

# Ademption and the Power of Attorney

By Jaclene D'Agostino

Substantial amendments to the New York General Obligations Law that significantly change the power of attorney statute became effective on September 1, 2009.<sup>1</sup> The state legislature implemented these modifications in an effort to mitigate the rampant financial abuses often committed by attorneys-in-fact of the elderly.<sup>2</sup> The new legislation is intended, in part, to inhibit an agent from potentially abusing his or her position by inappropriately selling or transferring to himself or herself assets belonging to the principal. At times these transfers have resulted in the ademption of intended bequests.



This article explores the limited number of cases addressing the treatment of the ademption doctrine where transfers were made by an attorney-in-fact, and how abuses of the fiduciary relationship in this context may be redressed. Highlighted is the distinct path courts have taken when confronted by *inter vivos* transfers to the attorney-in-fact by the attorney-in-fact, as opposed to pre-death sales by the fiduciary of the decedent's property.

## I. Ademption—A Historical Perspective

### a. Ademption Defined

Ademption is the “extinction or withholding of some legacy in consequence of some act of the testator which, though not directly a revocation of the bequest, is considered in law as equivalent thereto, or indicative of an intention to revoke.”<sup>3</sup> A bequest adeems when property that had been specifically devised no longer exists at the time of the testator's death.<sup>4</sup> This may occur in two circumstances: (1) the pre-death transfer or sale of the property,<sup>5</sup> or (2) the payment of money or transfer of property to be applied toward or in satisfaction of a testamentary bequest.<sup>6</sup> Ademption applies only to specific bequests, not to general, residuary or demonstrative dispositions.<sup>7</sup>

New York courts recognize ademption as a pure question of law.<sup>8</sup> Although under earlier law the issue of ademption was dependent on a testator's intent,<sup>9</sup> the current and longstanding rule is that ademption is one of the few estate law doctrines in which a testator's intent is irrelevant.<sup>10</sup> If intent is at all considered, its relevance is limited to interpreting the language of the bequest as to whether the testator intended an alternative legacy if the specifically bequeathed item no longer existed at the time of the testator's death.<sup>11</sup> Generally, however, “[t]he bequest fails and the legatee takes nothing

if the article specifically bequeathed has been given away, lost or destroyed.”<sup>12</sup> Thus, it is generally of no significance that the absence of an asset is not a result of the testator's voluntary act.<sup>13</sup>

Ademption does not necessarily result in a complete loss to a beneficiary; a bequest may partially ad-  
eem. Pursuant to EPTL 3-4.3,

[a] conveyance, settlement or other act of a testator by which an estate in his property, previously disposed of by will, is altered but not wholly divested does not revoke such disposition, but the estate in the property that remains in the testator passes to the beneficiaries pursuant to the disposition. However, any such conveyance, settlement or other act of the testator which is wholly inconsistent with such previous testamentary disposition revokes it.<sup>14</sup>

*In re Winfield*<sup>15</sup> is a case often cited to demonstrate partial ademption. There, the decedent bequeathed her mink coat, but had it cut down to a stole prior to her death. Because the stole was not entirely inconsistent with the bequest of the coat, the legatee received what remained of the gift.<sup>16</sup>

In a situation where the testator acts independently, the result is straightforward. The testator may sell an item that had been specifically devised in his most recent will, or gift that item to someone else. Upon the testator's death, the bequest of that property simply adeems, and the previously named beneficiary receives no gift. Altering this scenario, consider that the same testator executed a power of attorney, and it is the attorney-in-fact who decides to sell or transfer the specifically bequeathed property prior to the testator's death. The question whether a bequest should adeem becomes more difficult to answer under these circumstances.

### b. Statutory Exceptions to the Ademption Doctrine

In EPTL 3-4.4 and 3-4.5, the legislature established few and narrow exceptions to the ademption doctrine.<sup>17</sup> Pursuant to EPTL 3-4.4, a conveyance made by a committee or conservator, during the lifetime of its incompetent or conservatee, of property that had been specifically bequeathed in that individual's will, does not cause the bequest to adeem.<sup>18</sup> Instead, the intended beneficiary of the property is entitled to receive “any remaining money or the other property into which the proceeds from such sale or transfer may be traced.”<sup>19</sup> Additionally, EPTL 3-4.5 provides that insurance proceeds paid after death on property that had been spe-

cifically devised are to pass to the intended beneficiary of the property. It must be emphasized that this section applies solely to proceeds paid after the testator's death.<sup>20</sup>

Moreover, EPTL 3-4.4 is limited to ameliorating the financial abuses by a guardian to an incapacitated person. Perhaps this is because the individuals protected by that section are those who have been judicially declared incompetent, and are more likely to be victimized by their agents' misconduct.<sup>21</sup> This rationale for the limited exception can be extended to the authority granted to attorneys-in-fact, who can just as easily abuse their authority. Restrictions on gifting powers imposed by the new power of attorney legislation seek to eliminate the potential for these problems.

Nevertheless, although these sections provide some relief from the otherwise stringent rules of the ademption doctrine, the statute contains no reference to the consequences of acts taken by a testator's attorney-in-fact that may improperly defeat the testator's testamentary plan.

Outside the scope of the aforementioned exceptions, courts have addressed a variety of circumstances in which the transfers by an attorney-in-fact appeared to cause the ademption of bequests. Notably, a dichotomy has emerged in the way courts have applied the ademption doctrine to cases of *inter vivos* transfers by an attorney-in-fact to himself, and situations in which the specifically devised property was sold by the same agent, who keeps the proceeds for himself. But it is not necessarily fair to deem a beneficiary without recourse simply because an attorney-in-fact improperly sold property prior to the testator's death instead of merely transferring it to himself or herself. It will be interesting to see how courts will address new cases in light of the new legislation.

## II. The Dichotomy

### a. Ademption and *Inter Vivos* Transfers by the Attorney-in-Fact

A somewhat recent decision on this topic is *Musacchio v. Romagnoli*.<sup>22</sup> In that case, the attorney-in-fact transferred funds from the testatrix's bank account into his own, and conveyed her home to himself for the remainder of the testatrix's life.<sup>23</sup> Upon the testatrix's death, the attorney-in-fact retained ownership of the assets, and the executor commenced an action for their return to the estate contending that the property had been improperly withheld.<sup>24</sup> In response, the attorney-in-fact asserted that the assets had adeemed. The court disagreed, stating that "nothing . . . indicates that ademption would apply to an invalid *inter vivos* transfer."<sup>25</sup>

Rejecting the ademption argument, the court explained that a power of attorney gives rise to an agency-like relationship that imposes a fiduciary duty on the attorney-in-fact requiring that he or she act "for

the benefit of the principal."<sup>26</sup> The court further stated that "an agent may not make a gift to himself or a third party of the money or property which is the subject of the agency relationship."<sup>27</sup> In the event that such a transfer is made, a presumption of impropriety arises. The attorney-in-fact must rebut this presumption by clearly demonstrating that the principal intended to make a gift.<sup>28</sup>

In *Musacchio*, the attorney-in-fact failed to meet his burden of demonstrating either that a gift was intended or that the principal had been competent at the time of the transfer. Accordingly, the court directed the agent to return the assets to the estate for distribution in accordance with the terms of the testatrix's will.<sup>29</sup>

The Suffolk County Surrogate reached a similar conclusion in *Estate of Berry*.<sup>30</sup> There, the decedent executed a will after learning that she had mere weeks to live. In her will, she made specific bequests of percentages of the balance of a particular bank account to five individuals, four of whom were infants. The oldest of those five beneficiaries was the testator's attorney-in-fact. Utilizing that power, the attorney-in-fact withdrew a lump sum from the same account. He asserted that the testator instructed him to withdraw the funds to pay her bills.<sup>31</sup> Four days later, the testator died. Thereafter, the attorney-in-fact used some of the withdrawn funds to pay some estate bills, and allocated the remainder to his personal expenses.

The *guardian ad litem* for the infant beneficiaries argued that the funds withdrawn by the agent should be returned, minus any legitimate estate expenses, and that the specific legatees should receive their bequests in accordance with the percentages allocated by the will. The attorney-in-fact contended that his act of removing the funds upon instructions of the decedent effectively revoked the specific bequests from the account, and therefore the bequests adeemed.<sup>32</sup>

The Surrogate rejected this argument, opining that the payment of the decedent's bills would have involved withdrawing only specific amounts, not the lump sum that he took to "in effect, [make] a gift to himself."<sup>33</sup> Because the agent utilized his power to transfer the funds to himself, it was the attorney-in-fact's burden to rebut the presumption of impropriety and to make a clear showing that the testator had intended to make a gift. The court judged that he failed to do so and held that, except for the funds for which the attorney-in-fact could substantiate legitimate estate expenses, the bequest had not adeemed.<sup>34</sup>

Another noteworthy case is *In re Trotman*,<sup>35</sup> a contested accounting proceeding. *Trotman* involved a dispute over real property that had been specifically devised by the decedent, but was transferred to the attorney-in-fact by the attorney-in-fact just a few days before the decedent's death. The executor questioned the validity of the transfer and began a discovery pro-

ceeding in an effort to return title of the property to the specific devisee. The parties ultimately entered into a stipulation of settlement in which the attorney-in-fact agreed to re-convey her interest in the real property to the estate so that it could be distributed to the specific devisee.<sup>36</sup>

In light of the stipulation, the issue before the court was whether the attorney-in-fact was required to pay the real property taxes, utilities and homeowners insurance on the house for the period during which the property was in her name. The court held that the estate was entitled to the money expended for the property related expenses, pursuant to the terms of the agreement by which the attorney-in-fact had agreed to reimburse the estate for expenses incurred during the time she held title.

Even though the agreement by the agent to re-convey the property to the estate, and thus the specific devisee, may be interpreted as demonstrating the impropriety of the fiduciary's conduct, *Trotman* did not explicitly determine the issue whether the property had adeemed based upon the actions of the attorney-in-fact.

Nevertheless, as demonstrated by the more recent decisions of the *Musacchio* and *Berry* courts, when an attorney-in-fact makes an *inter vivos* transfer of a testator's assets utilizing a power of attorney, the ademption analysis mirrors that of assessing the validity of any *inter vivos* gift to an individual in a confidential relationship with the decedent. If the presumption of invalidity is not successfully rebutted by the fiduciary, the transaction becomes void.

#### b. Ademption and the Sale of Specifically Bequeathed Property

Interestingly, New York courts have not always treated cases in which the specifically bequeathed property was sold in the same manner.

In *LaBella v. Goodman*,<sup>37</sup> the contention was that the attorney-in-fact had converted to herself proceeds from the pre-death sale of the testator's real property, which had been specifically devised. The intended beneficiaries commenced a proceeding claiming that the attorney-in-fact had improperly obtained the power, breached her fiduciary duty, and sought to impose a constructive trust on the proceeds of the sale. The court did not address the issue whether the power of attorney had been improperly obtained, nor did it explore the validity of the sale. Instead, it affirmed the Surrogate's determination that because the property had been sold during the decedent's lifetime, the ademption doctrine extinguished any breach of fiduciary duty.<sup>38</sup> It further explained that once a devise adeems, "the court is not permitted to substitute something else for it."<sup>39</sup>

Absent from the *LaBella* opinion are most of the facts that were likely presented to the court. Thus, it is

unclear whether the sale was effectuated by the attorney-in-fact, but one may infer as much from a reading of the decision. Despite any possible abuses of the power, the Appellate Division adhered to the strict nature of the ademption doctrine in reaching its result.

*LaBella* follows the rationale implemented in older cases, such as *Estate of Barnwell*<sup>40</sup> and *In re Kramp*.<sup>41</sup> In *Barnwell*, a court-appointed conservator sold the testator's real estate despite the fact that the property had been specifically bequeathed. In holding that the bequest did not adeem based upon the exception in EPTL 3-4.4, the court stated that the attorney-in-fact "wisely decided to seek court intervention . . . by applying for the appointment of conservator" rather than selling the property pursuant to a power of attorney.<sup>42</sup> The court stated also that if the sale had occurred pursuant to a power of attorney, a different result would have been likely.<sup>43</sup> This statement clearly implies that a sale by the attorney-in-fact would have resulted in ademption based on strict compliance with the statute, despite the fact that the decedent was incapacitated at the time of the sale.

In *In re Kramp*,<sup>44</sup> the attorney-in-fact sold the testatrix's real property before her death, and the specific devisee sought to recover the proceeds of the sale. In explaining why the conveyance did not fall within the realm of the exception of EPTL 3-4.4, and thus why the bequest had adeemed, the court noted that the testatrix had never been declared incompetent, nor was any committee or conservator ever appointed for her.<sup>45</sup> The court stated that the language of the statute shows "the clear legislative intent to restrict its application to cases in which incompetency has been judicially determined and established under the restraints and safeguards of due process," and went on to explain that the purpose and effect of EPTL 3-4.4 "is to preserve the testamentary intent against a contrary disposition made by the representative of a testator judicially disabled from making such disposition himself."<sup>46</sup> The purpose of the statute, as explained by *Kramp*, is why some courts, such as the Kings County Surrogate in the more recent *Estate of Crowell*,<sup>47</sup> may be inclined to stray from its strict language when confronted with a testator who had either been declared incapacitated, or was evidently incompetent, and whose property was sold by an attorney-in-fact.

*Estate of Crowell*<sup>48</sup> appears to be the most recent instance in which a New York court opined on ademption within the context of a sale of specifically bequeathed assets by an attorney-in-fact. In *Crowell*, the attorney-in-fact sold shares of the testator's stock, contending that the sale occurred to ensure that the testator's bills were paid.<sup>49</sup> Upon the testator's death, the specific devisees of the stock asserted a claim to the proceeds of the sale. The parties ultimately entered into a settlement agreement.

Although the *Crowell* court could not resolve the ultimate ademption issue, because of the settlement, the court did opine that some courts are able to implement the testator's intent by circumventing EPTL 3-4.4 and "manipulating the classification of devises as specific or general."<sup>50</sup> The court also noted that durable powers of attorney have recently become a more popular substitute for Article 81 guardianship proceedings, a condition precedent to the applicability of EPTL 3-4.4. These statements have been interpreted by some authorities as favoring an expansion of the statute to provide an exception where "the sale is made by the attorney-in-fact of a now-incapacitated testator, and the other criteria of the statute are met."<sup>51</sup>

*Crowell* is one of the few ademption cases to mention giving any attention to testamentary intent. Despite the general rule that the testator's intent is of no consequence in determining whether a bequest adorns, the Appellate Division has at least once implied that the language in a will may be considered. In *Estate of Ellsworth*,<sup>52</sup> the testator had bequeathed two parcels of land to a town to be used "insofar as legally practical as a recreation area for senior citizens."<sup>53</sup> The testator's wife was given the residue of his estate for life in the form of income from a trust, and the remainder upon her death was bequeathed to the town for development or maintenance of the parks established by the gifted parcels.<sup>54</sup>

Prior to the testator's death, his wife, pursuant to a power of attorney, entered into contracts to sell the two parcels that had been bequeathed to the town. The agreements were executory at the time of the testator's death.<sup>55</sup> Although the Surrogate concluded that the town was entitled to the proceeds from the sale of the parcels, the Appellate Division reversed.<sup>56</sup>

The town argued that because the contracts were still executory at the time of the testator's death, the parcels automatically passed to it on that date subject to the specific performance of the agreements. Consequently, the town asserted, it was entitled to the cash proceeds of the sale in place of the original gift. In rejecting that argument, the court held that the gift was conditional and that a construction of both the paragraph making the gift to the town, and the will as a whole, demonstrated the decedent's intent to benefit the town and senior citizens with specific parcels of land.<sup>57</sup> If the town did not accept the gift or stopped using the parcels for that purpose, it was determined that the testator intended a reversion to his wife or her heirs.<sup>58</sup> Thus, the court opined that there was "no reasonable construction of the decedent's will" to allow the town to receive proceeds of the sale of the parcels, as that result would not be consistent with the testator's testamentary plan.<sup>59</sup>

The *Ellsworth* decision demonstrates that, in some cases, a testator's overall testamentary plan may be

considered in determining a specific devisee's rights to property improperly transferred or proceeds of property improperly sold by an attorney-in-fact. It should be noted, however, that the word "ademption" was never used in the *Ellsworth* decision, likely because the sale had not been completed at the time of the testator's death. This may explain the court's unusual consideration of the testator's intent.

### III. The Impact of the New Legislation

The statutory short form power of attorney that existed at the time of the aforementioned decisions allowed the principal to give the agent extremely broad authority, particularly to make gifts up to the annual exclusion amount, alter title to joint accounts or Totten trust accounts, create, revoke or modify trusts, and to change the beneficiary of retirement plans or life insurance policies.<sup>60</sup> In addition, the procedure involved in the principal delegating such sweeping authority was highly disproportionate to its importance.<sup>61</sup> The new legislation has imposed restrictions that prohibit the grant of such wide-reaching authority absent a more formal procedure and more specific instructions in the power.

Specifically, gift giving authority has been eliminated from the new statutory short form with the exception of permitting the attorney-in-fact to continue a principal's history of making gifts not exceeding \$500 per year per person or charitable organization.<sup>62</sup> The authority to make major gifts or other asset transfers must be established through a Statutory Major Gifts Rider (SMGR), or alternatively, through a nonstatutory power of attorney.<sup>63</sup> Regardless, the authority granted through the SMGR and the nonstatutory power of attorney must both be executed with the same formalities as a last will and testament.

Assuming an SMGR is used, it cannot stand alone, and must be signed simultaneously with the statutory short form. Most notable and relevant here is that the new statute requires an explicit statement on the SMGR if the principal wants to authorize the agent to make gifts to himself, and the fact that the principal may also name a monitor to receive financial information from the agent.<sup>64</sup> Further, the power of attorney will not be effective until it is signed by both principal and agent, although the signatures need not be simultaneous.

### IV. Conclusion

These amendments to the power of attorney statute not only impose procedural requirements that emphasize the importance of the authority given, but also provide safeguards seeking to eliminate the all too common financial exploitation of the elderly. Regardless, despite the best efforts of our legislators, misconduct by attorneys-in-fact will undoubtedly continue, perhaps most frequently in the form of the sale of a principal's property when the agent lacks authority to make gifts

to himself or others. In any case, it will be interesting to see whether courts change the manner in which they address the issue of ademption as a result of these abuses.

The import of the foregoing case law provides only one clear answer to the issue of how to apply the ademption doctrine to transfers by attorneys-in-fact: *inter vivos* transfers by an attorney-in-fact to himself or herself may be voided and the doctrine of ademption may not apply if the fiduciary fails to rebut the presumption of impropriety and to demonstrate that the testator intended to forgo a part of his testamentary plan by making a gift.

The question becomes: What about pre-death sales of the testator's property occurring at the hand of the attorney-in-fact? Why no presumption of impropriety, especially when the fiduciary retained the proceeds of the sale? Older cases such as *Kramp* and *Barnwell* reflect a very strict adherence to the ademption doctrine, and its narrow exception pursuant to EPTL 3-4.4.

Notwithstanding these older cases, the court in *Estate of Crowell* suggested the possibility of leeway from such strict adherence. The *Crowell* court made the very relevant statement that individuals are now more frequently using durable powers of attorney as opposed to seeking Article 81 guardianship proceedings to acquire authority to administer the affairs an incompetent individual. In addition, it indicated openness to expanding EPTL 3-4.4 to apply to the sale of property by an attorney-in-fact. This implies that expanding the current statute for practical and/or equitable purposes may be more beneficial and provide a remedy to estate beneficiaries. It certainly seems consistent with the broad revisions to the power of attorney law that an attorney-in-fact who breaches his or her fiduciary duty by improperly selling a testator's assets and retaining the proceeds should not be permitted to profit at the expense of the decedent's testamentary plan. Moreover, a testamentary plan should not be frustrated by an attorney-in-fact's liquidation of property even for the decedent's benefit if the proceeds are not utilized by the date of the testator's death.

Alternatively, one may argue that pre-death sales of a testator's property by an attorney-in-fact should be analyzed in the same manner as *inter vivos* transfers. The same fiduciary relationship exists, and thus, the same presumption of impropriety may follow. Because the property has been sold to a third party, the sale cannot necessarily be voided in the same manner as an *inter vivos* transfer by the attorney-in-fact to himself or herself. Nevertheless, the proceeds thereof may be ordered to be returned to the estate and subsequently distributed to the specific devisees of the subject property. In all events, regardless whether the origin of the agent's authority is under the new power of attorney statute or its prior version, additional scrutiny should

be imposed upon any individual receiving such a wide array of authority.

## Endnotes

1. N.Y. Session Laws: 2009 N.Y. Laws ch. 4 *amending* 2008 N.Y. Laws ch. 644.
2. See, e.g., Jordan Linn, *Getting to Know New York's New Power of Attorney Law*, New York Trusts and Estates Litigation, at [www.nyestatelitigationblog.com](http://www.nyestatelitigationblog.com), February 19, 2009.
3. *In re Dittrich's Estate*, 53 Misc. 2d 782, 784, 279 N.Y.S.2d 657, 660 (Sur. Ct., Queens Co. 1967).
4. 12 Warren's Heaton on Surrogate's Court Practice § 204.01[1].
5. *In re Brann*, 219 N.Y. 263, 114 N.E. 404 (1916); *In re Wright's Will*, 7 N.Y. 2d 365, 165 N.E.2d 561, 197 N.Y.S.2d 711 (1960).
6. 39 N.Y. Jur. Decedent's Estates § 934 (2009).
7. 12 Warren's Heaton on Surrogate's Court Practice § 204.01[1].
8. *In re Wright's Will*, 7 N.Y. 2d at 367, 165 N.E.2d at 562, 197 N.Y.S.2d at 713 (1960).
9. See *In re Brann*, 219 N.Y. 263, 114 N.E. 404 (1916).
10. See *id.*; cf. *Estate of Ellsworth*, 189 A.D.2d 977, 592 N.Y.S.2d 506 (3d Dep't 1993).
11. See 12 Warren's Heaton on Surrogate's Court Practice § 204.01[4].
12. See *In re Wright's Will*, 7 NY2d at 367, 165 N.E.2d at 562, 197 N.Y.S.2d at 713 (1960).
13. See *Will of Baker*, 106 Misc. 2d 649, 652, 435 N.Y.S.2d 482, 484 (Sur. Ct., Westchester Co. 1980); *Estate of Spanos*, N.Y.L.J., May 3, 1994, p. 29, col. 6 (Sur. Ct., Nassau Co.).
14. N.Y. Estates, Powers & Trusts Law (EPTL) 3-4.3.
15. *In re Winfield*, 11 Misc. 2d 149, 172 N.Y.S.2d 27 (Sur. Ct., N.Y. Co. 1958).
16. See *id.*
17. See *Estate of Spanos*, N.Y.L.J., May 3, 1994, p. 29, col. 6 (Sur. Ct., Nassau Co.).
18. It should be noted that the words "conservator" and "conservatee" and "incompetent" and "committee" have been replaced by "incapacitated" and "guardian" since April 1, 1993, when Article 81 of the Mental Hygiene Law superseded Article 78 of the Mental Hygiene Law (see *In re Buckner*, N.Y.L.J., Feb. 26, 1993, p. 26, col. 2 (Sur. Ct., N.Y. Co.); *In re P.V.*, N.Y.L.J., June 5, 2009, p. 27, fn3, col. 1 (Sup. Ct., N.Y. Co.); 3-4.4 remains in the antiquated language.
19. EPTL 3-4.4.
20. See EPTL 3-4.5; *Will of Baker*, 106 Misc. 2d 649, 652, 435 N.Y.S.2d 482, 484 (Sur. Ct., Westchester Co. 1980).
21. See EPTL 3-4.4, Margaret Valentine Turano, Practice Commentaries (2003).
22. *Musacchio v. Romagnoli*, N.Y.L.J., June 16, 2006, p. 25, col. 3 (Sur. Ct., Westchester Co.).
23. See *id.*
24. See *id.*
25. See *id.*
26. See *id.*
27. See *id.*
28. See *id.*
29. See *id.*
30. *Estate of Berry*, N.Y.L.J., Apr. 2, 1997, p. 31, col. 1 (Sur. Ct., Suffolk Co.).

31. See *id.*
32. See *id.*
33. See *id.*
34. See *id.*
35. *In re Trotman*, N.Y.L.J., May 13, 1998, p. 32, col. 2 (Sur. Ct., Nassau Co.).
36. See *id.*
37. *LaBella v. Goodman*, 198 A.D.2d 332, 603 N.Y.S.2d 885 (2d Dep't 1993).
38. See *id.*
39. See *id.* at 323.
40. *Estate of Barnwell*, 88 Misc. 2d 856, 859, 389 N.Y.S.2d 262, 264-65 (Sur. Ct., Erie Co. 1976).
41. *In re Kramp*, 100 Misc. 2d 724, 726, 420 N.Y.S.2d 80, 82 (Sur. Ct., Niagara Co. 1979).
42. *Estate of Barnwell*, 88 Misc. 2d at 859, 389 N.Y.S.2d at 264-65 (Sur. Ct., Erie Co. 1976).
43. See *id.*
44. *Matter of Kramp*, 100 Misc. 2d at 726, 389 N.Y.S.2d at 82 (Sur. Ct., Niagara Co. 1979).
45. See *id.*
46. See *id.*
47. *Estate of Crowell*, N.Y.L.J., Dec. 3, 2002, p. 27, col. 3 (Sur. Ct., Kings Co.).
48. See *id.*
49. See *id.*
50. See *id.*
51. See 12-204 Warren's Heaton on Surrogate's Court Practice § 204.01[10][b] (discussing *In re Crowell*, N.Y.L.J., Dec. 3, 2002, p. 27, col. 3 (Sur. Ct., Kings Co.)).
52. *Estate of Ellsworth*, 189 A.D.2d 977, 977-78, 592 N.Y.S.2d 506, 506 (3d Dep't 1993).
53. See *id.*
54. See *id.* at 978, 592 N.Y.S.2d at 506.
55. See *id.*
56. See *id.*
57. See *id.*
58. See *id.* at 979, 592 N.Y.S.2d at 506.
59. See *id.*
60. See Fish, Daniel G., *Understanding the Revised Power of Attorney Statute*, N.Y.L.J., Feb. 24, 2009, p. 3, col. 1.
61. See Radigan, C. Raymond & Schoenhaar David R., *Making Gifts and Property Transfers Under New Power of Attorney Law*, N.Y.L.J., Mar. 9, 2009, p. 3, col. 1.
62. See Fish, *supra* note 60.
63. See Bailly, Rose Mary & Hancock, Barbara S., *Changes for Powers of Attorney in New York*, NYSBA Trusts and Estates Law Section Newsletter, Spring 2009, Vol. 42, No. 1, p. 7.
64. See Fish, *supra* note 60.

**Jaclene D'Agostino is an associate at Farrell Fritz, P.C., where she practices in the trusts and estates litigation group. She is a graduate of Barnard College, Columbia University, and St. John's University School of Law.**

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