moment in the career of a lawyer who over the years has gained a reputation for ingratiating himself with older people and finding his way into their wills or trusts mostly as a beneficiary, but also as an executor or a trustee.”) In one such case, Sam Schurr, an elderly economist, signed a new will on March 3, 2002, after suffering a massive stroke and just one day before his death. Under that will, Mr. Morrissey received a valuable Diego Rivera drawing and a $680,000 Manhattan apartment. Gordon, supra n. 1, at 140. The signature on the will was “markedly different” from the signature on the will that was signed one year earlier and drafted by his attorney of 20 years. Id.
61 Gordon, supra n. 1, at 139.
62 Kavaleski & Moynihan, supra n. 51.
63 Id.
64 Id.
immediately before the termination of Mrs. Astor’s long-term lawyer, Terry Christensen. Morrissey became acquainted with Charlene Marshall in Maine before she divorced the pastor and married Anthony Marshall.65 During the early 2000s he ingratiated himself with Mrs. Astor with flowers, books, and visits; he began to escort her to social events in 2004.66 Mrs. Astor’s feelings toward Morrissey were unclear. Shortly before a trip to the theater with Morrissey for the opening of one of Marshall’s plays, Mrs. Astor told her social secretary, “I don’t like that man. He is not my friend. He is Marshall’s friend.”67 Consistent with that view, Morrissey treated his social efforts as work, billing Mrs. Astor for dinner conversations.68 Morrissey would have benefited from the changes to Mrs. Astor’s will. Morrissey agreed to split equally with G. Warren Whitaker, another attorney, the estimated $3.6 million legal fee for representing Mrs. Astor’s estate upon her death, and he would have shared in the $4.8 million commission as the named executor of her will.

D. Henry “Terry” Christensen III

Terry Christensen’s illustrious career began with a bachelor’s degree in literature from Yale and a law degree from Harvard.69 Christensen worked for Sullivan & Cromwell until 2007 when he moved to McDermott Will & Emery.

Christensen is a specialist in international estate planning.70 He is a past president of the International Academy of Trust and Estate Counsel71 and represented notable clients, including the Gallo family, Lloyds of London, and Maurice R. Greenberg, the former AIG chairman.72 He is considered by some to be “one of the fine intellects” in international estate planning.73

Sullivan & Cromwell represented Mrs. Astor beginning in 1953.74 Christensen took over representation of Mrs. Astor in 1991.75 He socialized with her from time to time without charging for his time. Their relationship ended in January 2004, when Anthony Marshall, as Mrs. Astor’s representative, summarily dismissed him, purportedly at her request. He was replaced by Morrissey and Whitaker.

E. G. Warren Whitaker

G. Warren Whitaker graduated from Columbia Law School and was a partner at Day, Berry & Howard at the time of the Astor case. Whitaker is a respected expert in es-

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65 Id.
66 Id.
67 Gordon, supra n. 1, at 145.
68 Id.
69 John Eligon, For Astor’s Former Lawyer, Role in Trial May Come with Damaging Effects, N.Y. Times (June 8, 2009).
70 Id.
71 Id.
72 Id. Mr. Christensen left Sullivan & Cromwell in 2007 so that he could continue to represent Greenberg, when a conflict of interest arose between his law firm and his continuing representation of Greenberg. Id.
73 Id.
74 Stiegel, supra n. 20, at 5; see also Eligon, supra n. 69.
75 Stiegel, supra n. 20, at 5.
tate planning for the wealthy. He is a fellow of the American College of Trust and Estate Counsel and a former chair of the U.K.-based Society of Trust and Estate Practitioners. He moved to the New York office of Day Pitney LLP shortly after the prosecution of Marshall and Morrissey.

Whitaker was originally contacted by Morrissey to work on the Astor estate. Although he introduced himself to Mrs. Astor as her “independent counsel,” he never signed a retainer agreement respecting his representation of her. He drafted both the second and third codicils, which were the subject of the financial exploitation case. He testified in that case against Marshall and Morrissey as a prosecution witness under a grant of immunity.

II. THE WORK OF THE MEN IN SUITS

The prosecution case regarding the financial exploitation of Mrs. Astor revolved around three codicils that were presented to her for her signature between December 18, 2003, and March 3, 2004, when she was 101 years old. These codicils allegedly reflected Mrs. Astor’s desire to modify her 2002 will. Her 2002 will “seemed to be well thought out and perfectly reasonable” and was consistent with her previous estate planning. Alex Folger, who served as the prosecution’s consultant and expert described the estate plan as follows:

Mrs. Astor’s estate was valued at $180 million (hereafter abbreviated as M). It included a marital trust of $60M created by the will of her late husband, Vincent Astor. His will provided that the income from the marital trust was payable to Mrs. Astor and on her death the principal was to be distributed as she determined by exercise of a power of appointment. Throughout the years since Vincent Astor’s death in 1959, Mrs. Astor’s estate plan had appointed the principal to charity. The remainder of her estate ($120M) was to be distributed as follows: Real estate of $40M, bequeathed to Mr. Marshall (who would be obliged to pay about $20M in estate taxes on that property).

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77 Stiegel, supra n. 20, at 6.
78 Id. at 9.
79 Id.
81 It is important to note that there were actually 32 other wills and seven codicils, including the three codicils that were the focus in the Marshall/Morrissey prosecution. Stiegel, supra n. 20, at 2. The defense attorney in the prosecution claimed that Mrs. Astor “changed wills like people change socks.” Gordon, supra n. 1, at 280.
82 Fishkind, supra n. 2, at 44 (including excerpts from the 2002 will at 44–61).
83 Alex Folger is an 86-year-old New York lawyer who practiced trust and estate law for 42 years. He testified for three days in the prosecution of Marshall and Morrissey. One of the prosecuting attorneys described Mr. Forger as “a lion of the bar” and praised him as “incredibly generous with his time.” Stiegel, supra n. 20.
Tangible property of about $5M, of which $4M was bequeathed to Mr. Marshall and the balance to others, including his wife Charlene Marshall, who was to receive one or two pieces of jewelry and two coats. Approximately $75M of liquid assets providing a cash legacy of $5M to Mr. Marshall, close to $3M in other bequests, and a residue of roughly $67M. Of that $67M residue, about $37M would be paid in taxes (in addition to the $20M mentioned above), leaving $30M in a charitable remainder unitrust that provided that Mr. Marshall would receive 7 percent per year until his death and then the principal would be given to charities that Mr. Marshall would select. All bequests to Mr. Marshall were made on condition that he survived Mrs. Astor. Her will named Mr. Marshall and her lawyer, Terry Christensen, as executors and trustees. Mr. Marshall could not name a successor to himself.84

The provisions that limited Marshall from naming a successor and that conditioned all bequests on Marshall surviving Mrs. Astor were of great concern for Marshall because he was in ill health and much older than his wife, Charlene.85 Christensen met with Marshall 37 times in 2004 before the first codicil was signed but met with Mrs. Astor only seven times.86 Marshall also wrote Christensen about the ideas he had about protecting Charlene.87 In one memorandum, he wrote “I am concerned about my ability to provide sufficient assistance to Charlene upon my death”88 (emphasis in original).

The first codicil was presented to Mrs. Astor on December 18, 2003. Christensen labeled this the “first and final codicil,” unusual language since one cannot know that a document is final until the maker has died.89 Christensen never explained what he meant, but the odd title suggests he meant to signal to Marshall that he was not going to be involved in another codicil.90 He may also have been signaling that he did not believe that Mrs. Astor would have the mental capacity to make any additional changes to her estate.91 Christensen testified, “The changes specifically relating to Mr. Marshall were directly the result of his incessant pressures on his mother for more money.”92

This codicil was the first of three that would “hack away at the charities’ interests and empower one Marshall to preside over the Astor fortune.”93 Of note, the codicil created the Anthony Marshall Fund; the “core of the fund”94 would come from the Vincent

84 Stiegel, supra n. 20, at 6.
85 Eligon, supra n. 47.
86 Eligon, supra n. 69. Mr. Christensen defended this as being at Mrs. Astor’s request. Id.
87 Eligon, supra n. 47.
88 Id.
89 Mr. Christensen admitted he had never used the term “final” in any other codicils. Stiegel, supra n. 20, at 7.
90 Id.
91 Fishkind, supra n. 2, at 64.
92 John Eligon, Astor Understood Changes to Will, Ex-Lawyer Says, N.Y. Times (June 4, 2009).
93 Fishkind, supra n. 2, at 61.
94 Id. at 63 (quoting from the codicil).
Astor Foundation and funds that had always been kept separate from Marshall’s inheritance. The Anthony Marshall Fund would benefit from substantial reductions in the gifts to charities that Mrs. Astor had supported throughout her life and in all previous wills. These charities included the New York Public Library, the Metropolitan Museum of Art, the Central Park Conservatory, the New York Zoological Society, and the Marine Corps University Foundation.95

Less than one month after the “first and final codicil” was signed, Marshall tried to get Christensen to yield to Marshall “sole investment authority over the residuary trust of which he was to receive 7 percent annually.”96 When Christensen refused to give up his obligations,97 Marshall began to orchestrate the termination of Christensen as Mrs. Astor’s attorney and to create a second codicil. Marshall outlined his intention in a memorandum dated January 8, 2004, “suggesting that he be made sole executor and be given the residuary outright as he did not want to be restricted by a trust.”98 The second codicil, wrote one observer,

[C]ut out the charitable trust entirely and left the Astor wealth, five generations in the making to Anthony Marshall. Call it chutzpah, call it unmitigated gall, but don’t call it Brooke Astor’s intentions.99

The second codicil eliminated Christensen as the co-executor and co-trustee. After the codicil was signed, Marshall, purportedly on Mrs. Astor’s behalf, wrote to Christensen to terminate his services.100 When he learned of the signing of the second codicil, Christensen said he did not believe that Mrs. Astor had the capacity to execute a testamentary document.101

Under the second codicil, Mrs. Astor gave the residuary estate to Marshall or, if he died, his estate. The prosecution considered this provision an “extraordinary provision, one rarely if ever seen” because it allowed Marshall to inherit from the grave.102 It was inconsistent with Mrs. Astor’s previous estate planning and, unusually, did not name a successor executor. The latter gap allowed Marshall to name Charlene Marshall and Morrissey as co-executors in a separate instrument a few days later, executed without Mrs. Astor’s knowledge or consent. In the drafting meetings, Marshall indicated his intent to name these two as co-executors.103 The prosecution argued that this was intended to keep

95 Id. at 63–64.
96 Steigel, supra n. 20, at 7.
97 Although Christensen did agree to let Mr. Marshall take the lead. Id.
98 Steigel, supra n. 20, at 8.
99 Fishkind, supra n. 2, at 66; Steigel, supra n. 20, at 10 (“prosecution characterized the second codicil as effecting a drastic change in Mrs. Astor’s estate plan, not at all consistent with the pattern over the years”).
100 Eligon, supra n. 69.
101 Steigel, supra n. 20, at 9.
102 Id. at 8. This would appear to be something of an overstatement; giving testamentary powers to an only child is hardly unheard of, which is not to say that it was appropriate or Mrs. Astor’s intent in this case.
103 Id. at 8.
Charlene’s name off any documents that Mrs. Astor would sign since she had made it clear over the years that she did not intend to leave anything to Charlene except a few personal items and so would unlikely agree to give Charlene authority over her estate.

Mrs. Astor was, according to the household staff, dragged by Marshall and Morrissey into the library in her home for the signing; the staff also said she did not recognize them. “I will not be dragged into business, do you hear me,” she shouted, banging her cane on the floor. After signing the second codicil, Mrs. Astor asked her staff, “Who were those men?” and “What did I just do?” The staff said that Mrs. Astor seemed to be “confused and terrified,” and one staff member recorded in the household log that Mrs. Astor feared that “four men are in the house who know everything about her and she doesn’t know them” and that she thought she was a “damn fool.” In the following days, Mrs. Astor demanded that her night nurse check under the bed to see if the “bad men” in dark suits had returned.

The third codicil, signed on March 3, 2004, appeared to “increas[e] Marshall’s inheritance while further decreasing the amount charity would receive, by shifting the financial burden of selling and maintaining the properties bequeathed to Marshall to administrative expenses of the estate.” This change could have saved Marshall costs of $5 million, ultimately reducing the amount going to charity. It also would have increased the amount owed to the executors (Marshall, Charlene Marshall, and Morrissey), because the proceeds from the property sold would now be subject to executors’ commissions. After drafting this codicil, Whitaker did not oversee its execution. The jury found Morrissey guilty of forging Mrs. Astor’s signature.

Others have suggested a more sinister reason for the third codicil. One author suggests that it was intended to burden anyone attempting to contest the will or codicils. Because each codicil would have to be litigated from the last (that is, the third codicil to the first codicil), a contesting party would more likely “run out of steam” before he or she ran out of questionable codicils. He posits, “It may be that Marshall knew that codicil #1 and #2 would be challenged once his mother died, so to protect the prospective inheritance of Astor riches, if another codicil was signed, any charity that contested the will and codicils would have to first sue and set aside codicil #3; in effect, he would build a moat around the will and the first codicils.”

These three codicils, drafted by superbly educated, well-respected, and even renowned “establishment” lawyers, were used to exploit Brooke Astor out of about $60 million. So what could have been done to prevent this financial exploitation? The easy
answer is that Marshall and Morrissey could have refrained from exploiting her.\textsuperscript{114} That answer may be accurate, but it is not complete; a more complete answer contains lessons for other lawyers to learn.

III. \textsc{Adherence to ABA Model Rules of Professional Conduct Can Protect Elderly Clients}

The ABA Model Rules of Professional Conduct serve as a model only. They cannot be used as the basis for disciplinary action unless they are adopted by the individual states.\textsuperscript{115} All states except California have adopted the rules in one form or another.\textsuperscript{116} Analyzing ethical issues under these rules provides a useful framework for evaluating ethical issues based on an attorney’s own state ethics rules.

Ethics rules have several purposes. As members of a self-governing profession, lawyers rely on court-created rules to govern themselves.\textsuperscript{117} The rules serve as the basis for disciplining individual attorneys. At the heart of all ethics rules is the protection of the public and clients.\textsuperscript{118} While some scholars lament that the rules do not go far enough in protecting clients,\textsuperscript{119} others argue that the rules go too far and negatively impact client autonomy.\textsuperscript{120} These judgments aside, the commentators agree that the basic premise of the

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\item \textsuperscript{114} Rosenberg, \textit{supra} n. 14, at 1059 (“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”).
\item \textsuperscript{115} See Model R. Prof’l Conduct, Scope 20 (ABA 2012). (“Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. …”) Although the rules cannot be the basis of a claim, they are used and cited by the courts routinely as evidence of the appropriate nature of the lawyer’s conduct. See e.g. Evelyn B. Thomason, \textit{How Estate Planners Can Cope with the Increasing Risk of Malpractice Claims}, 12 Est. Plan. 130 (May 1985); Roberta K. Flowers & Rebecca C. Morgan, \textit{Ethics in the Practice of Elder Law} (ABA 2013).
\item \textsuperscript{117} See Model R. Prof’l Conduct, Preamble 10–12.
\item \textsuperscript{118} Id. at § 9.
\item \textsuperscript{120} See Camille A. Gear, \textit{The Ideology of Domination: Barriers to Client Autonomy in Legal Ethics Scholar-
rules is that attorneys’ conduct must be regulated to protect clients.

Nowhere is protection more needed than in the area of Elder Law. Elder Law is different. 121

Ethical dilemmas that arise in representing older people and their families are difficult for attorneys to resolve because they concern fundamental issues involving property, health care, family relationships, and mortality. Lawyers must apply norms of professional conduct within a murky landscape of human frailty and emotional turmoil in an atmosphere permeated with the dread of mental incapacity, the possible need for long-term care, and the inevitability of death. When a client’s legal problems are deeply intertwined with a family’s interpersonal, emotional, economic and social dimensions, it is common for family members to be involved. 122 (footnotes omitted)

When family members are involved in the representation, the practical operation of the representation fights against the traditional view that the attorney represents a single client and disregards the rest of the world. Self-serving as well as well-meaning family members may be the very people from whom the client needs to be protected. One author noted:

As staff attorneys with Legal Services for the Elderly, the vast majority of elder abuse cases that we deal with involve financial exploitation with close relatives defrauding, diverting, or baldly stealing money from their mothers, fathers, aunts and uncles, or grandparents. The methods of removing money from the elder vary from subtle to brutally simple — and sometimes quite brutal — but the constants of an emotionally or physically vulnerable elder, a degree of isolation, and a sense of entitlement within the financial abuser remain. Another disheartening constant is the utter lack of contrition among abusers. 123

121 The National Academy of Elder Law Attorneys recognizes that Elder Law has come of age, because “[i]n the past 20 years, [it] has developed as a separate specialty area because of the unique and complex issues faced by older persons and persons with disabilities.” NAELA, National Academy of Elder Law Attorneys Aspirational Standards for the Practice of Elder Law (2005), http://www.naela.org/Public/Join_NAELA/Aspirational_Standards/Public/Membership/Join_NAELA/Aspirational_Standards.aspx (hereinafter NAELA Aspirational Stand.).

122 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, 405 (2000). Professor Rosenberg notes that the “ethical dilemmas” he refers to “are not limited to older clients and the practice of Elder Law. For example, family law involves complex family relationships and people of all ages have health-related concerns. Yet the prevalence of these circumstances among the elderly and their families pose singular challenges for Elder Law attorneys.” Id.

The rules that protect clients thus must be stringently obeyed in order to protect clients from those who would use the attorney’s services to harm the attorney’s client. Faithfulness to four specific ABA Model Rules of Professional Conduct might have prevented the financial exploitation of Mrs. Astor and could protect the elderly from exploitation at the hands of family members.

A. ABA Model Rule 1.2: Protecting the Client’s Objectives

The ABA Model Rules of Professional Conduct and all of the state rules emphasize the attorney’s duties to the client. Many of the rules deal specifically with the attorney’s conduct in relation to the client, but nowhere in the rules is “client” defined. The Scope of the rules says, “Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.”

The most important lesson for attorneys working with elderly clients is to recognize who the client is and to serve that client to the exclusion of all others. In every representation, the client is central; outside of Elder Law, identifying the client is usually not difficult. Elder Law is different from somewhat similar areas — estate planning and domestic relations — because the first question the attorney must explore and answer is who among the family members involved is going to be the client. In Elder Law, the client is not always easily identifiable because of the presence of other people. People viewed as third parties to the representation can be present and unintentionally treated as clients through their physical presence or because they are potential beneficiaries of the elder person’s decisions or because of their role in the elderly person’s decision-making. In Attorney Grievance Commission of Maryland v. Coppola, the attorney claimed that the mother was his client, not her four children, but he allowed documents to be executed in the presence of the four children, took instructions from them, and actually delivered documents to them. The court found that he in fact represented all of the parties and therefore violated the conflict rules.

After identifying the client and the role of the other people who are “present” in the representation, the attorney must then determine and adhere to the client’s objectives of the representation. Model Rule 1.2(a) states:

[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.

124 Model R. Prof’l Conduct 1.1 (duty of competency), 1.3 (duty of diligence), 1.4 (duty to communicate), 1.6 (duty of confidentiality), 1.7, 1.9 (duty of loyalty).
125 Flowers & Morgan, supra n. 115, at 18.
126 Model R. Prof’l Conduct, Scope 17.
127 19 A.3d 431(Md. 2011).
128 Id. at 443.
129 Id. at 444.
130 NAELA Aspirational Standard A-1 suggests that the attorney “[g]athers all information and takes all steps necessary to identify who the client is at the earliest possible stage and communicates that information to the persons immediately involved.”
131 Model R. Prof’l Conduct 1.2.
By identifying the client and the client’s objectives, the attorney focuses on who is deserving of the attorney’s loyalty, communications, and attention.132

In the Astor case, both Christensen and Whitaker identified Mrs. Astor as their client, but both failed to protect her because they did not adhere to nor identify her objectives. Whitaker never met with Mrs. Astor prior to drafting the will; in fact, he did not meet with her at all until the day she signed the second codicil. The NAELA Aspirational Standards for the Practice of Elder Law suggest an attorney needs to meet with the client before drafting the documents. Standard A-2 suggests that an Elder Law attorney “[m]eets with the identified prospective or actual client in private at the earliest possible stage so that the client’s capacity and voice can be engaged unencumbered.”133

In Matter of Brantley,134 the court found a violation of Model Rule 1.2, where the attorney never met personally with his client, Mary Storm, regarding a voluntary conservatorship that he filed on her behalf.135

At no time during any of the conservatorship proceedings did the Respondent ever meet personally with Mary Storm to determine for himself her state of mind or knowledge of her financial affairs, and his false statements contained in said petition have never been corrected.136

The attorney testified that he talked to his client by telephone to discuss large sums of money that were being withdrawn from her account. Although he had worked with her for years, this was the only time he spoke to her before filing the petition. She hired another attorney to oppose the conservatorship.137

Whitaker failed to meet with Mrs. Astor either privately, or indeed at all, until the day she signed the second codicil. It does not take much imagination to consider what might have happened had Whitaker met with Mrs. Astor before that day. He might have discovered that she lacked capacity to sign the codicil; he might have discovered that she did not want to change her estate plan to give her son more control of her estate; he might have discovered that Marshall and Morrissey were financially exploiting Mrs. Astor. Whitaker did not meet with her alone, however, and Marshall and Morrissey used that document, written by Whitaker, to exploit the 101-year-old Mrs. Astor.

132 See Ky. B. Ass’n v. Fernandez, 397 S.W.3d 383 (Ky. 2013) (attorney violated Rule 1.2 when he paid himself from one client’s estate to administer two of the client’s beneficiaries’ estates when they died intestate; the Kentucky Supreme Court noted, “[n]othing in the Sanders’ will authorized Respondent to charge the Estate for the expense of probating the Hetkowski and Price estates”). Id. at 391.

133 NAELA Aspirational Stand. A-2.

134 Matter of Ort, 631 A.2d 937 (N.J. 1993) (attorney violated Rule 1.2 when he proceeded with a home equity loan without client permission so that he could “pay himself excessive, unjustified, and unauthorized legal fees, and without the loan proceeds the Estate account would not have been sufficient to permit such payments to respondent”). Id. at 943. See also Flowers & Morgan, supra n. 115, at 19.

135 Id. at 436.

136 Id. at 437.

137 Id.
In contrast to the one meeting Whitaker had with Mrs. Astor, whom he claimed to be his client, he spent several hours with Morrissey, Marshall, and even Charlene Marshall while he was drafting the second codicil.\textsuperscript{138} Between January 8 and 10, 2004, Whitaker billed Mrs. Astor $5,000 for 10 hours of meetings,\textsuperscript{139} none of which were with her.

The only meeting Whitaker had with Mrs. Astor, his purported client, was the subject of much debate during the criminal trial. Whitaker claimed he spent at least a half hour with Mrs. Astor explaining the second codicil, which significantly changed the distribution of her assets from her long-established estate plan. However, a cab receipt presented in court indicated that Whitaker was at the house for only 14 minutes on the morning Mrs. Astor signed the second codicil.\textsuperscript{140} Whitaker wrote five file memos during the week following the signing describing what happened at the house. In one, he claimed that Morrissey explained the implication of the codicil, and in another, he claimed he did.

Whitaker also admitted that he never reviewed Mrs. Astor’s previous wills or other estate documents. Whitaker asserted that the previous estate plan was irrelevant to the drafting of the new instruments.\textsuperscript{141} Although nothing in the ABA Model Rules of Professional Conduct or the NAELA Aspirational Standards for the Practice of Elder Law requires the attorney to review previous documents, changing long-standing estate plans may be an indication that the client is experiencing diminished capacity\textsuperscript{142} or undue influence or both. Whitaker took his instructions from Morrissey and Marshall and never met with Mrs. Astor to determine whether what they told him was in truth her objectives. As with the failure to meet with Mrs. Astor, it is not hard to imagine that had Whitaker complied with Model Rule 1.2 and determined Mrs. Astor’s objectives, he and she would have avoided the unintended consequences of drafting a document reversing long-standing estate plans.\textsuperscript{143}

The attorney’s job is not only to draft documents to reflect the client’s objectives but also to ensure that the documents are valid and therefore enforceable as the client wishes them to be.\textsuperscript{144} ABA Model Rule 1.1 puts it this way, “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”\textsuperscript{145} A comment to that rule contemplates that “[t]he required attention and preparation are determined in part by what is at stake … ”\textsuperscript{146} When drafting documents for a client, what is at stake is the enforceability of these documents after the client has passed away and is no longer able to enforce his or her wishes. Competent representation

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\textsuperscript{138} John Eligon, \textit{Lawyer Describes Request to Redo Mrs. Astor’s Will}, N.Y. Times (June 16, 2009).
\textsuperscript{139} \textit{Id.}
\textsuperscript{141} The actual quote was “I think prior wills before a person’s current existing will are fairly unimportant.” Eligon, \textit{supra} n. 138.
\textsuperscript{142} See Comment 6 on Model Rules of Professional Conduct 1.14, which indicates that “variability of state of mind” and “consistency of a decision with the known long-term commitments and values of the client” are both factors in determining the capacity of a client.
\textsuperscript{143} It is important to note that Mr. Whitaker testified under immunity from prosecution. Italiano, \textit{supra} n. 80.
\textsuperscript{144} Flowers \& Morgan, \textit{supra} n. 115, at 40 (noting that an attorney cannot guarantee the validity of the documents but should “take all reasonable steps to accomplish the client’s wishes”).
\textsuperscript{145} Model R. Prof’l Conduct 1.1.
\textsuperscript{146} Model R. Prof’l Conduct 1.1, cmt. 5.
\end{flushleft}
involving documents does not end with the drafting. “Thoroughness” requires attorneys to oversee the signing of documents they prepare for their clients. NAELA Aspirational Standard A-4 states that an attorney “oversees the execution of documents that directly affect the interests of an individual only after establishing an attorney-client relationship with the individual.” This oversight protects the client’s objectives and wishes.

Whitaker drafted the third codicil without speaking to Mrs. Astor and did not oversee its signing. At the criminal trial of Marshall and Morrissey, the prosecution showed that the signature on that document was forged by Morrissey, the person whom Whitaker entrusted to oversee its execution. The signature page of the document was not bound to the witness page of the document; Morrissey was thus able to remove the signature page and add his forged signature page to the document. Mr. Folger observed:

A departure from what is the more customary practice was the binding of the four page document with two staples which could quite easily have been removed rather than ribbon and seal or some other means that would create an obstacle to tampering. Moreover the witness’s signature page (fourth page) was separate from the page that Mrs. Astor was to sign (third page) making it impossible for witnesses to be certain that the signature they saw Astor write on the preceding page was indeed the same signature as appeared in the document submitted to court as a duly executed codicil.

Had Whitaker attended the signing with Mrs. Astor, he could have protected her from the forgery and exploitation in three ways. First, he could have assessed her capacity. Second, he would have seen that her signature was very weak and not the one that ultimately appeared on the document. Third, he would have sent a strong message to Morrissey that someone was watching out for Mrs. Astor. Instead, Morrissey went alone, and the rest of the story played out in a criminal prosecution and conviction.

B. ABA Model Rule 1.7: Protecting Clients from Divided Loyalties

The ABA Model Rules of Professional Conduct that address conflicts protect two very important client interests: confidentiality and loyalty. The rules contemplate that clients should be served with undivided loyalty. Comment 1 to Model Rule 1.7 says, “Loyalty and independent judgment are essential elements in the lawyer’s relationship

147 NAELA Aspirational Stand. A-4. The comment to that section recognizes this affirmative duty of the attorney. It states, “The Elder Law Attorney is directly responsible to ensure that documents drafted for the client are properly executed. Ways to accomplish this may include direct oversight or oversight by trained staff or professionals.” Id.
148 Serge F. Kovaleski & Mike McIntire, Lawyers for Brooke Astor’s Son Defend Changes to Her Will, N.Y. Times (Sept. 15, 2006).
149 Stiegel, supra n. 20, at 10.
150 Id.
151 Ironcally, Mr. Morrissey insisted that the other attorney from Mr. Whitaker’s firm not go into the meeting on that day because he did not have on a suit and tie. Fishman, supra n. 26.
152 Flowers & Morgan, supra n. 115, at 88.
to a client.”153 The traditional role of the attorney is to serve as a “neutral partisan,”154 as articulated by Lord Brougham in his defense of Queen Caroline in her 1820 divorce:

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expediens, and all hazards and costs to other persons, and amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.155

The conflict rules protect clients from attorneys who are considering being influenced, or actually are being influenced, by others’ objectives or concerns. The prohibitions in the conflict rules are especially relevant in the Elder Law context because of the presence of other people in the representation. Others can be “present” in the representation of an older client in a variety of ways. The other person may be a concurrent or a joint client of the attorney, or be acting in a fiduciary capacity for the client, or the other person may merely have become involved in the decision-making of the client, either intentionally or unintentionally.

In considering the representation of multiple family members, an attorney must consider the protections implicit in the ethics rules. Representation of multiple family members can take the form of concurrent joint representation or concurrent separate representation. The NAELA Aspirational Standards for the Practice of Elder Law define “separate representation” as “representing persons in separate matters where confidences are not shared,” while “joint representation,” sometimes referred to as “common representation,” means, “representation of multiple clients in the same matter.”156 Each client should understand the nature of the representation and thus what information will be shared or not shared.157 Additionally, in separate representation, decision-making is not shared by the separate clients. The representations remain separate throughout the representation. Unless there appears to be a conflict, no client need know of another person’s representation. Clients from the same family would likely know of the representation of other family members. The point is that if the representation is separate, the attorney should not share information among the clients.

Under Model Rule 1.7, conflict of interest can take two forms when dealing with separate clients. A conflict may arise because the separate clients become directly adverse to one another or because the representation of one materially limits what the attorney

153 Model R. Prof’l Conduct 1.7, cmt. 1.
155 Id.
156 NAELA Aspirational Stand. B-1.
157 Comment to Standard B-1 suggests that “[b]ecause these situations can easily produce misunderstanding among family members, this Standard emphasizes the need for an additional educational element that ensures client-family members understand the difference between separate and joint (common) representation, especially with respect to the attorney’s obligation to keep or share confidences.”
can do for another.\textsuperscript{158} With multiple Elder Law clients, the conflict arises not because the clients are directly adverse\textsuperscript{159} but because the representation of one client materially affects the representation of another. “Materially affects” is defined as “a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests.”\textsuperscript{160} When a conflict exists, the attorney must consider whether the conditions for obtaining informed consent under Model Rule 1.7(b) are present.\textsuperscript{161}

A conflict can also arise when an attorney represents a client through a fiduciary. The attorney must keep in mind whom the client is.\textsuperscript{162} Where the client is acting through a fiduciary, the attorney must remember that the client must be consulted if possible. Comment 2 to Model Rule 1.14 says,

The fact that a client suffers a disability does not diminish the lawyer’s obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.\textsuperscript{163}

This is especially true when the client has not been found to be incapacitated and thus is able to make decisions.

In the Astor case, Christensen found himself in the proverbial “between a rock and a hard place.” He admitted that he represented both Marshall and Mrs. Astor.\textsuperscript{164} Whether he saw this as joint or separate representation is not clear. It is clear, however, that he freely shared information about Mrs. Astor’s estate plan with Marshall.\textsuperscript{165} Christensen might claim license to do so because Marshall was acting as Mrs. Astor’s attorney-in-fact. However, Christensen did not believe she was incapacitated at the time of the first codicil, yet he took orders and instructions from Marshall and did not consult with Mrs. Astor.\textsuperscript{166} He allowed Marshall to pressure him into the first codicil and tried to protect Mrs. Astor from future changes by naming the codicil the “first and final.”\textsuperscript{167} Christensen defended

\textsuperscript{158} Model R. Prof’l Conduct 1.7.
\textsuperscript{159} Although in a guardianship case the clients may actually be directly adverse.
\textsuperscript{160} Model R. Prof’l Conduct 1.7, cmt. 8.
\textsuperscript{161} Model Rules of Professional Conduct 1.7(b) states, “Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.”
\textsuperscript{162} This article does not discuss the issues of representation of the fiduciary as fiduciary, but rather the representation of a client who is acting through a fiduciary and therefore remains the client.
\textsuperscript{163} Model R. Prof’l Conduct 1.14, cmt. 2.
\textsuperscript{164} Melissa Grace & Corky Siemaszko, Friend Turns Foe at Trial, N.Y. Daily News (June 5, 2009).
\textsuperscript{165} John Eligon, Mrs. Astor’s Lawyer Describes Her Son’s Effort to Control a Trust, N.Y. Times (June 2, 2009).
\textsuperscript{166} Eligon, supra n. 92.
\textsuperscript{167} John Eligon, In Astor Trial’s Legalese, Jabs Are Delivered with Gusto (June 16, 2009), http://cityroom.
his actions when he testified in the Marshall/Morrissey prosecution, saying he was trying to protect Mrs. Astor from Marshall’s constant pressure to give him more control of the Astor assets. Christensen could not protect Mrs. Astor because, as he admitted in his testimony, he also represented Marshall.

Christensen also had to deal with Marshall not only as a client but also as an attorney-in-fact for Mrs. Astor; she named Marshall as attorney-in-fact respecting her financial affairs. Christensen was therefore dealing with Marshall as he discussed Mrs. Astor’s estate planning. In asking Mrs. Astor to sign the codicil, Christensen believed Mrs. Astor to be competent to make the decision to change her estate plan and that it was the change she wanted. Given that, it is difficult to understand why he spent so much more time discussing the change with Marshall, the beneficiary, rather than the settlor, Mrs. Astor. As with the failure to meet with Mrs. Astor and act to ascertain and protect her objectives, it is hard to imagine that, had Christensen complied with Model Rule 1.7, the reversing of Mrs. Astor’s long-standing estate plans would have occurred, or at least as it did.

C. ABA Model Rule 1.14: Protecting Clients with Diminished Capacity

Model Rule 1.14, addressing how to work with clients with diminished capacity, was written exactly for cases such as the Astor case. The rule recognizes that there is often no bright line between decision-making capacity and the lack of it and arguably details the continuing responsibilities of the lawyer whose client suffers lessened capacity. In its current form, the rule provides:

(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action,
including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.\(^{175}\)

Diminution of capacity often occurs as a slow, uneven regression along a continuum. Clients with beginning Alzheimer’s, for example, still largely retain functional intellectual capacity.\(^{176}\) Even people with moderate dementia who are largely incompetent have times and circumstances in which the clouds lift for them. A lawyer for a client suffering diminishing capacity should be allowed maximum flexibility in preserving whatever vestiges of a normal client relationship remain and should not be held to any rigid black letter standard. The lawyer should be allowed to take reasonable steps, including disclosure of information about the client, even though the information would be confidential in a different context, to determine the best course of action for the client. Indeed, classic conflict of interest concepts derived from the adversarial context often do not apply to family situations.\(^{177}\)

A lawyer forced to withdraw from the representation of an individual whose mental capacity is diminishing because of the possibility of a violation of rules puts the client in an untenable position. The client may be left without continuing legal representation precisely when he or she needs it most. A new lawyer may be retained, but the client may not be able to form a meaningful relationship with the new lawyer and may have lost the one advocate with no axe to grind in whatever family controversy is occurring.

The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility (hereinafter PBA Committee) and the ABA Standing Committee on Ethics and Professional Responsibility (hereinafter ABA Committee) have, in addressing problems of practitioners working with clients of diminishing capacity, elaborated on Model Rule 1.14.

In one PBA Committee case, an inquiring attorney had previously represented two sisters, one of whom had memory problems but did not suffer from Alzheimer’s disease. The impaired client-sister (whom the committee designated as “M”) had executed a routine will providing for equal division of her estate among her siblings. Later, a brother she had named as attorney-in-fact under a power of attorney asked to see the will under circumstances that made the lawyer doubt the good faith of the brother and the mental

\(^{175}\) Model R. Prof’l Conduct 1.14.


capacity of the client-sister. The PBA Committee told the attorney he might have a duty to take protective action with respect to the client-sister once he exercised due diligence in ascertaining the facts.

[Y]ou would be well advised to conduct sufficient due diligence to satisfy yourself that the brother is acting exclusively in M’s best interests. Should you conclude that he is not, that his motives are suspect, and/or that he may be attempting to reshape M’s Will for his benefit, or for the benefit of his heirs, the likelihood that you will be required to take other protective actions, including without limitation, seeking appointment of a guardian, increases.\(^{178}\)

Due diligence included a face-to-face meeting with the client to determine whether her brother was acting to further her interests or his own interests.

The Astor case emphasizes this point. It is a “well-published case of self-dealing”\(^ {179}\) by an agent of an elderly person. Whitaker did not meet with Mrs. Astor until the signing of the documents and therefore took no steps to ensure that the attorney-in-fact was not self-dealing or that Mrs. Astor had diminished capacity. Those simple actions would likely have protected Mrs. Astor as the rules of conduct intended.

In another case brought before the PBA Committee, an attorney inquired about a client whom he had represented for about 30 years. The client, for a year or two, had begun to show “signs of rapidly declining physical and mental health and his wife also appears to be showing advancing signs of age.” The attorney previously recommended that the client appoint a niece as his agent, and the client did so. The lawyer subsequently made a recommendation of a protective nature to the niece; she rejected it and responded by demanding files, accompanied by papers signed by the client confirming the demand. The inquiring attorney believed that disclosure of the information would be inimical to his client’s best interests. The hearing committee member, in his opinion, focused on the “other protective language” available to the attorney, who reasonably believed that his client could not adequately act in his own best interests.

As in all cases of derivative clients, however, the lawyer must be alert to the possibility that the guardian is abusing her position. If the lawyer becomes convinced that the guardian is acting contrary to the ward’s best interest (especially if the conduct is to the guardian’s personal advantage), the lawyer may have a duty to refuse instructions from the guardian, and even to take interdicting action.\(^ {180}\)

Thus the committee member suggested that the attorney might well have a duty to refuse to follow the instructions of the client’s agent.\(^ {181}\)


\(^{179}\) Klein, supra n. 3.


The lawyer’s duty to protect the client may survive the purported termination of the attorney-client relationship. 182 If the lawyer has reason to believe that the client may be incapacitated or under the undue influence of a third party, he or she is permitted to contact the client directly for the limited purpose of ascertaining whether the client has actually discharged him or her and to make a judgment about the client’s competency. 183

ABA Committee Opinion 96-404 sanctions this activist approach, if appropriate under the circumstances. 184 The ABA Committee suggests that a lawyer is required to take protective action on behalf of an impaired client, tailoring that action to the least restrictive alternative under the circumstances. Protective action “by its very nature must be regarded as ‘adverse’ to the client,” the ABA Committee noted, but the scope of authority under Model Rule 1.14 is quite broad, and “a lawyer who has a longstanding existing relationship with a client but no specific present work, is not, for lack of such an assignment, barred from taking appropriate action to protect a client where 1.14(b) applies.” 185 Comment 6 to ABA Model Rule 1.16 recognizes that “[i]f the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client’s interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.” 186

At the very least, Christensen had a duty to determine whether Mrs. Astor had discharged him and whether she had the capacity to do so.

The conflict between an attorney’s traditional role as an advocate in an adversarial proceeding and a lawyer counseling and advocating for a client with diminishing capacity presents complex countervailing considerations, but it is a dilemma that should not be avoided. As a client’s impairment increases, his or her ability to interact with others diminishes. The attorney with whom a client has a relationship may be the most knowledgeable person concerned with the client’s welfare, the only person who has no financial or other interest in the outcome of the proceeding, and the last person in whom the client could ever repose confidence. It is not likely that a client who has become so demented that traditional representation cannot continue could ever feel comfortable in a relationship with a new lawyer.

Even if Model Rule 1.14 suggests that lawyers exercise power in what they perceive is the best interests of their clients, “there is no reason why it should not demand attorneys

182 Indeed, some argue that an attorney who declined to represent a new client due to the client’s incapacity may have a duty to prevent another lawyer from doing so. James D. Gallagher et al., Representing a Client with Diminished Capacity: Where the Law Stands and Where It Needs to Go, 16 Geo. J. Leg. Ethics 597, 610 (2003).
183 Linda G. Bauer, Asst. B. Counsel, Mass. Bd. of B. Overseers, Ethical Issues for Elder Law Attorneys (Aug. 2004) (discussing a similar situation and suggesting that one possible scenario would be for the lawyer to write to the new attorney and request a private meeting with the “former” client to confirm his or her instructions), http://www.mass.gov/obcobo/elder.htm (accessed July 9, 2014); N.Y. St. B. Ass’n Comm. on Prof. Ethics, Op. 775 (May 4, 2004) (concluding that the lawyer may contact the former client directly in order to ascertain the client’s genuine wishes).
185 Id.
186 Model R. Prof’l Conduct 1.16, cmt. 6.
take power when they reasonably believe their client is being wronged. Passing the buck to another lawyer should not be considered ethical, as it often leads the client ending up with no lawyer at all.”

D. ABA Model Rule 4.2: Protecting Clients Who Are Represented from Overreaching

ABA Model Rule 4.2, referred to as the no-contact rule, states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”

The purpose of the rule is to

[protect] a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.

A Vermont court concluded that the no-contact rule does not by its terms apply only to litigation, nor does it apply specifically to a prosecutor. Indeed, it applies to persons retained to handle real estate transactions, administer estates for an executor, seek legislative relief, or any other of the myriad of tasks for which lawyers are employed. Its essential purpose is to avoid misunderstandings, unfairness or overreaching when a skilled lawyer speaks to a layperson, and to preserve the collegiality, which must exist among members of the bar, and cannot if lawyers talk to another’s client behind the lawyer’s back.

The Iowa Supreme Court laid out the requirements of the no-contact rule when it affirmed the disciplinary action against an attorney for meeting with a prospective cli-

187 Gallagher, supra n. 182.
188 Model R. Prof’l Conduct 4.2.
189 Model R. Prof’l Conduct 4.2, cmt. 1.
190 In re Illeuzzi, 616 A.2d 233, 236 (Vermont 1992); Monceret v. Bd. of Prof’l Resp., 29 S.W.3d 455, 459 (Tenn. 2000) (finding that the purpose of the rule “is to preserve the proper functioning of the legal system and to “prevent situations in which a represented party may be taken advantage of by adverse counsel”). See State v. Miller, 600 N.W.2d 457, 463, n. 5 (Minn. 1999) (tracing the lengthy history of the so-called “no contact rule” as an accepted principle of legal ethics); see also Ellen J. Bennett, Elizabeth J. Cohen & Martin Whitaker, Model R. Prof’l Conduct Rule 4.2: Communication with Person Represented by Counsel, ABA-AMRPC § 4.2 (2011).
The case was the too-familiar “merry-go-round,” where an elderly person is taken from one lawyer to another by different family members seeking different documents to benefit them. In *Box*, Mrs. Martha Hillard, an 80-year-old childless widow, was represented by attorney Bloethe, who had drafted her estate planning documents; this included devising a $975,000 farm to Martha’s niece. Box was the attorney for Martha’s brother and nephew, who wanted the property put into a trust and the option to buy it below market value. Bloethe wrote to Box to say that he represented Martha and that “in the event you would want to communicate with Martha, you should contact me instead inasmuch as I will be representing Martha.” About a month later, Box drafted a document for the sale of the farm property to Todd, Martha’s nephew, for about $362,000 under an installment contract. At the meeting, according to the testimony at the hearing, Martha said when asked about Bloethe’s letter to Box that she would talk to whatever attorney she chose. Box claimed he believed that that was Martha’s renunciation of attorney Bloethe.

*Box* is instructive for attorneys involved in estate planning in three important aspects. First, the Iowa Supreme Court found that the no-contact rule applies outside the context of litigation, to “any transaction in which the contacted party is represented by a lawyer.”

In the Astor case, the no-contact rule applied when Whitaker undertook drafting the second codicil for Mrs. Astor. As a matter of fact, Whitaker was informed by Anthony Marshall that Mrs. Astor was represented by Christensen.

Second, *Box* defined “matter of the representation” broadly in the case, including the sale of real property as the same matter as prior estate planning that would have disposed of the property by gift. Box argued that Bloethe’s representation of Martha did not include the sale of the farm. The Court relied on the broad language of the notice that Bloethe sent to Box to find that the “matter of the representation” was understood by Martha and the attorney to include future issues regarding the property that was the subject of the estate planning. The Indiana State Bar Association dealt with a similar issue in determining that a new power of attorney is the same “matter of representation” as the previous power of attorney. It found that although at times it may be “difficult to identify the outer bounds of the same matter for Rule 4.2 purposes, the preparation of a new power

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191 Iowa Sup. Ct. Att’y Disc. Bd. v. Box, 715 N.W.2d 758 (Iowa 2006). The old Disciplinary Rule 7-104(A) (1) discussed in this case is conceptually the same as Rule 4.2. Id. at 764.
192 Id. at 761.
193 Id.
194 Id. at 762.
195 Id.
196 Id.
197 Id. at 763.
198 Stiegel, supra n. 20, at 8.
199 715 N.W.2d at 763. The record indicated that Martha told Bloethe of the pressure she was receiving from the nephew and brother to sell the property to the nephew at below market price and Box’s involvement in the “proposed deal.” The letter Bloethe sent to Box was sent as a result of that information. Id.
of attorney is clearly the same matter as [the client’s] existing estate plan and incapacity plan, which for five years were handled for [the client] by [the first attorney].” 201 The bar went on to find that

the circumstances strongly suggest that [the client] either actually had or might well have had a lawyer for an estate plan and an incapacity plan, because [the client] was wealthy, had complicated property affairs, and had only recently fallen into ill health. Prudent persons of means almost invariably avail themselves of the assistance of many professionals including lawyers to organize and manage their affairs. It would not be reasonable here for [the second attorney] to claim he did not know [the client] had a lawyer already; a lawyer may not avoid Rule 4.2 by simply closing his eyes to the obvious. 202

Finally, the Box court found that the client does not waive this rule. The Indiana Bar agreed that the attorney “could not reasonably claim that [the client] had discharged [the first attorney], even if [the client] had said so; [the second attorney] should have taken steps to confirm any representation that prior counsel had effectively been discharged, at the very least by inquiring of [the client] and probably by attempting to contact the discharged lawyer as well.” 203 The Box court also found that the rule places a burden on the attorney to make sure that the client is no longer represented. 204 The court pointed out that, if it accepted an attorney’s contention that the ethics rule could be waived by the client, such a “contention would in our view greatly undermine the protection sought to be afforded” by the rule. 205 The Tennessee Supreme Court in Monceret v. Board of Professional Responsibility 206 found

[T]he language of the Rule specifically requires the consent of the party’s lawyer, and there is no indication that the party alone may waive the protections of the Rule. ... An apparent majority of courts have followed this interpretation and have held that the Rule is not waived simply because the represented person initiates contact or is otherwise willing to communicate. ... In short, the ethical responsibility rests with the attorney and not the layman.” 207

Comment 3 to Model Rule 4.2 makes this clear as well:

The rule applies even though the represented person initiates or con-

201 Id. at p. 5.
202 Id.
203 Id.
204 715 N.W.2d at 764.
205 Id.
207 Id.
sents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule.\textsuperscript{208}

Model Rule 4.2 is protection against overreaching by an experienced and trained lawyer; it thus makes sense that a lawyer could not receive a waiver of his or her ethical responsibility from an untrained client. The exercise of an individual’s right to change lawyers should be verified by an attorney before the attorney continues “contact with a previously represented party.”\textsuperscript{209}

Whitaker was told that Mrs. Astor was not satisfied with Christensen and Sullivan & Cromwell after they had represented her for over four decades. He was not told by Mrs. Astor but rather by Anthony Marshall and Morrissey. It does not appear that Whitaker asked Mrs. Astor whether she had terminated her relationship with Christensen, nor did he speak directly with Christensen prior to drafting the second codicil.

\textbf{IV. Conclusion}

The elderly are among the most vulnerable clients attorneys encounter. Adherence to the ABA Model Rules of Professional Conduct and the NAELA Aspirational Standards for the Practice of Elder Law can guide attorneys in dealing with the complicated issues that arise when dealing with family members, caregivers, and fiduciaries while representing the elderly. “Even those lawyers whose motives and actions intended to serve only their clients’ best interests need to exercise a degree of caution in the dynamic of family conflicts that could give rise to unintended consequences and misimpressions of their actions.”\textsuperscript{210} The unforeseen consequences of the attorneys in the Astor case clearly indicate that the ethics rules are intended to protect clients and if the ethics rules and standards are followed by attorneys dealing with elderly clients and their families financial exploitation may be prevented.

\textsuperscript{208} Model R. Prof’l Conduct 4.2, cmt. 3.
\textsuperscript{209} 715 N.W.2d at 764. Rule 4.2 was amended in 2002 to clarify that a lawyer is permitted to talk to someone who already has counsel but who wants a second opinion from a lawyer who is not representing a party in the matter. See La. St. B. Ass’n R. of Prof’l Conduct Comm., Public Op. 07-RPCC-014 (2007) (second opinion consultation); Phila. B. Ass’n Ethics Op. 2004-1 (2004) (lawyer approached by prospective client who is dissatisfied with current counsel not only should not, but may not, notify current counsel without prospective client’s permission). Bennett, Cohen & Whitaker, \textit{supra} n. 190.
\textsuperscript{210} Stiegel, \textit{supra} n. 20, at 14 (“Even those lawyers whose motives and actions intended to serve only their clients’ best interest need to exercise a degree of caution in the dynamic of family conflicts that could give rise to unintended consequences and misimpressions of their actions.”)
A NEW SOLUTION TO AN AGE-OLD PROBLEM:
STATUTORY AUTHORIZATION FOR GUARDIAN-INITIATED DIVORCES

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I. INTRODUCTION

Elder abuse is by no means a new phenomenon in the United States, or the world, for that matter.¹ In fact, Shakespeare devoted an entire play to the subject more than 400 years ago.² Only in the past 50 years, however, have federal and state governments begun to recognize elder abuse as a distinct societal problem and respond with legislation to combat it.³ Despite these governmental efforts, elder abuse continues to be a serious

¹ The term “elder” refers to people age 65 or older. Lawrence A. Frolik & Alison McChrystal Barnes, Elder Law: Cases and Materials 1 (Matthew Bender & Co., Inc. 2007). Elder abuse can take the form of either active or passive abuse. Id. at 8. Active abuse includes physical abuse, sexual abuse, financial exploitation, and emotional abuse. Id. at 9–12. Passive abuse includes neglect, abandonment, and self-neglect. Id. at 12–15.
² See William Shakespeare & Paul Werstine, King Lear (Simon & Schuster 2005). “This policy and reverence of age makes the world bitter to the best of our times, keeps our fortunes from us till our oldness cannot relish them. I begin to find an idle and fond bondage in the oppression of aged tyranny, who sways not as it hath power but as it is suffered. Come to me, that of this I may speak more. If our father would sleep till I waked him, you should enjoy half his revenue forever … .” Id. at act 1, sc. 2.
³ See Rosalie Wolf, Elder Abuse and Neglect: History and Concepts, in Nat’l Research Council, El-
societal problem. Although it is very difficult to determine the prevalence of elder abuse, the Congress, in a bill it introduced in 2002, estimated that each year between 500,000 and 5 million elders are abused in the United States. This approximation is bolstered by the fact that, in the year 2000 alone, more than 470,000 cases of elder abuse were reported to adult protective services agencies across the country, a 300 percent increase from 1986. It is likely that the incidence of elder abuse will continue to rise as the elder population makes up an increasingly higher percentage of the general population.

One of the fastest growing forms of elder abuse is financial exploitation. Financial exploitation occurs “when someone improperly acquires or uses an elder’s funds, benefits or other assets.” In the past, financial exploitation of the elderly was largely limited to forgery, fraud, conversion, and undue influence. In the past 20 years, however, a new form of elder abuse has become prevalent. This form of abuse involves marriages with wide age discrepancies between spouses that are entered into with the intent of taking ownership of the older spouse’s financial assets. In many cases, the elders are aware of

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4 Frolik & Barnes, see supra n. 1, at 4 (discussing the various reasons “precise figures identifying abuse are difficult to obtain and why those that exist are suspect”).
7 In 1990, approximately 12.6 percent of the American population was age 65 or older. Frolik & Barnes, supra n. 1. By 2020, 16 percent of the population is expected to be 65 or older and, by 2030, this percentage is projected to increase to 20 percent. Id.
8 In 2009, financial exploitation cost the elderly an estimated $2.9 billion, a 12 percent increase from the year before. Nat’l Ctr. on Elder Abuse, Impact of Elder Abuse, http://www.ncea.aoa.gov/Library/Data/index.aspx#impact (accessed Feb. 2, 2014). Also, abuse is more common with increasing age. Id.
10 See Kelly Johnson, Financial Crimes Against the Elderly, Ctr. for Problem-Oriented Policing (2003), http://www.popcenter.org/problems/crimes_against_elderly (describing various forms of elder financial exploitation, and dividing them into two categories: fraud committed by strangers and financial exploitation by relatives and caregivers).
11 In fact, there are now how-to books and articles that instruct young men and women on how to find, date, and exploit older women and men. See e.g. Cory Adams, Dating Older Women: How to Get and Keep a Cougar (Apr. 2, 2012) (detailing how a young man can attract and date older women); Baje Fletcher, A Gold Diggers Guide (Glitz & Glamour Publg. 2010) (outlining where a woman should go and how she should dress and present herself to attract wealthy older men); Today.com, How to Meet and Marry a Billionaire: Money Magazine’s Field Guide to the Mating Habits of the Ultra Rich (updated July 2, 2007), http://www.today.com/id/19505458/ns/today-money/t/how-meet-marry-billionaire/#.UUuClVdgliE.
their significant others’ financial motivations but willingly proceed with the marriage. In some cases, however, the elders do not discover their significant others’ financial motivations until months or even years down the line. By that time, it is often too late to recover lost assets, and for elders who become incapacitated after getting married, it is often impossible to prevent future financial exploitation.  

An incapacitated person cannot file for divorce. Accordingly, his or her only option to end the marriage is to have a guardian file the petition on his or her behalf. Historically, the vast majority of state courts did not allow a guardian to initiate a divorce action on behalf of his or her ward. These courts held firm to the notion that it was a “strictly personal” decision to file for divorce, a decision that could only be made by an elder with capacity. For an incapacitated elder, that often meant no escape from financial exploitation.

In the past 20 years, three trends — the liberalization of divorce laws, expansion of guardian powers, and recognition of elder abuse as a distinct societal problem — have led 18 states to reconsider the majority rule. Although these states disagree on the procedures a guardian must follow to receive the authority to initiate a divorce action, they do agree on one thing: an absolute bar on guardian-initiated divorce actions is inequitable.

Of the 18 states that have rejected the majority rule, only three, Florida, Colorado, and Missouri, have gone beyond the courts to codify a guardian’s authority to initiate a divorce on behalf of his or her ward. While these state laws represent an important next step toward protecting this vulnerable population from abuse, they do not go far enough. The Illinois Senate proposed a bill in 2012 that would offer a vast improvement over current legislation. Even the Illinois bill, however, fails to fully protect victims.

This article provides the reader with context for understanding the legal issues surrounding a guardian’s power (or lack thereof) to initiate a divorce on behalf of his or her ward. Section II lays the groundwork for evaluating current and proposed statutory

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13 In many states, the incapacitated elder’s guardian can file an annulment on behalf of the elder. See e.g. 750 Ill. Comp. Stat. 5/301(1), 5/302(a)(1) (1977) (stating that a party’s “legal representative” may petition for an annulment on behalf of the party if he or she “lacked capacity to consent to the marriage at the time the marriage was solemnized, … because of mental incapacity or infirmity … .”).

14 Many states impose strict evidentiary requirements and statute of limitations on parties seeking annulments. See e.g. 750 Ill. Comp. Stat. 5/302 (1977) (stating that a petition for annulment must be filed “no later than 90 days after the petitioner obtained knowledge” of the party’s incapacity). Therefore, an annulment may not be a viable option for many elders.

15 David E. Rigney, Power of Incompetent Spouse’s Guardian or Representative to Sue for Granting or Vacation of Divorce or Annulment of Marriage, or to Make Compromise or Settlement in Such Suit, 32 A.L.R.5th 673, § 3(a) (1995).

16 See e.g. Mohler v. Shank’s Estate, 61 N.W. 981 (Iowa 1895) (“The marriage contract, by which two persons assume the relation of husband and wife for their joint lives, is a personal status or condition entered into by the parties alone.”). The requisite “mental capacity” to file for divorce varies by state. However, in most states, including Illinois, the mental capacity a party must have in order to dissolve his or her marriage is substantially the same capacity he or she must have to enter into a marriage.
authorization for guardian-initiated divorces with a discussion of the circumstances under which a guardian is appointed and the different kinds of guardianship appointments. Section III discusses the rationale underlying the majority rule that a guardian cannot file for divorce on behalf of his or her ward. Section IV analyzes why an increasing number of courts have departed from this rule in the past 20 years. Section V examines three recent attempts by states to codify a guardian’s authority to initiate a divorce proceeding and the shortcomings of these attempts. Section VI proposes a statute that overcomes these shortcomings and strikes the ideal balance between protecting the ward from both spousal and guardian abuse. Section VII concludes with a discussion of the importance of statutory authorization for guardian-initiated divorces and the need for further legislative action.

II. BACKGROUND

A. Guardianship Appointments

A guardian is a court-appointed fiduciary authorized to make personal and/or property decisions that serve the best interest of a ward, a person who is unable to make these decisions due to disability or mental incapacity.\(^{17}\) Guardianship proceedings are primarily governed by state law.\(^{18}\) A state’s power to act on behalf of its incapacitated citizens is derived from its role as *parens patriae*.\(^{19}\) Under this doctrine, a state may intervene in the private lives of its citizens if those citizens are “unable to care for themselves.”\(^{20}\) Today, every state has codified its guardianship rules by statute.\(^{21}\) While these statutes vary considerably in their terminology, procedures, and the powers they grant both guardians and courts, they share two common goals: 1) to provide incapacitated persons with procedural due process protection throughout the appointment process and 2) to preserve the autonomy of wards to the fullest extent possible.\(^{22}\)

Uniform Probate Code (UPC) Article 5 was one of the earliest efforts to promote uniformity across state guardianship laws.\(^{23}\) Under the current version of the UPC, any person interested in the welfare of the allegedly incapacitated person,\(^{24}\) referred to as the

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17 A guardian appointed to make personal decisions on behalf of a ward is called a “guardian of the person,” or, in some states, simply a “guardian.” A guardian appointed to make property and financial decisions on behalf of a ward is called a “conservator” or “guardian of the estate.”
18 *Brasher, supra* n. 9, at 30.
19 *Id.*
21 *Brasher, supra* n. 9, at 30.
22 *Id.* at 31.
23 The first version of the Uniform Probate Code (UPC) was published in 1969 and has been revised several times since then. The Code was drafted by the National Conference of Commissioners on Uniform State Laws, an organization of practicing lawyers, judges, professors, and other legal professionals appointed to research, draft, and promote the enactment of uniform state laws. *Unif. L. Commn., About the ULC, About Us*, http://uniformlaws.org/Narrative.aspx?title=About%20the%20ULC (accessed Apr. 26, 2014).
24 The UPC defines an incapacitated adult as a person who “is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.” *Unif. Probate Prob. Code § 5-102(5).* The respondent does not necessarily have to be inca-
“respondent,” may petition a probate court for the appointment of a guardian or conservator. Upon receiving the petition, the court appoints a visitor and schedules a hearing to determine whether the respondent is incapacitated. If the respondent objects to the appointment of a guardian or conservator, he or she is entitled to constitutional protections at the hearing, including the right to be represented by counsel and the right to call and cross-examine witnesses. At the conclusion of the hearing, if the court finds that the respondent is, in fact, incapacitated, the court has a number of options available under the UPC. The court can appoint a guardian to manage the ward’s personal affairs, a conservator to manage the ward’s financial affairs, both, or a limited guardian or conservator to manage only some of the ward’s personal or financial affairs. Once the court determines what kind of guardian and/or conservator is necessary, it decides who should be appointed to that position. The UPC guides a court’s decision with a priority list.

The UPC sets forth the precise scope of the powers and duties for guardians in § 5-314 and § 5-315 and for conservators in § 5-418 and § 5-425. Under § 5-314, a guardian has the power to make decisions related to his or her ward’s “support, care, education, health, and welfare.” In making decisions, the guardian must “consider the expressed desires and personal values of the ward to the extent known to the guardian.” At all times the guardian must “act in the ward’s best interest and exercise reasonable care, diligence,
and prudence."\textsuperscript{32} Under UPC § 5-425, a conservator is responsible for the management and investment of the ward’s estate.\textsuperscript{33} In managing the estate, the conservator must devise an estate plan based on the actual needs of the ward and what is in the ward’s best interest.\textsuperscript{34} This plan must include steps the conservator will take to restore the ward’s ability to manage his or her own estate.\textsuperscript{35}

Although most states have not enacted UPC Article 5, statutes governing guardianship proceedings are similar across states.\textsuperscript{36} These similarities include the appointment process, the bifurcation of substitute decision-making into personal and estate matters, initial and annual reporting requirements, and the process of removing a guardian or conservator failing to fulfill his or her duties.\textsuperscript{37}

**B. Substitute Decision-Making for Elderly Wards**

Over the next 20 years, the American elderly population will experience unprecedented growth.\textsuperscript{38} By 2030, the population of persons age 65 and over will double from 39.6 million in 2009 to 72.1 million.\textsuperscript{39} Currently, half of all elderly persons age 85 and older have some form of dementia.\textsuperscript{40} As the number of elderly persons increases, so will the number of persons with some form of dementia.\textsuperscript{41} The implication of this trend is that an increasing number of elders will be adjudicated incompetent and appointed guardians.

For the elderly person with dementia, the appointment of a guardian is especially important. Research shows that elders with dementia are at greater risk of elder abuse than other elderly persons.\textsuperscript{32} A 2009 study found that approximately 50 percent of elderly persons with dementia experience some form of abuse.\textsuperscript{43} In another study, 47 percent of participants with dementia had suffered abuse at the hands of their caregivers.\textsuperscript{44} A guard-

\textsuperscript{32} Id. Subsection (a) also emphasizes the importance, due to the ward’s limitations, of restricting a guardian’s authority to areas needed. Id.

\textsuperscript{33} Unif. Prob. Code § 5-425 enumerates powers a conservator may exercise without court approval, while Unif. Prob. Code § 5-411 enumerates powers a conservator cannot exercise without first obtaining court approval.


\textsuperscript{35} Id.


\textsuperscript{37} Id.


\textsuperscript{39} Id.


\textsuperscript{41} Id.

\textsuperscript{42} Id.

\textsuperscript{43} Claudia Cooper et al., Abuse of People with Dementia by Family Caregivers: Representative Cross Sectional Survey, 338 BMJ b155 (Jan. 23, 2009).

\textsuperscript{44} Aileen Wiglesworth et al., Screening for Abuse and Neglect of People with Dementia, 58(3) J. Am. Geriatrics Soc'y. 493 (2010).
Statutory Authorization for Guardian-Initiated Divorces

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III. THE MAJORITY RULE

No jurisdiction allows an incapacitated person to dissolve his or her own marriage. The underlying premise behind this rule is that the decision to seek a divorce is so personal that the marriage should not be dissolved except with the person’s consent. The law considers an incapacitated person incapable of giving consent, and, accordingly, incapable of making this personal decision. For an incapacitated person who wishes to dissolve his or her marriage, the only option is for a guardian to initiate a divorce action on the ward’s behalf.

Under the early American common law majority rule, a guardian lacked the authority to initiate a divorce action on behalf of a ward. Courts relied on two main ratio-

45 A person who has been appointed a guardian of the estate may still have the mental capacity to initiate a divorce action. See In re Marriage of Kutchins, 482 N.E.2d 1005, 1007 (Ill. App. 2 Dist. 1985) (“The standard of mental capacity for appointing a guardian of the estate … is the determination that ‘because of his disability he is unable to manage his estate or financial affairs.’ The test of the mental capacity required for filing a petition for dissolution of marriage is whether the petitioner has sufficient mental capacity to understand fully the meaning and effect of the petition and whether the petitioner is able to determine in his own interest that he desires a final separation.”).

46 As a N.J. Superior Court stated in Matter of Jennings, “No marital failing works an automatic destruction of a marriage. Of critical significance is a person’s reaction to and evaluation of the actions of his spouse. This reaction and this evaluation are intensely personal to each individual.” Matter of Jennings, 453 A.2d 572, 574 (N.J. Super. Ch. Div. 1981).

47 Under early American common law, it was difficult to obtain a divorce in general. In some states, a divorce could only be obtained on the grounds of adultery, extreme cruelty, or desertion. John DeWitt Gregory et al., Understanding Family Law 237 (3d ed., LexisNexis 2005).

48 See supra n. 13. Because each state has limited grounds for invaliding a marriage, annulment is unlikely to be an option for many wards. See e.g. 750 Ill. Comp. Stat. Ann. 5/301 (West 1977) (authorizing annulment only in cases in which a party lacked capacity to consent to the marriage, lacked the physical capacity to consummate the marriage, was underage or lacked parental consent to marry, or the marriage was prohibited under the law).

49 The jurisdictions in which the following cases were decided have adopted the majority rule: Murray v. Murray, 426 S.E.2d 781 (S.C. 1993); In re Marriage of Drews, 503 N.E.2d 339 (Ill. 1986); Hart v. Hart, 705 S.W.2d 332 (Tex. App.— Austin 1986); Mallory v. Mallory, 450 N.Y.S.2d 272 (N.Y. Sup. Ct. 1982); Matter of Jennings, 453 A.2d 572 (N.J. Super. Ch. Div. 1981); State ex rel. Robedaux v. Johnson, 418 P.2d 337 (Okla. 1966); Wood v. Beard, 107 So. 2d 198 (Fla. 2d Dist. App. 1958); Shenk v. Shenk, 135 N.E.2d 436 (Ohio 1954); State ex rel. Queer v. Madison Civ. Ct., 99 N.E.2d 254 (Ind. 1951); Kuta v. Kuta, 47 N.W.2d 558 (Neb. 1951); Cox v. Armstrong, 221 P.2d 371 (Colo. 1950); Johnson v. Johnson, 170 S.W.2d 889 (Ky. 1943); Mohrman v. Koh, 51 N.E.2d 921 (N.Y. 1943); Stevens v. Stevens, 254 N.W. 162 (Mich. 1934); Fourth Nat’l Bank v. Diver, 289 P. 446 (Kan. 1930); Mohler v. Shank’s Estate, 61 N.W. 981 (Iowa 1895); Birdzell v. Birdzell, 6 P. 561 (Kan. 1885); Worthy v. Worthy, 1867 WL 1461 (Ga. 1867). In the past 15 years, several of these jurisdictions, including Florida, Illinois, Ohio, and Texas, have moved away from the majority rule and allowed a guardian to initiate a divorce action on behalf of his or her ward. See Karbin v. Karbin, 977 N.E.2d 154 (Ill. 2012); Broach v. Broach, 895 N.E.2d 640 (Ohio App. 2 Dist. 2008); Vaughan v. Guardianship of Vaughan, 648 So. 2d 193 (Fla. 5 Dist. App. 1994); Wahlenmaier v. Wahlenmaier, 762 S.W.2d 575 (Tex. 1988).

50 Some courts phrase this “lack of authority” in terms of jurisdiction, others in terms of standing. See e.g. Mohler v. Shank’s Estate, 61 N.W. 981 (Iowa 1895) (“[T]he circuit court had no jurisdiction to entertain an action for divorce, commenced on his behalf by his guardian.”); Ruvalcaba v. Ruvalcaba, 850 P.2d
nales to support this rule. First, courts reasoned that the right to divorce is not a common
law right, but rather a right dependent upon legislative enactments. Accordingly, absent
a specific divorce or guardianship statute that grants a guardian the authority to initiate a
divorce action on behalf of the ward, a guardian lacks the power to do so. Second, courts
reasoned that the decision to file for divorce is so personal that it cannot be made by any-
one acting in a representative capacity. This rationale is based on the proposition that
“no marital failing works an automatic destruction of a marriage.” Rather, a spouse’s re-
action to and evaluation of his or her spouse’s actions is based on considerations — social,
financial, and in many cases religious — that are unique to that individual. Because of
the immensely personal, and often private, nature of these considerations, absent a clear
manifestation by the ward of his or her desire to divorce, a guardian is not in a position to
weigh these considerations on behalf of the ward.

Based on the early American common law rule, a ward was stuck in a marriage un-
less the spouse initiated a divorce action or the ward regained capacity and initiated a di-
vorce action him or herself. For the ward suffering from physical, emotional, or financial
abuse at the hands of a spouse, this meant no legal recourse.

674, 680 (Ariz. App. Div. 1 1993) (“[T]he guardian ad litem had no standing to seek a dissolution on
behalf of a legally incompetent husband.”).

51 See e.g. State ex rel. Quear v. Madison Cir. Ct., 99 N.E.2d 254 (Ind. 1951) (“Marriage is not only a civil
contract, but it creates a status or relation. With this status or relation courts can interfere only to the
extent and in the manner prescribed by statute.”).

52 Ironically, one court recently cited to the lack of express statutory authority in its jurisdiction as a justi-
App. 2003) (“[H]ad the Legislature intended to prohibit actions by guardians on behalf of a spouse, it
would have expressly said … ”).

53 This rationale was first discussed in Worthy v. Worthy, an 1867 Supreme Court of Georgia decision.
1867 WL 1461 (Ga. 1867). In Worthy, the next friend of a legally insane woman filed a divorce action
on her behalf against her adulterous husband. Id. at *2. Ultimately, the court held that a legal representa-
tive cannot initiate a divorce action on behalf of the party he or she represents because of the immensely
personal nature of the decision. Id.


55 See e.g. Shenk v. Shenk, 135 N.E.2d 436, 438 (Ohio App. 3 Dist. 1954) (“[I]t must be kept in mind that
marriage is a civil contract, a personal and human relationship, as well as an institution. It cannot be cre-
ated except by the consent of the parties. It cannot be dissolved except by the consent and the intelligent
exercise of the will of one of the parties. That is to say, that no matter what or how many valid grounds
for divorce exist, it is only by the decision and will of the party aggrieved that an action for divorce
may be brought. Such aggrieved party may desire to condone acts that may have been committed by
the opposite party. Such party may, for personal reasons, whether social, financial or religious, or out of
consideration for the welfare of children or even other members of the families involved, desire that the
marriage relation continue. There are no marital offenses which cannot be condoned.”).

56 Id.

57 Some courts acknowledge the inequities that can result from the application of the majority rule but
nevertheless uphold it. See e.g. Johnson v. Johnson, 170 S.W.2d 889, 890 (Ky. 1943) (“It may be that
in some cases a hardship will be worked by the conclusion we have reached — such may be the case
here — but stability of the marriage relation is a matter of public concern and, in the absence of specific
legislative declaration to the contrary, its continuance or dissolution should not be dependent on the
pleasure or discretion of a legal representative.”).
IV. EROSION OF THE MAJORITY RULE

In the past 20 years, the convergence of three trends has led an increasing number of courts to reconsider the majority rule barring guardian-initiated divorces: 1) the liberalization of divorce statutes and the commonality of divorce in our society; 2) the expansion of guardian powers to include immensely personal decisions such as the refusal of medical care; and 3) an increasing societal focus on elder abuse and prevention. Based on these trends, a growing number of courts are now rejecting the majority rule.

A. Liberalization of Divorce Laws

For most of American history, divorce was taboo. In the past 20 years, the convergence of three trends has led an increasing number of courts to reconsider the majority rule barring guardian-initiated divorces: 1) the liberalization of divorce statutes and the commonality of divorce in our society; 2) the expansion of guardian powers to include immensely personal decisions such as the refusal of medical care; and 3) an increasing societal focus on elder abuse and prevention. Based on these trends, a growing number of courts are now rejecting the majority rule.

A. Liberalization of Divorce Laws

For most of American history, divorce was taboo. State laws and state court decisions reflected this societal view of divorce. Until the early 1970s, a person could only obtain a divorce if he or she was entirely innocent of any wrongdoing and was able to establish that the spouse was at fault. In some states, a spouse could only file for divorce on three fault-based grounds: adultery, desertion, and extreme cruelty.

Beginning in the 1930s, criticism of American divorce laws began to surface. Critics argued that the fault system encouraged perjury and collusion. Critics also claimed that differences in fault grounds between states spurred migratory divorces. One critic went so far as to say that fault grounds were nothing more than a formality. Societal attitudes toward divorce also began to change. With the women’s movement in the early

58 See Sanford Katz, Family Law in America 1 (Oxford U. Press 2003) (“[D]ivorce in the United States, opposed by some religions, was a taboo subject, and the status of a divorced person carried with it a social stigma.”).
59 See e.g. Cohen v. Cohen, 166 P.2d 622, 625 (Cal. App. 2d Dist. 1946) (“The state recognizes the family as the foundation-stone of the social order. Because under the American philosophy of government the state itself springs from the family, it can only exist so long as the solemnity of marriage and the stability of the family and home ideal endure. Therefore the contract of marriage cannot be dissolved upon the whim or caprice, or by the consent or collusion, of the contracting parties. Only for the grave causes recognized and sanctioned by law can the marriage bond be dissolved.”)
60 Gregory et al., supra n. 47.
61 Id. In many states, however, “insanity, conviction of a crime, habitual drunkenness and drug addiction” were also grounds for divorce. Id.
63 Id. at 8; Joyce Hens Green, Dissolution of Marriage 15–16 (McGraw-Hill 1987); see also Lawrence M. Friedman, American Law in the 20th Century 436 (Yale U. Press 2002) (discussing the practice of “colusive adultery,” whereby a wife would “discover” her husband committing adultery with a “mistress” hired by the parties; later, the wife would falsely testify about the “adultery” and her husband would make a “confession” to the judge). In fact, one likely reason for California Governor Ronald Reagan’s decision to sign the nation’s first no-fault divorce bill in 1969 was because his first wife had falsely accused him of “mental cruelty” to obtain a divorce. W. Bradford Wilcox, The Evolution of Divorce, Nat’l Affairs (2009), http://www.nationalaffairs.com/publications/detail/the-evolution-of-divorce (accessed Feb. 2, 2014).
64 See Vernier, supra n. 62, at 9 (accusing Western states of passing lax divorce laws to attract residents from other states).
and the sexual revolution, divorce became more socially acceptable and commonplace.

Divorce statutes evolved in kind. In 1970, California enacted the first no-fault divorce statute in the United States. The statute reflected the California legislature’s dissatisfaction with the traditional requirement that a spouse must prove fault to obtain a divorce. The statute also reflected a new public policy: “dead marriages should be terminated.” By 1985, every state allowed divorce on no-fault grounds. Between 1970 and 1990, many states also enacted statutes that allowed spouses to unilaterally petition for and obtain a divorce. In the past, states required both spouses to consent to the divorce; under these new statutes, a spouse could proceed with a divorce even if the other spouse adamantly opposed the proceeding.

The liberalization of divorce statutes, coupled with increased social acceptance of divorce, led to a significant rise in divorce rates. In 1960, only 2.2 out of every 1,000 persons were divorced. By 1981, this rate more than doubled to 5.3 out of every 1,000 persons. Today, divorce is no longer taboo.

66 See Id. ("Increases in women’s employment as well as feminist consciousness-raising also did their part to drive up the divorce rate, as wives felt freer in the late ’60s and ’70s to leave marriages that were abusive or that they found unsatisfying.")
67 See Id. (noting that during the “Swinging Seventies” spouses had an easier time finding extramarital partners and “came to have higher, and often unrealistic, expectations of their marital relationships”).
72 Phillips, supra n. 68, at 219.
73 Research suggests that the adoption of unilateral divorce statutes “accounted for 17 percent of the increase in divorce rates between 1968 and 1986.” Leora Friedberg, Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data, 88 Am. Econ. Rev. 608 (1998).
77 Id. From 1981 to 2008, the divorce rate stabilized at 3.6 per 1,000 persons; however, the marriage rate dropped significantly. In 1960, 8.5 out of every 1,000 persons were married; in 2006, that number went down to 7.3 out of every 1,000 persons. Id.
78 In fact, a growing number of people are now claiming that it is too easy to get a divorce. See e.g. Susan Cheever, Commentary, in Andrew Lindenauer, Divorce Made (Too) Easy, CBSNews.com (Mar. 1, 2001), http://www.cbsnews.com/news/divorce-made-too-easy.
in divorce.\textsuperscript{79} For the most part, spouses seeking a divorce no longer have to worry about the social stigma that once plagued many divorcing couples.

As issues related to guardian-initiated divorce powers re-emerge in the courts, an increasing number of courts are referring to the commonality of divorce as a justification for relaxing the majority rule.\textsuperscript{80} These courts note that the adoption of no-fault and unilateral divorces has undermined the view that “marriage is sacred and that only the most serious of marital offenses should be grounds for divorce.”\textsuperscript{81} Adopting a new public policy — dead marriages should be terminated — these courts conclude that the majority rule is now outdated.\textsuperscript{82}

\textbf{B. Expansion of Guardian Powers}

In the past 25 years, courts have allowed guardians to make increasingly more complex and immensely personal decisions on behalf of their wards. In fact, some of these decisions may be considered even more personal in nature than the decision to obtain a divorce.\textsuperscript{83} For example, courts have granted guardians the power to refuse or withdraw life-sustaining medical treatment on behalf of their wards.\textsuperscript{84} Courts have allowed guard-

\begin{itemize}
\item \textsuperscript{79} Mark Banschick, The High Failure Rate of Second and Third Marriages (Feb. 6, 2012), http://www.psychologytoday.com/blog/the-intelligent-divorce/201202/the-high-failure-rate-second-and-third-marriages. The statistics for second and third marriages are even more shocking: 67 percent of second marriages and 74 percent of third marriages end in divorce. \textit{Id.}
\item \textsuperscript{80} \textit{See e.g. Karbin v. Karbin, 977 N.E.2d 154 (Ill. 2012)} (asserting that Illinois’s ban on guardian divorce powers was “predicated upon concepts of fault and injury” that are no longer applicable under Illinois’s no-fault divorce statute); \textit{Kronberg v. Kronberg, 623 A.2d 806 (N.J. Super. Ch. Div. 1993)} (“When the Legislature created the no-fault ground for divorce in 1971, the legislative intent was to establish an additional cause of action in keeping with public policy that ‘dead marriages should be legally terminated.’ This court has attempted to carry out that public policy by allowing the guardians to maintain this action in an effort to legally terminate a marriage that has been dead for many years.”); \textit{In re Marriage of Gannon, 702 P.2d 465 (Wash. 1985)} (“[I]n these days of … no-fault dissolutions and the other vagaries of a vastly changing society, we think an absolute rule denying authority is not justified nor in the public interest.”).
\item \textsuperscript{81} \textit{Karbin v. Karbin, 977 N.E.2d 154, 161 (Ill. 2012)}, quoting Kurt X. Metzmeier, \textit{Power of an Incompetent Adult to Petition for Divorce Through a Guardian or Next Friend}, 33 U. Louisville J. Fam. L. 949, 951–952 (1995). Indeed, many “majority rule” jurisdictions emphasize the roles of fault and forgiveness in a spouse’s decision to obtain a divorce. \textit{Wood v. Beard, 107 So. 2d 198 (Fla. 2d Dist. App. 1958)} (noting that the majority rule upholds a ward’s right to forgive or condone his or her spouse’s actions and the competent spouse’s right to use condonation as a defense).
\item \textsuperscript{82} \textit{See e.g. Kronberg v. Kronberg, 623 A.2d 806, 813 (N.J. Super. Ch. Div. 1993)} (noting that, by creating no-fault divorce grounds, the legislature intended to further the public policy that “dead marriages should be legally terminated”).
\item \textsuperscript{83} \textit{See Karbin v. Karbin, 977 N.E.2d 154 (Ill. 2012)} (“[I]t is difficult for us to accept the view that the decision to divorce is qualitatively different from any other deeply personal decision, such as the decision to refuse life-support treatment or the decision to undergo involuntary sterilization. Each of these latter decisions can rarely be undone. The same cannot be said for the decision to divorce — if the disabled adult regains competency and disagrees with the guardian’s decision, remarriage to the former spouse may be possible.”)
\item \textsuperscript{84} \textit{See In re Estate of Longeway, 549 N.E.2d 292 (Ill. 1989)} (listing the jurisdictions that have permitted guardians to refuse or withdraw life-sustaining medical treatment on behalf of their wards).
\end{itemize}
rians to authorize sterilization, psychosurgery, abortion, organ donation, and experimental medical treatment on behalf of their wards. Courts have even allowed guardians to consent to their wards’ adoption and marriage.

These decisions share a number of similarities with the decision to obtain a divorce. First, these decisions are immensely personal. Many of these decisions — in particular, the decisions to refuse medical treatment and authorize abortion and organ donation — implicate the wards’ moral and religious beliefs. Second, these decisions are not expressly authorized by statute in the jurisdictions in which they are made. Rather, courts allow guardians to make these decisions under broad interpretations of statutes granting guardians the power to make decisions related to the “care, comfort, health, education and maintenance” of their wards. Finally, many of these decisions are made under circumstances in which the ward had not expressed a preference regarding the decision in the past and in which the ward was unable to communicate a preference at the time the decision needed to be made. The guardian, with court approval, is forced to make the decision based on what he or she believes to be in the best interest of the ward.

90 Ala. Code § 26-2A-78(c)(5) (West 1987); Wyo. Stat. Ann. § 3-2-201(b)(vi) (West 1985); see also In re Adoption of Savory, 430 N.E.2d 301, 302 (1981) (holding that a guardian has the authority to consent to his or her ward’s adoption).
91 Ala. Code § 26-2A-78(c)(5); Wyo. Stat. Ann. § 3-2-201(b)(vi); see also Knight v. Radomski, 414 A.2d 1211 (Me. 1980) (holding that a marriage between a ward and his or her spouse is void unless it is approved by the ward’s guardian).
92 In fact, some courts have characterized the decision to divorce as less personal than other decisions a guardian is already allowed to make. See e.g. Kronberg v. Kronberg, 623 A.2d 806, 810 (N.J. Super. Ch. Div. 1993) (“Everyone agrees that a decision to obtain a divorce is a personal one, but the [New Jersey] Supreme Court has authorized guardians to make decisions that are even more personal in nature . . . [such as] whether life support systems should be removed from the incompetent.”).
94 See, e.g., In re Estate of K.E.J., 887 N.E.2d 704, 719-20 (Ill. App. 1 Dist. 2008) (granting a guardian’s petition to sterilize his or her ward without express statutory authorization).
95 Id.
96 See e.g. Matter of Guardianship of L.W., 482 N.W.2d 60 (Wis. 1992) (authorizing a guardian to withdraw life-sustaining treatment in the best interest of his or her ward, where the ward was in a persistent vegetative state, had not executed a living will or power of attorney, and had never expressed his or her wishes regarding life-sustaining treatment).
97 Id.
A number of courts have relied on the similarities between the decision to initiate a divorce action and other personal decisions to justify a move away from the majority rule. These courts reason that if a guardian is allowed to make other immensely personal decisions on behalf of his or her ward, why should the decision to file for divorce be any different?

C. Protecting Elderly Wards from Their Spouses

The problem of elder abuse did not receive much attention in the United States until the 1950s, when Congress passed legislation that provided funding for states to establish protective service units for the elderly. Only a few states, however, elected to accept the funding. Nearly 20 years passed before Congress mandated protective service units in all states. Not until 1981 did Congress propose legislation to establish a national center dedicated to the prevention of elder abuse. Even then, the legislation never reached the floor of Congress.

Court decisions regarding guardian-initiated divorce reflect this shift in focus on elder abuse. Prior to 1980, the courts upholding the majority rule on guardian-initiated divorce did not acknowledge elder abuse as a distinct societal problem. These courts did not mention the hardships imposed on wards by the majority rule and seemed entirely unsympathetic to the abuse the wards alleged was being perpetrated against them by their guardians. In fact, one court went so far as to say the only way the ward could escape her marriage was by death.

In contrast, after 1980, nearly every court addressing this issue has emphasized the need to protect wards from abuse as a justification for reversing the majority rule. These courts noted that the majority rule vests the competent spouse with “absolute, final control

98 See e.g. Karbin v. Karbin, 977 N.E.2d 154, 162 (arguing that the decision to divorce is qualitatively no different from other decisions, such as refusing life-support treatment or undergoing involuntary sterilization, which a guardian is able to make on behalf of his or her ward in Illinois); Nelson v. Nelson, 878 P.2d 335, 339–340 (N.M. App. 1994) (observing that New Mexico courts have authorized guardians to make other immensely personal decisions on behalf of their wards even absent express statutory authorization); Ruvalcaba v. Ruvalcaba, 850 P.2d 674, 681 (Ariz. App. Div. 1 1993) (“[I]n this day and age, when guardians are permitted to refuse medical care on behalf of their incompetent wards — surely a decision that is extremely ‘personal’ to that individual — prohibiting that same guardian from maintaining an action for dissolution on behalf of the ward cannot be justified.”).

99 This view was summed up best by the court in Karbin v. Karbin: “Either the guardian can act in the best interests of the ward for all personal matters, or for none at all.” 977 N.E.2d 154, 165 (Ill. 2012).

100 Wolf, supra n. 3.

101 Id.

102 Id.

103 Id.

104 Id.

105 As one court noted, “majority jurisdictions choose an absolute bar as the lesser of two evils, protecting the possibility that the incompetent spouse might elect to remain married if competent, even if it effectively prevents the incompetent spouse from ending the marriage while under the adjudication of incompetency.” Nelson v. Nelson, 878 P.2d 335, 338 (N.M. App. 1994).

106 Sternberg v. Sternberg, 46 S.E.2d 349, 350 (Ga. 1948) (“Death only can dissolve the marriage relation without her consent ….”)
over the marriage.” The ward is left without adequate legal recourse against physical, emotional, or financial abuse at the hands of his or her spouse. At best, this inequity deprives the ward of his or her dignity and, at worst, condemns him or her to a life of abuse. The ward is left at the mercy of the spouse, and the only individual who may be in a position to help, the guardian, is left helpless.

D. The New Rule

Since 1970, courts in 18 states have rejected the majority rule based on one, or a combination, of the three trends discussed previously. Although these courts agree that there should not be a bright-line rule barring guardians from initiating divorce petitions on behalf of their wards, the courts rely on vastly different approaches to reach this conclusion.

Traditionally, courts barred guardians from initiating divorce actions on behalf of their wards absent express statutory authorization. Now, five courts have adopted the reverse logic to allow guardians to initiate divorce actions.


109 Id. at 684.


112 See e.g. Shenk v. Shenk, 135 N.E.2d 436, 438 (Ohio App. 3 Dist. 1954) (listing the jurisdictions that have relied on this rationale to uphold the majority rule).

113 See Broach v. Broach, 895 N.E.2d 640, 642 (Ohio App. 2 Dist. 2008) (concluding that, because the statute authorizing a guardian to initiate a suit on behalf of his or her ward does not explicitly exclude divorce actions, a guardian has the authority to initiate such actions); Houghton ex rel. Johnson v. Keller, 662 N.W.2d 854, 856 (Mich. App. 2003) (“Nothing in the language of M.C.L. § 552.6 expressly prohibits guardians from filing a complaint for divorce on behalf of a party to the marriage.”); Kronberg v. Kronberg, 623 A.2d 806, 810 (N.J. Super. Ch. Div. 1993) (“It is significant that while the Legislature conferred a broad, nonexclusive list of powers on a guardian, the only power that was withheld was the power to make a will.”); In re Ballard, 762 P.2d 1051, 1052 (Or. App. 1988) (concluding that a guardian has the authority to initiate a divorce action on his or her ward’s behalf because the statute authorizing a guardian to initiate a suit on behalf of his or her ward does not explicitly exclude divorce actions); McRae v. McRae, 250 N.Y.S.2d 778, 780 (N.Y. Sup. Ct. 1964) (“Without some basis for such an im-
guardianship statutes in their jurisdictions are broad enough to encompass the power to initiate a divorce action and conclude that, absent a statute that expressly bars a guardian from initiating a divorce action on behalf of his or her ward, a guardian has the power to do so.

Three courts have upheld the traditional ban against guardian-initiated divorces but create a narrow exception for “high functioning” wards. Under this exception, a guardian may file for divorce on behalf of a ward if the ward is 1) capable of exercising reasonable judgment regarding personal decisions; 2) expresses a desire to be divorced; 3) understands the nature of a divorce action; and 4) is able to testify at the divorce proceedings. If a ward is so incompetent that he or she is unable to satisfy these requirements, the guardian will not be able to initiate a divorce action on the ward’s behalf.

Several courts have rejected the majority rule outright and created a new rule whereby a guardian can initiate a divorce petition on behalf of his or her ward if there is evidence that clearly suggests the ward desires to divorce his or her spouse. This evidence may include written manifestations of the ward’s intent to be divorced, such as diary entries, emails, or a petition for dissolution signed by the ward while competent, as well as statements the ward made to third parties prior to his or her incapacitation. The ward’s spouse may retort with written or verbal manifestations of the ward’s intent to remain married. Ultimately, the court determines whether the ward, if competent, would want a divorce and substitutes its judgment for what it believes the ward would do under the circumstances.


(115) Syno v. Syno, 594 A.2d 307, 311 (Pa. Super. 1991); Northrop v. Northrop, 1996 WL 861489 at *8 (Del. Fam. June 10, 1996); In re Marriage of Higgason, 516 P.2d 289, 294 (Cal. 1973). This exception adopts the modern view that “capacity exists along a spectrum.” Frolik & Barnes, supra n. 1, at 33. Under this view, a ward may be capable of making some decisions but may need a guardian to assist him or her in making others. Id.

(116) The Superior Court of Pennsylvania took these requirements a step further by necessitating courts to “conduct an inquiry to determine whether the [ward] understands his or her duty to tell the truth and whether he or she is able to perceive, remember, and communicate the pertinent facts” prior to authorizing a guardian-initiated divorce.

(117) See e.g. Ruvalcaba v. Ruvalcaba, 850 P.2d 674 (Ariz. App. Div. 1 1993) (concluding that a trial court should apply the “substituted judgment” standard to determine whether a ward desires to dissolve his or her marriage,-reserving the issue of whether a court may apply the “best interest” test if there is no evidence of what the ward desires); Boyd v. Edwards, 446 N.E.2d 1151 (Ohio App. 8 Dist. 1982) (ruling that a guardian may initiate a divorce action on behalf of his or her ward only upon a showing that the ward has expressed a “sincere wish and desire” to dissolve his or her marriage in the past).

(118) See e.g. Ruvalcaba v. Ruvalcaba, 850 P.2d 674, 682–683 (Ariz. App. Div. 1 1993) (allowing guardian to testify about statements the ward, her daughter, made to her regarding her marriage while still competent).

(119) Id.

(120) Courts have given the “substituted judgment” standard preference over the “best interest” standard. See e.g. Ruvalcaba v. Ruvalcaba, 850 P.2d 674, 682 (Ariz. App. Div. 1 1993) (authorizing guardian-initiated
In cases in which there is no evidence of the ward’s desire to obtain a divorce prior to his or her incapacitation, some courts have applied a “best interest” standard.\textsuperscript{121} Under this standard, a court determines whether a divorce would further the ward’s immediate and long-term interests.\textsuperscript{122} If known, a court considers the ward’s values, lifestyle, and goals in making this determination.\textsuperscript{123} The court will allow a guardian to initiate a divorce action on behalf of his or her ward if it concludes that a divorce is the best means to promote and protect the well-being of the ward.\textsuperscript{124}

To safeguard against unwanted divorces initiated by guardians with ulterior motives, courts have required guardians to obtain court approval prior to initiating a divorce action.\textsuperscript{125} This requirement ensures that a court can exercise its discretionary authority in determining whether a divorce action is appropriate under the circumstances.\textsuperscript{126} As an additional safeguard, in cases in which the divorce proceeding was initiated by a guardian of the person, courts have appointed a guardian ad litem to conduct an independent evaluation of the case and assist the court in making its determination.\textsuperscript{127}

To safeguard against guardian abuse of divorce powers, some courts have imposed heightened evidentiary standards on guardians seeking to initiate divorce actions on behalf of their wards.\textsuperscript{128} For example, the court in \textit{Ruvalcaba v. Ruvalcaba} required a guardian to initiate divorces under a “substituted judgment standard” but abstaining from a decision as to whether a “best interest” standard would be sufficient).\textsuperscript{121}

\textsuperscript{121} See Vaughan v. Guardianship of Vaughan, 648 So. 2d 193, 196 (Fla. 5 Dist. App. 1994) (remanding the case to afford the ward’s spouse an opportunity to present evidence supporting her claim that a divorce was not in the ward’s best interest); Nelson v. Nelson, 878 P.2d 335, 340 (N.M. App. 1994) (“We are concerned that the wishes of an incompetent adult ward with regard to the permanence of marriage vows be respected. If those wishes cannot be definitively ascertained, a divorce may still be granted under appropriate circumstances when the best interests of the ward are implicated.”); Kronberg v. Kronberg, 623 A.2d 806, 811 (N.J. Super. Ch. Div. 1993) (concluding that a divorce would be in the ward’s best interest); In re Marriage of Gannon, 702 P.2d 465, 467 (Wash. 1985) (remanding to give the guardian an opportunity to prove a divorce was in the ward’s best interest).

\textsuperscript{122} As in other actions, the burden of proof is on the guardian seeking to initiate the divorce action. See e.g. Nelson v. Nelson, 878 P.2d 335, 340 (N.M. App. 1994) (stating that a guardian has the “burden of proving the necessary factual basis supporting the divorce”).

\textsuperscript{123} Courts have allowed friends, family members, and clergy to testify regarding a ward’s values and beliefs. \textit{Id.}

\textsuperscript{124} \textit{Id.} (“Where, as here, there was evidence of abuse and there is evidence of neglect of an elderly, incompetent spouse by a competent spouse … we find no public policy or equitable justification for barring the ward’s guardian from bringing an action for divorce on behalf of the ward.”)

\textsuperscript{125} For the one jurisdiction that does not require court approval prior to the initiation of a divorce action, see Mo. Rev. Stat. Ann. § 452.314 (West 1990).

\textsuperscript{126} The court exercises this discretion for the first time when it decides whether to allow the guardian to file the divorce petition and for a second time when it decides whether to grant the divorce.

\textsuperscript{127} See e.g. Stubbs v. Ortega, 977 S.W.2d 718, 722 (Tex. App.— Fort Worth 1998) (interpreting general guardianship statutory provisions to require the appointment of a guardian ad litem or next friend in cases in which a guardian is seeking to initiate a divorce on behalf of his or her ward).

\textsuperscript{128} Courts also have required a heightened evidentiary burden in guardianship cases involving other highly personal and complex decisions. See e.g. In re Grady, 426 A.2d 467 (N.J. 1981) (requiring guardian to adduce clear and convincing evidence that sterilization was in his ward’s best interest); In re Estate of Longeway, 549 N.E.2d 292 (Ill. 1989) (requiring guardian to establish by clear and convincing evidence that withdrawal of artificial sustenance was in his ward’s best interest).
Statutory Authorization for Guardian-Initiated Divorces

ian to produce clear and convincing evidence of his ward’s intent or attitude toward the marriage prior to initiating a divorce action on her behalf. The court reasoned that “[c]ases involving the dissolution of an incompetent spouse’s marriage … present issues involving personal interests more complex and important than those typically presented in a civil lawsuit” and, therefore, a heightened evidentiary burden is appropriate. Similarly, the court in Karbin v. Karbin, required a guardian to establish by clear and convincing evidence that a divorce would be in his ward’s best interest.

Some legal commentators have suggested that courts can safeguard against guardian divorce power abuse by barring various parties, including the ward’s spouse and family members, from testifying about statements the ward made while competent concerning his or her desire to remain married or obtain a divorce. To date, however, courts have taken the opposite approach and allowed this hearsay testimony.

V. CODIFYING THE NEW RULE

A. Current Statutory Authorization for Guardian-Initiated Divorces

Three states, Florida, Colorado, and Missouri, have gone beyond the courts and passed statutes that allow guardians to initiate divorces on behalf of their wards. None of these statutes, however, goes far enough to protect wards from spousal abuse, guardian abuse, or both.

1. Florida’s Spousal Consent Law

In 1989, the Florida legislature passed a statute that impliedly authorizes a guardian to initiate a divorce action on behalf of his or her ward. The statute states that a guardian

130 Id.
132 See e.g. Diane Snow Mills, “But I Love What’s-His-Name”: Inherent Dangers in the Changing Role of the Guardian in Divorce Actions on Behalf of Incompetents, 16 J. Am. Acad. Matrimonial L. 527, 554 (2000) (“In order to allow testimony as an exception to the hearsay rules, trustworthiness is a requirement. Particularly in cases where the inheritance of the guardian or of the witnesses is at stake, there is no trustworthiness guarantee. Indeed, human nature is likely to intervene in any situation where the guardian and/or third-party witnesses have strong feelings on the issue of whether or not the dissolution should occur.”).
133 See e.g. Ruvalcaba v. Ruvalcaba, 850 P.2d 674 (Ariz. App. Div. 1 1993) (admitting, out of necessity, hearsay testimony from third parties about comments the ward made about his marriage prior to his incapacitation); In re Ballard, 762 P.2d 1051, 1053 (Or. App. 1988) (allowing testimony from a ward’s social worker, nephew, and friend as to the ward’s desire to be divorced from his wife while competent, noting “[t]he risk of bias of wife is at least as great as that of third parties”).
134 Fla. Stat. Ann. § 744.3215(4)(c) (West 1989). It was not until 1994 in Vaughan v. Guardianship of Vaughn that a court first interpreted § 744.3215(4)(c). 648 So. 2d 193 (Fla. 5th Dist. App. 1994). In Vaughan, the Court of Appeals for the Fifth District stated that the legislature “clearly envisioned circumstances which would justify authorizing a guardian to undertake the admittedly very personal act of seeking a [divorce] on behalf of an incapacitated ward.” Although the court pointed out that § 744.3725 specifies § 744.3215(4)(c) as merely procedural and not intended to create any new right or authority over divorce, the court determined that “the question of who will bring the action is merely procedural.” The court concluded that § 744.3215(4)(c) supports a guardian’s authority to initiate a divorce on behalf
cannot initiate a divorce action on behalf of the ward without first obtaining court approval as described in another statute passed later that same year. According to the latter statute, a court must follow three fact-finding steps prior to granting this authorization. First, the court must appoint an independent attorney to act on the ward’s behalf. The attorney is responsible for meeting with the ward and presenting evidence and cross-examining witnesses at any hearing on the guardian’s petition for authority to act. Next, the court must “[r]eceive as evidence independent medical, psychological, and social evaluations” with respect to the ward or “appoint its own experts to assist in the evaluations.” The court must also schedule a personal meeting with the ward to obtain its own impression of the ward’s incapacity and provide the ward with an opportunity to express his or her views regarding the divorce. Finally, after these steps are completed, the court may authorize the guardian to initiate the divorce action if it finds that the following three conditions are met: 1) there is clear and convincing evidence showing that the ward lacks the capacity to make the decision to obtain a divorce and is unlikely to regain capacity in the foreseeable future; 2) there is clear and convincing evidence demonstrating that divorce is in the best interest of the ward; and, the major caveat, 3) the ward’s spouse consents to the dissolution.

In many ways, the laws governing guardian-initiated divorces in Florida are very protective of wards: the guardian must satisfy a heightened evidentiary standard in order to obtain court approval, and the court must take extra precautions to ensure that the ward truly wants the divorce (i.e., a personal meeting with the ward, independent evaluations of the ward’s condition, appointment of an attorney). In contrast, the spousal consent requirement undercuts all of these protections. Based on this requirement, a guardian’s ability to initiate a divorce on behalf of his or her ward is contingent on the approval of the ward’s spouse, the very person who may be the ward’s abuser. If the ward’s spouse has an incentive to remain married, he or she can simply veto the proposed divorce, thereby terminating the divorce proceeding. Given that the purpose of a statute authorizing a guardian to initiate a divorce is to protect the ward, the current legislation contravenes that purpose by leaving the ward’s spouse with complete and absolute control over the marriage and the ward without adequate legal recourse against potential abuse.

2. Colorado’s “Compelling Circumstances” Test

The law governing guardianship/conservatorship proceedings in Colorado is in many ways more lenient than the law in Florida. First, unlike Florida law, Colorado

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137 Id.
142 Fla. Stat. Ann. § 744.3725(5) (West 1995). This paragraph was not included in the original 1989 statute.
143 Colorado law only uses the term “guardian” to refer to a substitute decision maker who makes personal
law does not mandate the involvement of an independent attorney (or any neutral party, such as a guardian ad litem) in the guardianship or conservatorship proceeding. Second, courts in Colorado are not required to obtain independent evaluations of the ward’s condition or meet with the ward to evaluate him or her. Third, the law does not impose a “clear and convincing” burden of proof on the guardian or conservator; a guardian or conservator in Colorado merely has to demonstrate that, due to “compelling circumstances,” a divorce is in the ward’s best interest and that the ward is either incapable of consenting or has consented to the proposed divorce in the past. Finally, a guardian or conservator in Colorado can initiate the divorce action even if the ward’s spouse does not consent to the divorce.

On the one hand, the Colorado legislation offers a ward added protection against spousal abuse by not including Florida’s spousal consent requirement; on the other hand, the legislation removes much needed protection for the ward by failing to impose a clear and convincing evidentiary standard on the guardian seeking to initiate a divorce proceeding. A heightened evidentiary standard is necessary in these cases because the issues involved are far more complex and important than those typically present in a civil lawsuit. Although the liberalization of divorce laws and current divorce rates suggest that divorce is no longer taboo, the decision to divorce is no less personal today than it was 50 or 100 years ago. A heightened evidentiary burden strikes an appropriate balance between safeguarding against unwanted divorces initiated by guardians with ulterior motives and ensuring that a guardian can dissolve his or her ward’s marriage when it is truly warranted under the circumstances.

3. Missouri’s “Reasonable Cause” Standard

Of the three states that have passed statutes authorizing guardian-initiated divorces, Missouri has the most lenient statute. In Missouri, a guardian may file for divorce on behalf of his or her ward if the guardian has “reasonable cause to believe that the [ward] has been the victim of abuse.” The guardian is not required to satisfy a heightened evidentiary standard or demonstrate that a divorce would be in the ward’s best interest. In fact, the guardian does not even have to obtain approval from the court prior to filing the

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145 Id.


147 A spousal consent requirement is particularly worrisome in its application to elders given that a large percentage of elders are abused by their spouses. Nat’l Ctr. on Elder Abuse, Frequently Asked Questions, http://www.ncea.aoa.gov/faq/index.aspx (accessed Feb. 2, 2013). A substantial portion of these cases involves a history of one spouse exerting power and control over the other through abuse, isolation, and threats. Id.

petition.\textsuperscript{149} Although the Missouri statute affords considerable protection to the ward from his or her spouse, it offers no protection from the ward’s guardian.\textsuperscript{150} For one, the statute does not define abuse; a guardian is left guessing what conduct on the part of the ward’s spouse triggers his or her authority to initiate the divorce action on behalf of the ward.\textsuperscript{151} In addition, nothing in the statute prevents the guardian from employing his or her own subjective definition of abuse rather than an objective definition.\textsuperscript{152} Typically, a heightened evidentiary burden would safeguard against this shortcoming; however, the Missouri statute does not impose this burden on the guardian.\textsuperscript{153} The Missouri statute merely requires the guardian to have a “reasonable cause to believe” that the ward is a victim of abuse.\textsuperscript{154} With a decision as personal as the fate of the ward’s marriage, this standard hardly seems sufficient to protect the ward from an unwanted divorce. Moreover, because court approval is not required before a guardian initiates the divorce action, a court does not have the opportunity to exercise its discretionary authority to determine whether the divorce is appropriate under the circumstances.\textsuperscript{155} Overall, the Missouri statute’s added protections against spousal abuse leave little room for protection against guardian abuse.

\textbf{B. Proposed Statutory Authorization for Guardian-Initiated Divorces}

In 2012, State Sen. Ira Silverstein (D-Chicago) proposed a bill that, if passed, would grant a guardian of the person in Illinois, with court approval, the authority to initiate a divorce action on behalf of his or her ward.\textsuperscript{156} The bill offers wards added protections over

\textsuperscript{149} To date, Missouri is the only jurisdiction that has allowed a guardian to initiate a divorce petition without first obtaining court approval. \textit{See supra} n. 49 for a list of the jurisdictions that allow guardian-initiated divorces only upon court approval.


\textsuperscript{151} In fact, the statute does not define any of its terms or refer to other legislation for definitions. Mo. Rev. Stat. Ann. § 452.314 (West 1990).

\textsuperscript{152} Spousal abuse can take either an active or passive form. Brashier, \textit{supra} n. 9, at 8–11. Active abuse falls into one of four categories: physical, sexual, financial, or emotional. \textit{Id.} Passive abuse involves a spouse failing to take reasonable steps to protect his or her spouse and his or her spouse’s welfare. \textit{Id.} Based on the language of the Missouri statute, it is unclear which form of abuse triggers the statutory protection.


\textsuperscript{154} \textit{Supra} n. 151.


\textsuperscript{156} Ill. Sen. 2547, 97th Legis. (Jan. 11, 2012). The bill was posted for hearing in the Judiciary Committee on February 7, 23, and 28 and April 7, 2012, but was either not called in committee or, if called, was not voted on. On March 9, 2012, the bill was re-referred to the Committee on Assignments but was never assigned to another committee. On February 5, 2014, Senator Silverstein proposed another bill which, if passed, will grant both a guardian of the person and guardian of the estate to file a petition for dissolution of marriage on behalf of his or her ward. Ill. Sen. 2954, 98th Legis. (Feb. 4, 2014). The bill was passed by the Senate on April 2, 2014 and by the House on May 20, 2014. \textit{Bill Status of SB2954}, http://www.ilga.gov/legislation/BillStatus.asp?DocNum=2954&GAID=12&DocTypeID=SB&SessionID=85&GA=98 (accessed July 22, 2014). The bill was sent to the Governor for final approval on June 27, 2014. \textit{Id.}
the Florida, Colorado, and Missouri statutes; however, it does not fully protect wards from potential abuse.

Under the proposed bill, a guardian of the person must file a verified motion alleging facts that demonstrate the divorce is warranted under one of three standards. The first standard applies when a ward has capacity to consent or withhold consent for the proposed divorce. A ward is not presumed to lack this capacity solely on the basis that he or she has been appointed a guardian. The second standard applies when the ward does not have capacity to consent or withhold consent, and is unlikely to regain such capacity, but nevertheless expresses a clear desire for the proposed divorce. Under this standard, a court relies on the substituted judgment and best interest standards set forth in the Illinois Probate Act to decide whether the divorce action is warranted. The third standard applies when the ward lacks capacity to consent or withhold consent, is unlikely to regain such capacity, and is not expressing a clear desire for the proposed divorce. Again, the court looks to the Illinois Probate Act to decide whether the divorce action is warranted.

The bill includes three provisions to safeguard against unwanted divorces. First, a guardian cannot initiate a divorce action on behalf of his or her ward without first obtaining court approval. Second, upon the filing of the guardian’s verified motion, the court is mandated to appoint a guardian ad litem to report to the court. The guardian ad litem is required to meet with the ward to ascertain the ward’s preferences and, at or before the hearing on the verified motion, submit a written report on his or her findings. Third, if the court finds that the ward does not have the capacity to consent and has not expressed a clear desire to be divorced, the court cannot authorize the guardian to initiate the divorce action unless it finds by clear and convincing evidence that the following criteria are met: 1) The ward lacks decisional capacity regarding the proposed divorce; 2) the benefits to the ward of the proposed divorce outweigh the harms; 3) less intrusive alternatives would be inadequate; and 4) the proposed divorce is in the best interest of the ward, “taking into consideration the possibility that the ward will experience trauma or psychological damage if she is divorced, or conversely, the possibility of trauma or psychological damage if she remains married.”

Although the bill may ensure that a divorce is only initiated in cases in which the wards want or would have wanted a divorce if competent, the bill does not adequately protect wards from abuse at the hands of their spouses or guardians. In the past, courts have allowed various kinds of guardians to initiate divorce actions on behalf of their wards. In fact, out of the 18 jurisdictions that have rejected the majority rule in the past 30 years, 10 suits were brought by guardians of the person and guardians of the estate, six

157 Id.
158 Id.
159 Id.
160 Id.
163 Id.
164 Id.
165 Id.
166 Id.
by guardians ad litem, one by a guardian of the person, and one by a special guardian.\textsuperscript{167} Only one out of the 15 courts specified which kind of guardian could initiate a divorce action on his or her ward’s behalf.\textsuperscript{168} All three states that have passed statutes expressly authorizing guardian-initiated divorces extend this authority to guardians of the person \textit{and} guardians of the estate.\textsuperscript{169} The language of the proposed bill only grants a guardian of the person the authority to initiate a divorce action on behalf of his or her ward. Although the bill does not explicitly bar a guardian of the estate or guardian ad litem from initiating a divorce action, absent this express authorization, the bill could be interpreted to imply such a bar. This limitation on the kind of guardian who may initiate a divorce may prevent a ward from escaping an abusive marriage. More often than not, guardians of the person are related to the ward. In fact, courts prefer to appoint a ward’s close relative as his or her guardian.\textsuperscript{170} In many cases, a guardian’s familial relationship to the ward does not interfere with his or her ability to fulfill his or her obligations as guardian. Unfortunately some familial guardians make decisions for their wards based on their own personal motives or biases or, worse, actually become their wards’ abusers.\textsuperscript{171}

In the context of guardian-initiated divorces, a familial relationship between the guardian and the ward may become particularly problematic if the guardian’s inheritance depends upon the ward’s marital status. The guardian may fail to initiate a divorce action out of a desire to influence his or her inheritance, rather than out of consideration for the ward’s preferences or what is best for the ward. Based on the inheritance provisions set forth in the Illinois Probate Act, it is not difficult to imagine a scenario in which a guardian’s inheritance would depend upon his ward’s marital status.\textsuperscript{172} If spousal abuse is taking place, a guardian’s failure to initiate a divorce action on behalf of his or her ward leaves the ward at the mercy of the spouse and leaves the ward’s spouse with complete control over the marriage.

In cases in which the guardian of the person may have a financial interest in the outcome of the divorce proceedings, the appointment of a guardian ad litem or a guardian of the estate without a financial interest in the case is essential to protect the ward. Upon

\begin{itemize}
\item \textsuperscript{167} In all of these cases except one, the guardian of the person was either the ward’s parent or child.
\item \textsuperscript{168} \textit{Syno v. Syno}, 594 A.2d 307 (Pa. Super. 1991). In the remaining jurisdictions, it is unclear whether a conservator is allowed to initiate a divorce action on behalf of an incapacitated person whose spouse is financially exploiting him or her.
\item \textsuperscript{170} Presumably a close relative is more familiar with the preferences, values, and lifestyle of the ward than a distant relative or public guardian and, therefore, is better equipped to act in the ward’s best interest.
\item \textsuperscript{171} Research suggests that 90 percent of elder abusers are family members of the elders. Nat’l Ctr. on Elder Abuse, \textit{supra} n. 150.
\item \textsuperscript{172} For example, the Act’s intestacy provisions favor the close family members of a decedent. If married people die intestate, half of their estate is distributed to their spouse and the other half to their descendants per stirpes. 755 Ill. Comp. Stat. 5/2-1 (West 1999). On the other hand, if nonmarried people die intestate, their entire estate is distributed to their descendants per stirpes. \textit{Id.} If people with no spouse or descendants die intestate, their parents are among those who may inherit their estate. \textit{Id.} Another provision in the Act voids a bequest to a spouse in a will if the testator divorces his or her spouse. 755 Ill. Comp. Stat. 5/4-7(b) (West 1979).
\end{itemize}
investigation, if the guardian ad litem or guardian of the estate suspects that the financial motives of the ward’s guardian of the person are interfering with his or her duty to protect the ward from spousal abuse, the guardian ad litem or guardian of the estate can step in and initiate the divorce action him or herself to prevent further abuse.\textsuperscript{173}

VI. PROPOSED STATUTE

The following proposed statute borrows and builds upon the Florida, Colorado, and Missouri legislation discussed previously. By expanding the protections a ward receives beyond those afforded under current legislation, this statute strikes the proper balance in ensuring that a ward receives the protection he or she needs against both spousal \textit{and} guardian abuse.

**Procedure for Guardian-Initiated Divorces**

(A) A guardian of the person, guardian of the estate, or guardian ad litem (GAL) seeking authority to initiate a divorce on behalf of his or her ward must seek such authority by filing a verified motion.\textsuperscript{174} The verified motion must allege facts that demonstrate that the proposed divorce is warranted.\textsuperscript{175}

(B) The ward must receive notice of the divorce proceedings, unless the court finds the incapacitated person lacks the ability to comprehend the notice.\textsuperscript{176}

(C) Upon the filing of a verified motion for authority to initiate a divorce, if the petitioner is not the ward’s GAL, the court must appoint a GAL to report to the court.\textsuperscript{177} If the GAL is not a licensed

\textsuperscript{173} The appointment of a new guardian for this purpose is exemplified in \textit{Northrop v. Northrop}, 1996 WL 861489 (Del. Fam. June 10, 1996). In \textit{Northrop}, the husband filed a petition for divorce at the age of 81 alleging irreconcilable differences. \textit{Id.} at 1. Seven months later, his attorney filed a motion alleging the husband had advanced Alzheimer’s and seeking to substitute the husband’s two children in the divorce petition. \textit{Id.} The wife filed an answer to her husband’s petition denying that the marriage had broken down. \textit{Id.} The issues before the court were whether, 1) the husband’s divorce petition should be dismissed due to his incapacity, and 2) whether the substitution of parties should be granted. \textit{Id.} After a review of case law from other jurisdictions, the court rejected the majority rule. \textit{Id.} at 3. Addressing the second issue, the court noted that the husband’s children may have had a conflict of interest in these proceedings and appointed a guardian ad litem to continue the divorce action. \textit{Id.} at 9. Although \textit{Northrop} involved the continuation of a divorce action, rather than the initiation of a divorce action, the same considerations and procedure for appointing a guardian ad litem apply.

\textsuperscript{174} By removing limitations on the type of guardian who may initiate the divorce, this provision protects wards from guardians of persons or estates who may have personal incentives to preserve the ward’s marriage.

\textsuperscript{175} A motion is verified when it includes a signed and notarized statement by a person swearing that the facts presented in the motion are true. USLEGAL, \textit{Verified Petition Law & Legal Definition}, http://definitions.uslegal.com/v/verified-petition (accessed Feb. 2, 2014). A verified motion ensures that the petitioner can be held legally accountable if the motion is found to contain false information.

\textsuperscript{176} This notice requirement helps ensure that a proposed ward’s procedural due process rights are not violated.

\textsuperscript{177} The appointment of a guardian ad litem helps safeguard against guardians of the person or estate who are seeking to initiate a divorce on behalf of their wards merely for personal gain.
attorney, he or she must be qualified, by training or experience, to work with or advocate for persons with a developmental dis-
ability, mental illness, physical disability, or disability resulting from mental deterioration, depending on the type of disability of the ward that is alleged in the motion. The GAL must personally meet with the ward prior to the hearing to obtain his or her own impression of the ward’s capacity. At this meeting, the GAL must inform the ward orally and in writing of the contents of the verified motion for authority to initiate a divorce action. The GAL must afford the ward the full opportunity to express his or her personal views or desires with respect to the proposed divorce. At or before the hearing, the GAL must file a written report detailing his or her observations of the ward; the responses of the ward to any inquiries relating to the proposed divorce; the opinion of the GAL and any other professional with whom the GAL consulted concerning the ward’s understanding of and desire for or objection to, as well as what is in the ward’s best interest relative to, the proposed divorce; and any other relevant material issue discovered by the GAL. The GAL must appear at the hearing and testify, and may present and cross-examine witnesses, about any issues presented in his or her report.

(D) The court may appoint counsel for the ward if the court finds that the interests of the ward will be best served by the appointment. The court must appoint counsel upon the ward’s request if the ward objects to the proposed divorce or if the ward takes a position adverse to that of the GAL. The ward must be permitted to obtain the appointment of counsel either at the hearing or by any written or oral request communicated to the court prior to the hearing. Counsel can be invaluable in preparing a ward for the hearing in cases in which the ward intends to object to the proposed divorce or take a position adverse to his or her guardian.

178 By being familiar with the ward’s disability, the guardian ad litem will be in a better position to assess the intentions of the guardian of the estate or person and the ward’s physical and mental condition.
179 This requirement helps ensure that a guardian ad litem has an opportunity to form an independent impression of the ward’s condition rather than merely relying on the opinions of others.
180 Supra n. 176.
181 This provision reinforces the idea that a ward should be granted the maximum level of autonomy consistent with his or her cognitive and physical abilities. Brashier, supran. 9, at 49.
182 A comprehensive written report is particularly important because the court is relying on the guardian ad litem’s assessment and evaluation of the case.
183 Potential witnesses include court-appointed physicians, court-appointed psychologists, and any other individuals who participated in the evaluation of the ward’s condition.
184 This provision is particularly important in cases in which the guardian of the person or estate is the ward’s family member because the ward may be reluctant to report the guardian as his or her abuser. A court-appointed attorney can emphasize the importance of reporting the abuse and help protect the ward from possible retaliation from the guardian.
185 Counsel can be invaluable in preparing a ward for the hearing in cases in which the ward intends to object to the proposed divorce or take a position adverse to his or her guardian.
appointed counsel. The court may allow counsel for the ward reasonable compensation.

(E) Before the court may grant authority to a guardian to initiate a divorce action on behalf of his or her ward, the court must:

1. Receive as evidence independent medical, psychological, and social evaluations with respect to the incapacitated person by competent professionals or appoint its own experts to assist in the evaluations;
2. Find by clear and convincing evidence that the following factors are present:
   a) The ward lacks decisional capacity regarding the proposed divorce and is unlikely to regain this capacity in the foreseeable future or has capacity and has consented to the proposed divorce;
   b) The benefits of the proposed divorce to the ward outweigh the harms;
   c) Less intrusive alternatives are inadequate in the ward’s case;
   d) The proposed divorce does not contravene the ward’s moral or religious beliefs; and
   e) The proposed divorce is in the best interest of the ward, taking into consideration the possibility that the ward will experience trauma or psychological damage if he or she is divorced or, conversely, the possibility of trauma or psychological damage if he or she remains married.

(F) Nothing in this section must be construed as modifying the statutory grounds for divorce.

VII. CONCLUSION

For more than a century, guardians could not initiate divorce actions on behalf of their wards. The rationales for this rule were twofold: 1) the decision to divorce was simply too personal to be made by anyone other than the ward and 2) there was no express statutory authority granting guardians this power. In the past 40 years, a number of changes in the law and society in general have eroded these rationales. Consequently, a

186 Supra n. 176.
187 Independent evaluations are an extra precaution to ensure that the ward truly wants or needs the divorce.
188 A heightened evidentiary standard is necessary because of the complex and highly personal issues involved in divorces.
189 Less intrusive alternatives include relationship-focused alternatives, such as couples therapy, and legal alternatives, such as annulment and separation.
190 This factor helps alleviate some of the personal concerns implicated by the decision to divorce.
191 If known, the court must consider the ward’s values, lifestyle, and goals in making this determination.
192 This provision reinforces that the statutory grounds for divorce in each state must still be met in order for the guardian’s divorce petition to be granted.
growing number of courts have abandoned the majority rule or created exceptions to it. While court abandonment of the majority rule is an important next step in ensuring that guardians have a legal mechanism to protect their married elderly wards from abuse, it is simply not enough. Statutory authorization for guardian-initiated divorces is essential to ensure uniformity within each state\textsuperscript{193} and prevent both underuse and overuse of this legal mechanism.

Three states, including Florida, Colorado, and Missouri, have stepped beyond the courts and passed legislation expressly authorizing a guardian to initiate a divorce on behalf of his or her ward. At least one other state has considered joining these states. While this legislation represents an important next step toward protecting this vulnerable population from abuse, additional steps, such as the ones suggested in the proposed statute above, are essential to protect wards from abuse both at the hands of their spouses and at the hands of their guardians.

BOOK REVIEW


(Nomos, Stampfli Verlag, C.H. Beck, 2013, 335 pp.)
Editors: Makoto Arai, Ulrich Becker, and Volker Lipp

Reviewed by Charles P. Golbert, Esq.

In 2010, Yokohama, Japan, hosted the First World Congress on Adult Guardianship Law. The Congress brought together lawyers, judges, guardians, and academics from around the world to study the current state of adult guardianship law, compare different approaches, and exchange ideas. The papers presented at the Congress are now available in a thought-provoking book.

While all of the countries represented have some type of guardianship, the specifics and the extent to which guardianship is used vary widely. Japan’s hybrid guardian/power of attorney, for example, is the subject of several papers. In Japan, a person can designate a power of attorney while still competent. The power of attorney is registered, and a court appoints a supervisor over the agent if the principal loses capacity. If a power of attorney is not designated, a guardian can be appointed. However, it was not until 2000 that a social service agency or municipality could be appointed as a guardian. Although guardianship is not as widely used in Japan as in other countries, its occurrence is increasing and the family courts need more resources. One of the papers discusses the interesting etymology of the Japanese word for guardianship, “kohken,” which has its roots in Japanese puppet theater. A kohken is a stagehand who helps the actors perform dramatic scenes and dances.

Expanding the supply of and supports for volunteer guardians is the topic of several papers from different countries. Like the United States, Germany relies heavily on a volunteer guardianship system. Approximately 70 percent of guardians are volunteer family members, friends, neighbors, or colleagues. To encourage volunteer guardians, the German states provide support such as access to free legal advice. Volunteer guardians can also claim all expenses or elect to receive a yearly compensation of approximately 350 euros. If the estate has less than 2,600 euros, the state bears the expense. To increase the availability of volunteer guardians, Japan recently implemented training programs developed by national universities.

In Australia, guardianship is adjudicated by specialist tribunals that are not part of the judiciary. The tribunals are comprised of multidisciplinary panels chaired by a legal practitioner. Other panel members may include psychologists or social workers trained in communication techniques to put participants at ease. The tribunals often convene in hospital wards or nursing homes and can receive evidence via email.

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One of the papers discusses recent cases decided by the European Court of Human Rights, including a case addressing the voting rights of people under guardianship, which is the topic of an article in this issue of *NAELA Journal*. In 2010, in a case from Hungary, the court held that the automatic disenfranchisement of people under guardianship is unjustified. As a result, countries in Europe that provide for automatic disenfranchisement are changing their laws.

A judge from England presented a provocative paper about whether guardianship proceedings should be open to the public. The paper outlines the history of adult guardianship proceedings in England since the reign of Edward I in the thirteenth century. The “lunacy inquiry,” as it was known at the time, took place in public before a judge and a jury of up to 23 members. The first inquiry to receive extensive newspaper coverage was that of an English aristocrat, John Charles Wallop, the Third Earl of Portsmouth, in 1823. For the next 67 years, the press reported regularly on lunacy inquiries. None of the newspapers protected the anonymity of the persons concerned and published their full names, addresses, assets and liabilities, income and expenditures, eating and drinking habits, living conditions, and sexual activities. Due to privacy concerns, since 1890, proceedings have generally been conducted in private, although a judge can open the proceeding upon a finding of good reason. A recent appellate opinion interpreting this exception suggested that publicizing adult guardianship proceedings could constitute a form of discrimination against persons who lack capacity.

Several American experts presented papers at the Congress. David English discussed the prospects for U.S. ratification of the Hague conventions relating to adult guardianship — in particular, the 2000 Convention on the International Protection of Adults and the 1985 Convention on the Law Applicable to Trusts and on Their Recognition. Professor English is cautiously optimistic that the United States will eventually adopt one or both conventions.

Sally Hurme, Senior Project Manager at AARP, presented a paper on guardianship trends in the United States. In explaining our decentralized state system and the resultant slow pace of meaningful change, she analogized guardianship in the United States to an old patchwork quilt that has been patched with some modern quilt pieces and held together randomly by modern stitching. Although the 51 pieces (the 50 states and the District of Columbia) of that quilt have changed over time, Hurme stressed that the quilt has held together well.

Rebecca Morgan presented a paper on the use of the least restrictive alternatives and limited guardianships to maximize ward autonomy. Her paper is interesting in juxtaposition to papers from countries such as China that have an all-or-nothing approach and do not use, or rarely use, limited guardianship. In Germany, on the other hand, most guardianships are extremely limited. This is in part a response to abuses during Germany’s Nazi period when people with disabilities were murdered or sterilized without their consent.

Although the book makes for stimulating reading, it is not without its flaws. The translation of some papers is clumsy or awkward at times. The book would have benefited from an expanded introduction explaining how the First World Congress on Adult Guardianship in Brussels was attended by experts from around the world.

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Guardianship Law came to happen, who organized the Congress, what was asked of the presenters, how Yokohama was selected as the host city, and the goals of the Congress. In addition, the Congress took place in 2010, but the book was not published until 2013. As a result, some of the papers are not timely. Moreover, the quality of the papers is uneven. Some are absorbing and comprehensive; others less so. The papers are organized alphabetically by author, and the book would have been stronger if organized by subject matter. Because the papers are organized alphabetically, some papers refer to points that were made in previous papers during the Congress but that appear in later papers in the book, which can be confusing. Some papers refer to PowerPoint slides that are not published as part of the book.

Notwithstanding these criticisms, the volume is worthwhile reading for Elder and Special Needs Law attorneys with an interest in guardianship law. The various approaches to guardianship taken by different countries are intrinsically fascinating, and there is much we can learn from other countries and cultures. Moreover, the issues that guardians face are increasingly global. As the Public Guardian and Trustee of British Columbia, Canada, observed in his paper:

> Virtually everything the [Public Guardian and Trustee] does is a matter of local law — but we are living in an increasingly global environment. Clients that used to be institutionalized are now living in the community and traveling internationally. Seniors have assets worldwide … . As a result, there is increasing interest in developing global solutions that serve clients wherever they or their assets might be.

Or, as Professor English put it:

> [O]ur world is getting smaller. Guardianship law is increasingly international in character. Individuals move more frequently from one country to another. However … citizenship and other contacts with the former country may be retained. Furthermore, upon the principal’s incapacity, family in the former country may be designated as caretakers.

Our world is, indeed, getting smaller. Countries throughout the world are facing demographic challenges similar to those in the United States and have taken different approaches to address those challenges in their adult guardianship systems. As the book’s editors state in the preface, the time has come to start a worldwide discussion and to develop concepts and recommendations for a modern human rights-based law of adult guardianship.
The decision in *Hughes v. McCarthy* has hopefully put to rest an argument many states have made about the extent to which an institutionalized spouse can transfer assets to the community spouse without causing a “penalty period” of ineligibility under the transfer of assets rules, at least with respect to pre-eligibility transfers. A number of states took the position that such an interspousal transfer would result in a transfer of assets penalty because it brought the assets of the community spouse over the community spouse resource allowance (CSRA), which is half the couple’s resources, subject to a minimum of $23,448 and a maximum of $117,240 in most states in 2014.

42 U.S.C. § 1396r-5(f)(1) permits a transfer of an amount equal to the CSRA to a community spouse as soon as practicable after the date of the initial determination of eligibility, regardless of the general transfer of assets rules in 42 U.S.C. § 1396p(c)(1). Such a transfer must be made as soon as practicable after the date of the initial determination of eligibility of the institutionalized spouse. By contrast, 42 U.S.C. § 1396p(c)(2)(B)(i) provides an exception to the general transfer of assets rule in § 1396p(c)(1) if the assets are transferred to the individual’s spouse or to another for the sole benefit of the individual’s spouse.

Several initial state court appellate decisions have upheld decisions by state Medicaid agencies imposing transfer penalties on pre-eligibility transfers in excess of the CSRA.

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1 734 F.3d 473 (6th Cir. 2013).
Meanwhile, unbeknown to those courts, the Centers for Medicare & Medicaid Services (CMS) wrote letters to several state Medicaid agencies and Elder Law attorneys (including an attorney in Ohio) stating that there was a critical distinction between 42 U.S.C. § 1396r-5 and 42 U.S.C. § 1396p. In its earliest letter on the subject, CMS explicitly explained why the decision in McNamara v. Ohio Department of Human Services was incorrect. According to CMS, the unlimited transfer provisions of § 1396p(c)(2)(B)(i) apply to transfers made prior to a Medicaid eligibility determination, while the more limited provisions of § 1396r-5(f)(1) apply if the transfer is made after eligibility has been determined. It is after eligibility has been determined that the institutionalized spouse needs a limited period of time to get assets titled in his or her name or retitled in the name of the community spouse. This period enables the community spouse’s assets to be brought up to the CSRA as contemplated in the statutory language, which states that the transfer should be made as soon as practicable after the initial determination of eligibility.

The federal courts got involved thereafter. Initially, a federal court in Ohio followed McNamara in the Burkholder v. Lumpkin case, in which the institutionalized spouse inherited assets that were then transferred to the community spouse post-eligibility; that is, while the institutionalized spouse was receiving Medicaid coverage for his nursing home care. The Burkholder decision was followed by the district court’s decision in Hughes v. Colbert, which also relied on the district court decision in Morris v. Oklahoma Department of Human Services. Both Burkholder and Morris held that the limitation of § 1396r-5(f)(1) applied, even though the transfers in question were made prior to the applications for Medicaid.

The district court in Hughes was not advised by counsel for the defendant of the CMS letters, although several had been submitted to the district court in Burkholder after its initial decision. In Burkholder, the court distinguished those letters on the basis that they applied to transfers made prior to eligibility, whereas in Burkholder, the transfer was made while the institutionalized spouse was receiving Medicaid. This distinction would have presumably resolved the issue in Hughes, in which the transfer was made three months before Medicaid coverage was sought. However, the state defendant and his counsel failed to disclose this information.

Then, just a few weeks after the district court decision in Hughes, the decision in Morris on which the Hughes court had relied was reversed on appeal. The appellate court recognized the distinction between transfers made prior to eligibility and transfers made after eligibility, without even having the benefit of any of the CMS letters before it.

In the prior cases, the courts had accepted the argument of the state Medicaid agencies that the supersession provision in 42 U.S.C. § 1396r-5(a)(1), which provides that the provisions of § 1396r-5 supersede any other inconsistent provisions of the Medicaid statute in determining Medicaid eligibility for an institutionalized spouse, meant that the limit on transfers under § 1396r-5(f)(1) controlled. On appeal, the Morris court concluded that this was not the case because § 1396p(c)(2)(B)(i) and § 1396r-5(f)(1) were not incon-

3  2010 N.D. Ohio LEXIS 11308 (Feb. 9, 2010).
5  758 F. Supp. 2d 1212 (W.D. Okla. 2010).
6  685 F.3d 925 (10th Cir. 2012).
consistent; rather, they applied to different temporal circumstances. The court concluded that the general unlimited transfer provisions in § 1396p(c)(2)(B)(i) applied when the transfer was made prior to the date of eligibility, while the more limited provisions of § 1396r-5(f)(1) only applied to post-eligibility transfers. The foregoing conclusion makes sense since the general exception for unlimited transfers in § 1396p(c)(2)(B)(i) would otherwise be meaningless.

The court of appeals in *Morris* also rejected the approach of many of the prior courts whose decisions had relied on the judges’ views that the appropriate public policy of the Medicaid program is to limit eligibility. While the court of appeals described the situation as “what can only be described as a loophole,” it went on to “conclude that the problem can only be addressed by Congress.”

It was against this backdrop that the Sixth Circuit addressed the issues in *Hughes*. While the court of appeals decision in *Morris* was a very important factor in the ultimate decision in *Hughes*, the various letters from CMS on the issue of interspousal transfers and an amicus curiae brief from the U.S. Department of Health and Human Services (HHS) were also critical in the decision. None of the CMS letters were contained in the record on appeal in *Hughes*; therefore, the National Academy of Elder Law Attorneys (NAELA) filed an amicus brief calling them to the court’s attention and arguing that the letters were entitled to deference.

One problem was how to get the letters before the court since they were not contained in the record. After consultation with the court clerk’s office, NAELA drafted the brief referring to the letters that had been filed in other federal court litigation, requesting that the court take judicial notice of them. With all federal court filings being done electronically through the Public Access to Court Electronic Records (PACER) system, the Sixth Circuit would be able to view the letters even though they were not contained in the record in *Hughes*.

The amicus brief gained considerably more traction at the last moment when, just a few days before it was due to be filed, the Ohio State Bar Association joined the brief. Having this bar association of more than 20,000 Ohio attorneys taking a supporting position undoubtedly raised the credibility of the brief in the court of appeals. The court of appeals noted that it agreed with the brief that the views expressed in the CMS letters were a “well thought out explanation of the differences between these two statutes” and thus were entitled to respectful deference under *Skidmore v. Swift & Co.*

At the request of the court of appeals, HHS also filed an amicus curiae brief. The court of appeals cited previous authority from its case law giving similar deference to amicus briefs filed by federal agencies charged with administering a statutory program. In its brief, HHS attached several of the letters it had sent out on the issue of interspousal transfers so that the court would have them on hand to view rather than having to search for them on PACER.

The *Hughes* court began its analysis by noting that the provision permitting unlimited transfers of assets between spouses in 42 U.S.C. § 1396p(c)(2)(B)(i) was enacted in its

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7 Morris, 685 F.3d at 928.
8 323 U.S. 134, 140 (1944).
9 See *In re Carter*, 553 F.3d 979, 987–988 (6th Cir. 2009).
current form 20 years ago, in 1993, and was not amended when the Deficit Reduction Act of 2005 (DRA) was enacted. It then recounted how Mr. Hughes had paid his wife’s nursing home bill privately for nearly four years. Good facts make good law. Several months before Mrs. Hughes applied for Medicaid, Mr. Hughes purchased a single-premium immediate annuity for himself that named Mrs. Hughes as the first contingent beneficiary and the Ohio Medicaid program as the secondary beneficiary to the extent of the Medicaid benefits it had paid for her. The annuity paid $1,728.42 per month for nine years and seven months, commensurate with Mr. Hughes’ life expectancy. It was actuarially sound.

The Ohio Medicaid program treated this transaction as a disqualifying transfer of assets because the annuity was purchased with more than the amount of the CSRA and because it named Mrs. Hughes ahead of the Ohio Medicaid agency as the contingent beneficiary.

The court rejected the State’s first ground for denying the application by holding that the limited authority for transfers up to the amount of the CSRA was at most permissive, not prohibitive, and that the statute on which the State relied did not say anything about a transfer made before the initial determination of eligibility or that a pre-eligibility transfer in excess of the CSRA was subject to a transfer of assets penalty. The court followed the Tenth Circuit’s decision in *Morris*, which held that no inconsistency exists between §§ 1396p(c)(2)(B)(i) (permitting unlimited transfers) and 1396r-5(f)(1) (permitting transfers up to the CSRA), because they apply to transfers made at different times. The court then relied on the amicus brief and series of letters from HHS, which echoed the decision in *Morris*.

As an additional nail in the coffin of the State’s argument, the court relied on legislative history that, although the Senate in 1993 passed an amendment that would have subjected the unlimited transfer provision to the CSRA cap, the conference report, H.R. Rep. 213, at 1, 324 (1993) (Conf. Rep.) reprinted in 1993 U.S.C.C.A.N. 1088, dropped that provision. The court held that Congress’s declination to adopt language supporting the construction of the statute the State was advancing was a compelling indication of its intent not to subordinate the unlimited transfer provision to the CSRA cap.

The State raised two other arguments that the court also rejected. First, the State argued that the annuity Mr. Hughes purchased was not for his “sole benefit” as required under § 1396p(c)(2)(B)(i) (the unlimited transfer provision) because the institutionalized spouse was named as the first contingent beneficiary and the Ohio Medicaid agency was named as the second. Again, the court disagreed, pointing out that, under the State’s interpretation, virtually no financial instrument could pass muster as being for the sole benefit of the spouse. The court explained that someone else almost always benefits after the spouse’s death, either named contingent beneficiaries or the insurance company that benefits from the forfeiture of future payments. HHS also made this point in its amicus brief. Rather, said the court, a transfer was for the sole benefit of the spouse if it benefitted only him or her during his or her lifetime, but the transfer could include contingent beneficiaries for whom payments could be made after the spouse’s death.

The court also relied on §§ 3257 and 3258.11 of the CMS State Medicaid Manual,

10 685 F.3d 925, 935.
which link sole benefit with actuarial soundness. While § 3257 states that no one else can benefit from the assets transferred “whether at the time of the transfer or at any time in the future,” HHS said that this only referred to a time in the future during the beneficiary’s lifetime. Despite the State’s own regulation,\footnote{Ohio Admin. Code 5101:1-39-07(F)(1) (2013), renumbered as Rule 5160:1-3-07 effective October 1, 2013.} which mirrors that of the CMS State Medicaid Manual, the State had the audacity to claim that its own regulation was wrong! The court also noted that the State’s position was contrary to that of the Social Security Administration in its Program Operations Manual System (POMS), § SI 011120.201(F) (2), which defines “sole benefit” to mean that no one other than the individual can benefit from it “at any time for the remainder of the individual’s life.”

The last argument made by the State and rejected by the court was that Mr. Hughes’ annuity violated 42 U.S.C. § 1396p(c)(1)(F) because it did not name Ohio as the first remainder beneficiary but rather named Mrs. Hughes. The court held that an annuity that satisfies the sole benefit rule under § 1396p(c)(2)(B)(i) need not satisfy the remainder requirement of § 1396p(c)(1)(F). The court concluded that the § 1396p(c)(2)(B)(i) sole benefit rule was an exception to the general transfer penalties required under § 1396p(c) (1). This was, therefore, an exception to the requirement to name the State as remainder beneficiary under § 1396p(c)(1)(F).

A final interesting aspect of the case is the ruling of the district court on abstention, which the defendants did not challenge on appeal. The court of appeals, therefore, deemed it abandoned. The plaintiffs in the federal court action filed state court administrative appeals, along with their federal court action, and over the opposition of the Medicaid officials, the state courts stayed those proceedings pending the decision in the federal court. This is the same procedural posture that the U.S. Supreme Court recently held did not require abstention by the federal courts in \textit{Sprint Communications, Inc. v. Jacobs}.\footnote{___ U.S. ___, 134 S. Ct. 584, 187 L. Ed. 2d 505 (2013).} Such parallel proceedings, assuming the state court agrees to stay its hand, should be a way around the problem of defendant state officials in a Medicaid eligibility case having immunity from any award of retroactive benefits by a federal court under the Eleventh Amendment.\footnote{See Edelman v. Jordan, 415 U.S. 651 (1974) This is subject to a possible exception for the three months prior to the federal court order, see Morenz v. Wilson-Coker, 414 F.3d 230, 237 (2d Cir. 2005).}

Under \textit{Sprint}, filing an administrative review proceeding in state court, followed by a federal court action to determine the claims on the merits, subject to a state court stay pending the federal decision, should be possible. The trial court in \textit{Hughes} adopted the foregoing procedure.

Some of the other cases concerning the use of the institutionalized spouse’s spend down amount to purchase an actuarially sound annuity that pays income to the community spouse have characterized this strategy as a “loophole.” The court in \textit{Hughes} rejected that characterization, however, noting that Congress failed to address this planning strategy in the DRA and holding that the court would not impose the state agency’s notion of what a loophole is (and whether it should be closed) in the absence of clear statutory language.
In November 2013, the U.S. Department of Justice (DOJ) entered into a formal agreement with Camelot Child Development Center, a private company that operates child care centers in Oklahoma City and Edmond, Oklahoma, settling claims under the Americans with Disabilities Act (ADA), as amended. The claims, filed originally by

**Case Note**

**Settlement Agreement Between the United States and Camelot Child Development Center**

*By Professor A. Kim Dayton*

In November 2013, the U.S. Department of Justice (DOJ) entered into a formal agreement with Camelot Child Development Center, a private company that operates child care centers in Oklahoma City and Edmond, Oklahoma, settling claims under the Americans with Disabilities Act (ADA), as amended. The claims, filed originally by

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(a) Findings.—Congress finds that—

1. in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” and provide broad coverage;
2. in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;
3. while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;
4. the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;
5. the holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;
6. as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;
7. in particular, the Supreme Court, in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the term “substantially limits” to require a greater degree of limitation than was intended by Congress; and
8. Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term “substantially limits” as “significantly restricted” are inconsistent with congressio-
the mother of a child with Down syndrome, concerned a variety of acts and omissions by Camelot that resulted in the child’s inability to participate in scheduled activities at her day care center, including threats to expel the child from the school due to her developmental delays. In the settlement, Camelot agreed to several forms of relief, including injunctive relief and monetary damages.2

This case note discusses the Camelot settlement and its importance as an indicator of current United States policy on the rights of children with disabilities to participate, as fully as possible, in the range of activities normally afforded to other children. Part I of the note provides a brief overview of the ADA as it applies to public accommodations. Part II provides background on the Camelot case and outlines the terms of the settlement. Part III notes other cases and settlements that are similar to Camelot and offers thoughts on the significance of Camelot to families dealing with a child with special needs as they seek to engage their children in the “normal” activities of childhood.

I. BACKGROUND: THE ADA AND PUBLIC ACCOMMODATIONS

When the ADA was enacted in 1990, President George H.W. Bush hailed it as “the world’s first comprehensive declaration of equality for people with disabilities.”3 In creating substantive rights and procedural enforcement mechanisms to prevent discrimination against persons with disabilities in a wide variety of contexts, the ADA went far beyond existing federal disability discrimination laws, which were largely restricted to situations involving federally funded enterprises and, for the most part, did not afford private remedies to persons ostensibly protected by these laws.4

The first three sections of the ADA contain the law’s statement of purpose and definitions; these provisions apply to all subsequent sections of the law.5 Thereafter, the ADA is divided into five titles, each of which applies to different entities and involves different enforcement mechanisms. Title I concerns discrimination in employment settings, requiring employers with 15 or more employees to provide equal employment opportunities
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for individuals with disabilities. Title II applies to state and local governments. Title III
prohibits discrimination based on disability by and within places of public accommoda-
tion. Title IV concerns telecommunications. The fifth title is a hodgepodge of provisions
pertaining to the ADA’s relationship to other federal laws, enforcement issues, and other
miscellaneous matters.

A. Defining Disability and the Concept of “Reasonable Accommodations”

The ADA’s definition of “disability” is very broad and, especially since enactment
of the 2008 amendments, has been expansively interpreted by the federal courts. Under
the ADA, “[t]he term ‘disability’ means, with respect to an individual (A) a physical
or mental impairment that substantially limits one or more major life activities of such
individual; (B) a record of such an impairment; or (C) being regarded as having such an
impairment.” The statute itself, and many judicial decisions, flesh out the meaning of
such phrases as “substantially limits,” “major life activities,” having “a record of impair-
ment,” and so forth. Many disabilities obviously fall within the scope of these defini-
tions. In recent years, various federal courts have held that major limitations or impair-
ments, even if temporary, are covered by the ADA; many diseases, including cancer, celiac
disease, and HIV/AIDS, have also been treated as disabilities for purposes of

6 42 U.S.C. §§ 12111–12117. The term “employer” under Title I means:
[A] person engaged in an industry affecting commerce who has 15 or more employees for each working
day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent
of such person, except that, for two years following the effective date of this subchapter, an employer
means a person engaged in an industry affecting commerce who has 25 or more employees for each
working day in each of 20 or more calendar weeks in the current or preceding year, and any agent
of such person.
2719633 at *11 (S.D.N.Y. 2012) (noting that the Act does not permit consideration of mitigating mea-

sures when assessing the existence of a disability).
13 An excellent analysis of post-amendment cases addressing these concepts is available at National Coun-
cil on Disability, A Promising Start: Preliminary Analysis of Court Decisions under the ADA Amend-
2010).
15 See Claudia Trotch, It’s Not Easy Being G-Free: Why Celiac Disease Should Be a Disability Covered
Under the ADA, 22 Am. U. J. Gender Soc. Policy & L. 219 (2013); see also Settlement Agreement be-
tween the United States of America and Lesley University, DJ 202-36-231 (Jan. 25, 2013), http://www.
the law.

A person who has a disability within the meaning of the Act is entitled to reasonable accommodations or reasonable modifications that will enable the person to enjoy the benefits of the environment within which he or she seeks to operate or participate. What is reasonable depends on many factors, including the context (e.g., employment, education), the extent to which the accommodation or modification sought will affect others or disrupt normal operations, the cost involved, and so forth. The obligation to provide accommodations or make modifications exists unless doing so is not feasible or would result in undue hardship.

B. Discrimination by Public Accommodations

Title III was the source of the legal issues that arose in the Camelot case. Title III provides that “no individual may be discriminated against on the basis of disability with regards to the full and equal enjoyment of the goods, services, facilities, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” The term “public accommodations” is a broad one that includes inns and hotels, recreational facilities, transportation services, education, restaurants, care providers, places in which public events are held, almost all businesses, and even websites. Unlike Title I, which is limited in applicability to employers with more than 15 employees, all businesses that qualify as public accommodations, irrespective of their size, are subject to the mandates of Title III.

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17 E.g. 42 U.S.C. § 12112 (defining discrimination for purposes of Title I); 42 U.S.C. § 12182(b)(2)(A) (defining discrimination for purposes of Title III).
18 E.g. E.E.O.C. v. Ford Motor Co., ___ F.3d ___ (6th Cir. 2014) (discussing whether telecommuting can be a reasonable accommodation under Title I of the ADA).
19 See 42 U.S.C. § 12112(b)(5)(A) (defining Title I ADA discrimination as including “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity”); 42 U.S.C. § 12182(b)(2)(A)(ii) (exempting from the definition of Title III discrimination modifications that “would fundamentally alter the nature of” the services being delivered). See also generally e.g. Job Accommodation Network, Employers’ Practical Guide to Reasonable Accommodation under the Americans with Disabilities Act (ADA), https://askjan.org/ErGuide/index.htm (accessed Mar. 13, 2014); The Americans with Disabilities Act: Title II Technical Assistance Manual Covering State and Local Government Programs and Services (discussing reasonable accommodations and modifications under Title II), http://www.ada.gov/taman2.html (accessed Mar. 13, 2014); West Virginia State, Americans with Disabilities Act: Title III – Public Accommodations(discussing type of accommodations required under Title III), http://www.ada.wv.gov/general/Pages/TitleIII-PublicAccommodations.aspx (accessed Mar. 13, 2014).
22 Id. The term “commerce” is defined as

[T]ravel, trade, traffic, commerce, transportation, or communication—
(A) among the several States;
(B) between any foreign country or any territory or possession and any State; or
(C) between points in the same State but through another State or foreign country.

42 U.S.C. § 12181(1).
Entities subject to Title III are obliged to make accommodations or modifications and remove barriers to their facilities to allow access by persons with disabilities. For example, a school or testing service might be required to allow an individual with a learning disability extra time to take a test if doing so would place the person on equal footing with those who do not have such a disability. A store or restaurant must rearrange tables, chairs, vending machines, display racks, and other potential barriers to full wheelchair access. Public accommodations are also required to furnish auxiliary aids that are necessary to ensure communication and full participation. For example, a theater might be required to modify or supplement its sound system or provide an American Sign Language translator to enable those who are hard of hearing to enjoy movies or plays. A restaurant that excludes animals must, nonetheless, allow service animals — although ADA regulations are quite specific about what constitutes a service animal.

II. THE CAMELOT CASE AND SETTLEMENT

The original complainant in the Camelot case was the mother (“Mother”) of a “school age” girl with Down syndrome (“Child”). According to the facts recited in the settlement agreement, Child was not fully toilet trained — she needed reminders and assistance to use the bathroom, and she wore pull-up diapers as a precaution. She needed help to change her pull-ups when accidents happened.

In January 2012, Mother enrolled Child in an after-school day care program offered by one of Camelot’s day care facilities. Camelot also ran an infant and toddler program in the same building and, accordingly, had diaper changing facilities located in a bathroom connecting the preschool and after-school rooms. Mother advised Camelot of her daughter’s toileting issues, which were the consequence of developmental delays associated with Down syndrome. Camelot told her that other children with Down syndrome had been in the program before and that Child’s developmental issues would not be a problem.

In February 2012, Camelot called Mother saying that Child was arriving at the facility from school with wet diapers that needed changing. The facility said that if this continued, Child would not be allowed to attend Camelot, or Mother would need to leave her

25 Id.
29 The settlement agreement does not specify the child’s exact age but describes her as a “school age” as distinguished from a “younger” child. Camelot Settlement Agreement, supra n. 2, at ¶ 14.d. Neither the mother nor the child is referenced by name in the agreement.
job, come to Camelot, and change her daughter when she arrived from school. Camelot did not follow through on this threat, although Mother said that she was constantly fearful that it would do so.

The next month, Camelot told Mother that Child would not be permitted to go on class field trips during elementary school spring break week because of her toileting issues. Mother was forced to find other child care arrangements for her daughter for that week. Then, in the summer of 2012, Camelot told Mother that Child would not be allowed to attend any summer field trips, which were frequent and included trips to the movies, zoo, pool, and restaurants. When Mother asked for a tuition reduction because her daughter was not allowed to participate in these activities, Camelot said this was against the facility’s policy.

Title III violations may be redressed through a private civil action, or an aggrieved party may file a complaint with the DOJ, which can, if necessary, pursue the case in behalf of the complainant in federal court. In the Camelot matter, Mother filed a complaint with the DOJ. After investigation, the DOJ found that Camelot had violated ADA Title III by failing to provide appropriate accommodations for Child’s developmental disability. Ultimately, the DOJ entered into a settlement agreement with Camelot in which the company acknowledged that it had violated Title III of the ADA. Camelot agreed in the settlement to several forms of relief, including prospective relief and specific relief tailored to the injuries suffered by Mother and Child.

First, Camelot admitted to the past disability-based discrimination, agreed that it would not discriminate in the future, and agreed to post a statement of nondiscrimination prominently in all of its child care facilities. It promised to notify DOJ promptly of any future ADA claims that might be made against it. It also agreed to provide annual training on the protections of the ADA and reasonable accommodations for all employees and to ensure that all new employees received such training promptly after being hired. Camelot


31 See Camelot Settlement Agreement, supra n. 2, at Exhibit 1:

NON-DISCRIMINATION STATEMENT
PROHIBITION OF DISCRIMINATION ON THE BASIS OF DISABILITY
Camelot will not discriminate against any individual on the basis of disability with regard to the full and equal enjoyment of the goods and services of Camelot. Camelot will also not discriminate against any individual because of the known disability of an individual with whom the individual is known to have a relationship or association.
Camelot will make reasonable modifications to its policies, practices, or procedures when necessary to afford its goods and services to individuals with disabilities, including children with developmental disabilities, unless Camelot can demonstrate that making the modifications would fundamentally alter the nature of its goods and services. A reasonable modification may include providing personal services, such as diapering or toileting assistance, for children who need it due to a disability, regardless of age, when such personal services are provided to other children.
Camelot will take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden, i.e., significant difficulty or expense.
would maintain an attendance log for these training sessions, which it would provide to the DOJ upon request.

Second, with respect to the complainant and her daughter, the relief contemplated in the settlement included monetary compensation of $3,000 plus free tuition for a year at any of Camelot’s day care centers. Child would be allowed to continue attending Camelot and would presumptively be entitled to go on field trips and participate in all other activities generally made available. The agreement contained detailed provisions regarding the process for determining whether reasonable accommodations could be made for Child in connection with specific activities and what those accommodations would be.\(^{32}\) “In determining what reasonable modifications are necessary, Camelot [would be required to] give primary consideration to the request(s) of the Child’s parents or guardians.”\(^{33}\) In the event that Camelot determined in a particular situation that it could not make accommodations for Child, it must memorialize its decision and reasoning in writing.

### III. Thoughts on the Camelot Settlement

Although the ADA is more than 20 years old, its enforcement has not always been a top priority for the federal government.\(^{34}\) Parents of children with special needs do not always have the financial resources or emotional stamina to pursue legal remedies against those who fail — either deliberately or as a result of ignorance — to respect children with disabilities despite their differences. Thus, it is extremely important that, in recent years, the DOJ has become much more aggressive in its efforts to enforce Titles I, II, and III, which fall largely within its bailiwick.\(^{35}\) Public settlements of cases such as Camelot send a strong message to parents, and to providers, that discrimination based on disability will not be tolerated.

In some ways, the Camelot case was an easy one. Camelot operated several child care centers and already had in place both staff and the physical facilities necessary for assisting Child with her toileting needs. Given that it is sometimes necessary under Title III to modify the built environment or hire additional employees to address the needs of

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\(^{32}\) The Settlement Agreement provided:

Camelot will conduct an individualized assessment of the Child’s needs resulting from her disability and, for each of Camelot’s field trips, assess whether or not reasonable modifications would allow the Child to attend the field trip. If so, Camelot shall make such reasonable modifications, giving primary consideration to the request(s) of the Child’s parents or guardians. If it is determined that the Child cannot participate in a field trip, Camelot will memorialize its reasoning in writing and will provide a copy of such written explanation(s) to the Child’s parents or guardians and to the United States within 10 days of any request for them. Camelot will reassess the Child’s needs and appropriate reasonable modifications for each field trip upon request by the Child’s parents or guardians or the United States, and at least at the beginning of every semester, Spring Break, and summer. Camelot Settlement Agreement, supra n. 2, at ¶ 29.

\(^{33}\) Id. at para. 28.

\(^{34}\) Michael Waterstone, *A New Vision of Public Enforcement*, 92 Minn. L. Rev. 434, 458 (2007) (concluding that the EEOC and the DOJ “have not made structural litigation a high priority.”).

persons with disabilities, the accommodations requested for Child were barely accommodations at all. In essence, accommodating Child’s developmental delays involved little more than waiving a policy that had little to do with the ability of the facility to serve the needs of this particular child with Down syndrome.

But Camelot is just the latest in a series of settlement agreements involving ADA discrimination by child care centers. These settlements involve claims by the parents of children with, among other things, Down syndrome, diabetes, autism, asthma, and epilepsy. Indeed, a significant share of the DOJ’s formal settlements in recent years has involved child care cases. The DOJ’s position on the obligation of child care facilities to provide access — whatever that might require — to children with disabilities is made very clear in an FAQ-style online document titled Commonly Asked Questions about Child Care Centers and the Americans with Disabilities Act. The DOJ has, with Camelot and these other cases, shown its willingness to take enforcement action against providers who fail to honor the ADA’s promise and mandate. Its efforts to correct the historical exclusion of children with disabilities — particularly those with cognitive limitations — from private-sector child care settings demonstrates a strong, and necessary, commitment to ensuring equality for these children in many other contexts as well. This, we can hope, offers a long-term possibility of achieving a discrimination-free environment for all children and their families.

