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TRUSTS AND ESTATES

Expert Analysis

Protecting Digital Assets in a Digital Age

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Over the last several years, many of our assets which used to be tangible have become "digital." Our photo albums are now stored on our smartphones or in the "cloud"; our books are downloadable; and even our currency may be stored in a digital "wallet." These "digital assets" can and will endure long after our inevitable demise.

Despite the growth of digital assets, when most people are making an estate plan today, they are most concerned with the disposition of their traditional assets such as real and tangible property (their home, cash, bank accounts, and jewelry, for example). Individuals may fail to appreciate the extent of their digital assets, which includes online financial accounts, social media accounts, photographs, documents, Internet-based businesses, and digital files. Each of these assets may require a specific username and password, known only to the owner of the asset, to access and manage the accounts. When an individual dies or becomes incapacitated, important and valuable digital assets may be difficult, or near impossible, to access by anyone other than the owner. This begs the question: How do we protect our digital assets now, yet ensure access later by our trusted family member or fiduciary so that they can be marshaled and protected as part of our estate?

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At least three obstacles may prevent ready access to digital assets after the death or incapacity of the account owner, which typically do not apply to traditional real and personal property. These obstacles include:

- **Passwords:** Individuals typically have unique usernames and passwords for each of their digital assets. If passwords are not documented and routinely updated, family members and fiduciaries will have difficulty accessing digital assets in the future.
- **Data encryption:** This can complicate retrieval of digital assets by family members and fiduciaries if they do not know how to properly access encrypted material.
- **Relevant federal and state laws:** Unauthorized access to computers and data may violate criminal and data privacy laws. See, e.g., N.Y. Penal Law, art. 156.

To address these concerns, estate planning practitioners should familiarize themselves with EPTL Article 13-A, which is

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New York's statute governing the administration of digital assets. The statute defines "digital assets" as "an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is in itself an electronic record." EPTL §13-A-1(i). The legislative intent behind Article 13-A is clear:

"The wide use of digital assets has created an urgent need for legislation dealing with the administration of these assets upon the death or incapacity of the user. As a practical matter, there should be no difference between a fiduciary's ability to gain access to information from an online bank or other Internet-based business and the fiduciary's ability to gain access to information from a business with a brick and mortar building. This measure would amend the EPTL to restore control of the disposition of digital assets back to the individual and removes such power from the service provider." Sponsor's Memo., Bill Jacket, L. 2016, ch. 354.

Once a fiduciary has authority over tangible and/or personal property of a decedent or ward, the fiduciary then has the authority to access any digital assets stored within. Said fiduciary is also an authorized user for the purposes of computer fraud and unauthorized computer access laws, including New York state's law regarding unauthorized computer access. EPTL §13-A-4.1. The statute expressly applies to "a fiduciary acting under a will, trust or power of attorney executed before, on, or after the effective date" of the statute. EPTL §13-A-2.1(a).

Article 13-A was enacted in September 2016, based in large part on the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA). Article 13-A provides that the user of a digital asset may "use an online tool to direct the custodian to disclose to a designated recipient or not to disclose some or all of the user's digital assets, including the content of electronic communications." EPTL §13-A-2.2(a). Notably, "[i]f the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power or attorney, or other record." *Id.* The statute also imposes the familiar legal duties upon a fiduciary that is charged with managing digital assets, including the duty of care; duty of loyalty; and duty of confidentiality. EPTL §13-A-4.1.

Practitioners and fiduciaries should be wary of the difference between disclosure of *digital assets* and disclosure of the *content of electronic communications*, as distinguished in Article 13-A. Disclosure of digital assets is mandated "unless the user [decedent or ward] prohibited disclosure of digital assets." Id. On the other hand, disclosure of the content of electronic communications is authorized only where the user (decedent or ward) "consented or a court directs disclosure." EPTL §13-A-3.1. See, e.g., *Matter of Serrano*, 56 Misc.3d 497 (Sur. Ct. New York County 2017) (holding that fiduciary had the authority to request the decedent's Google contacts and calendar information which constituted digital assets, but denying without prejudice the fiduciary's application to disclose the content of decedent's email communications).

To address these concerns, many practitioners have assisted their clients with appointing a "digital executor" who is charged with the marshaling and protection of digital assets. Wills and trusts may also contain a digital powers and duties clause, outlining the role and powers of the digital fiduciary. As more and more of our lives are stored online and "in the cloud," the access to and protection of our digital assets becomes increasingly important.