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Recent Cases Highlight "Digital Assets" As A New Frontier in Estate Planning and Litigation

The Bottom Line

- *New York State's EPTL now includes a provision that clarifies how matters involving digital assets are handled in estate administration. The full scope of the Act's implications has yet to play out, but digital assets will undoubtedly affect estate planning and litigation matters for years to come.*
- *While the need to plan for digital assets is clearly important, fiduciaries of estates should also be mindful of those assets in potential estate administration and litigation issues that may arise.*

In September 2016, New York passed the Revised Uniform Fiduciary Access to Digital Assets Act (the Act), now Article 13-A of the state's Estates, Powers and Trusts Law (EPTL). The Act provides fiduciaries (such as executors and administrators, trustees, guardians and agents under powers of attorney) with the legal authority to access and manage the digital assets of deceased or incapacitated individuals. Under the Act, "digital assets" include emails, text messages, photographs, videos, social media accounts, websites, other types of Internet accounts requiring passwords (i.e., e-commerce, banking, etc.) and other web-based, digitally-stored items and information.

Assets in the Digital Age

The statute was drafted as a proposed law by the Uniform Law Commission to clarify and provide fiduciaries with the required authority to access digital assets. The need for such a law is clear, and over 35 other states have enacted similar statutes.

Most Americans regularly engage in a significant number of online communications and transactions, which are recorded and preserved in digital form. When a person dies, the location of their assets (including identity of financial institutions, account numbers, etc.) may be memorialized only in digital form – in an attachment to an email, for example. In addition, digital assets like photographs, emails and social media accounts may bear sentimental value that can create disputes among competing family heirs. As a result, estate executors and administrators are no longer concerned only with physical, tangible objects, but must also deal with digital assets.

Court Interpretations of the Act

Less than two years after its passage, the Act is now being interpreted by the courts. Recently, the New York State Surrogate's Court (which has primary jurisdiction over matters involving wills, estates and trusts) has issued decisions that highlight the increasing importance of digital assets.

In *Matter of Serrano*, decided by the New York County Surrogate's Court in 2017, the court directed Google to provide the decedent's contacts and calendar information to the estate's voluntary administrator, but not

the content of any emails, holding that "a] deceased user's calendar kept electronically is . . . a digital asset that does not include 'content of electronic communications,' and, therefore, must be disclosed to a personal representative by a custodian of such a record pursuant to EPTL 13-A-3.2." The court dismissed Google's concern that such disclosure would run afoul of federal law by noting "[i]nasmuch as there is no transfer of information between two or more parties when a calendar entry is made, a user's calendar is not a 'communication,' the disclosure of which by the custodian is prohibited by the Stored Communications Act."

The Suffolk County Surrogate's Court faced a similar situation in *Matter of White* in the fall of 2017. In that case, the estate's administrator argued that he needed access to the contents of the decedent's email communications in order to obtain information about the decedent's business that was necessary to administer the estate. Noting that the decedent did not address disclosure of his digital assets in his will, the court limited disclosure to the decedent's contact information, finding that other information was too personal and sensitive to disclose. In applying the digital assets statute, the court took a cautious approach and limited disclosure to what it believed was "reasonably necessary" to administer the estate, noting that the administrator could make another application to the court if he needed greater access to the decedent's email account.

These decisions are instructive, as they highlight:

- The importance of planning for digital assets in a will by clearly delineating the authority of the estate fiduciary in handling digital assets; and
- The emergence of digital assets as a focus of disputes in estate litigation matters.

Estate Planning Implications

While most individuals may still think of their "estate" in terms of economic wealth and tangible property, a complete modern-day estate plan would be remiss if it fails to consider the disposition of digital assets upon death. Very often, digital assets in the form of photographs, emails and social media accounts have sentimental value that can create disputes after death among competing parties vying for ownership. The lack of adequate planning can also leave a decedent's surviving heirs uncertain as to what happens to those digital assets and who controls them. A well-thought-out and executed estate plan can provide extra security on both counts.

Estate Litigation Implications

New questions are bound to arise with the increasing use of digital assets, and so will disputes between fiduciaries and the custodians of those assets.

"Discovery and turnover" proceedings in Surrogate's Court, which seek the recovery of misappropriated estate assets, will likely reflect the increasing importance of digital assets. These proceedings, which have in the past involved thefts of cash or other tangible property, will now determine the ownership of digital assets.

The nature of will contests in New York may also change as a result of fiduciaries' ability to access digital assets. Emails and social media accounts may provide insight into a decedent's relationship with his or her relatives and could prove useful to an understanding of the decedent's overall health and mental capacity to sign a will, and whether any undue influence was being exerted. The ability of fiduciaries to access that information as a result of the Act could make it more difficult for them to deny wide-ranging requests by the will's objectants for that information in response to discovery demands.

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