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### Administering Digital Assets



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In 2016, the Legislature enacted Article 13-A of the Estates, Powers and Trusts Law, New York's digital assets legislation. Article 13-A addresses the permissible scope of access to digital assets, and the duties that apply to such assets.

Article 13-A defines a "digital asset" as "an electronic record in which an individual has a right or interest." EPTL §13-A-1(i). The definition of "digital asset" excludes "an underlying asset or liability unless the asset or liability is itself an electronic record." *Id.* Thus, where an electronic record represents "cash, stocks or bonds," it is not subject to Article 13-A. Jill C. Beier, "Probate v. Privacy: The Technology Battle After Death," 90 N.Y. St. B. J. 24 (2018). Conversely, where an electronic record "represents another electronic record such as emails, photos or documents stored in the cloud, virtual property in gaming sites, blogs, domain names, [and] online music and books," Article 13-A applies. *Id.* Although not

yet addressed by a court, cryptocurrencies likely qualify as digital assets under Article 13-A.

Article 13-A provides that an estate fiduciary can access the content of the decedent's digital assets—such as emails, social media accounts, and cloud-based documents—where the decedent has consented to such access by an online tool, a will, or another document that controls the disposition of digital assets. *Matter of Coleman*, 63 Misc.3d 609 (Sur. Ct., Westchester County 2019). Absent such consent (and an express prohibition by the decedent), the fiduciary's access to a decedent's digital accounts generally will be limited to non-content information, including contacts, calendars, catalogues of emails (but not the emails themselves), and photographs. *Matter of Serrano*, 56 Misc.3d 497 (Sur. Ct., New York County 2017); *Matter of Swezey*, NYLJ, Jan. 18, 2019, at 34, col. 2 (Sur. Ct., New York County).

Access to digital assets may assist a fiduciary in identifying estate assets, and honoring the duties that Article 13-A imposes with respect to them. Specifically, EPTL §13-A-4.1 provides that the "legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets," and include the duties of care, loyalty, and confidentiality. EPTL §13-A-4.1.

As with other types of assets, a fiduciary's negligence in administering digital assets arguably could result in surcharges against the fiduciary. For example, just as with respect to traditional investments, a court could well determine that a surcharge is appropriate where a fiduciary retains cryptocurrencies—which fluctuate in value on a daily basis—for an unreasonably long period of time. As time passes, it will be interesting to see whether, and to what extent, fiduciaries are surcharged for their administration of digital assets.

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