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In Astor Trial, a Lesson for Estate Lawyers

By JOHN ELIGON

While Brooke Astor's son and a lawyer who worked on her estate face prison time after a jury convicted them of defrauding and stealing from her, experts say the verdict may be felt by others: namely, the people who make wills and the lawyers who help them.

The trial has certainly provided talking points for estate planning experts across the country; it has already been the topic at panels of trusts and estates lawyers in New York and other states. To them, the Astor trial is noteworthy not only because of the famous name, but also because the actions of trusts and estates lawyers were parsed in a criminal courtroom, something that usually happens in civil proceedings.

"It now is not unheard of for a district attorney to question the motives of some lawyers," said Alexander D. Forger, a trusts and estates lawyer who testified for the prosecution in the Astor trial.

Although the conviction of Anthony D. Marshall, Mrs. Astor's son, and Francis X. Morrissey Jr., a lawyer who worked on her estate, may not fundamentally transform the way wills are done, lawyers and those in the academic world say it is likely to force estate planners in New York and elsewhere to take extra precautions when balancing their clients' wishes and competence.

The law generally requires a very low standard of mental capacity to execute a will, and there are few hard and fast rules that lawyers must follow when ascertaining a client's competence.

Some experts said the Astor case could motivate lawyers to use additional safeguards to ensure that their clients are competent when there is any doubt.

Lawyers said their precautions included bringing a doctor to the signing to examine the mental capacity of the client, having clients write in their own words why they are making changes to a will and, in rare cases, recording will executions. The main thing, lawyers said, was to engage clients in conversation -- to make sure they are not simply giving yes-and-no answers -- and use common sense.

Yet nearly a dozen estate planning experts said they were comfortable with the standards of mental capacity required to execute a will. (Benefactors generally need to know what they have, who their relatives are and who is getting what.)

They stressed the importance of making sure that everyone -- despite age and infirmity -- had the right to dispose of their property. The mental capacity required for executing a will is lower than for any other contract because even if people are tricked into signing it, they will not be affected when it goes into effect, experts said.

In the Astor trial, prosecutors were highly critical of the way two prominent lawyers handled changes to Mrs. Astor's will. Although those lawyers — [Henry Christensen III](#) and G. Warren Whitaker — were not charged with crimes, prosecutors said they contributed to the fraud against Mrs. Astor by having her sign documents that did not reflect her wishes and that she was not competent enough to understand. Some jurors said they believed the lawyers acted improperly.

Mr. Whitaker, who did not respond to telephone calls and e-mail messages requesting comment, testified that even people with severe mental defects could legally execute a will if they understood what they were doing when they signed it.

Mr. Whitaker drafted an amendment to Mrs. Astor's will that gave Mr. Marshall control of a \$60 million portion of her estate, and testified that she understood what she was doing when she signed it in January 2004, even though she was 101 and had Alzheimer's disease. Prosecutors said that Mr. Marshall and Mr. Morrissey tricked her into signing it, and they charged them with conspiracy.

The jurors, who convicted on that count, seemed to agree, with some saying they did not believe that Mrs. Astor, who died two years ago at 105, was capable of a lucid moment at that point in her life.

Philip Bump, one of the jurors, said he believed that lucidity meant "being lucid enough in the moment to actually understand the instrument," and not just simply being aware.

Trusts and estates experts said people could avoid being taken advantage of by planning their wills early and making updates when necessary, appointing confidants to take over their financial affairs when they become older and incapacitated and cultivating good relationships with friends and family who will take good care of them later in life.

"It may be time to look at whether or not there needs to be changes as to the level of capacity required to make a will," said Clifford A. Meirowitz, a Manhattan-based trusts and estates lawyer. "Even lawyers who are ethical and do things right, they make mistakes sometimes."

In the end, however, a trustworthy lawyer may be the only reliable safeguard, experts said.

"The lawyer has to judge the situation," said Darcy M. Katris, a lawyer for Sidley Austin and the chairwoman of the [New York State Bar Association](#)'s estate planning committee. "Generally, we expect lawyers to do the right thing."

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