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The **Digital Footprint After Death:** Who Wears the Shoes?

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Email, Facebook, LinkedIn, Twitter, Instagram, Snapchat, Tumbler, online banking, online shopping and other forms of electronic communications comprise our digital footprint. They are seemingly ubiquitous and omnipresent in the life of our business, social, and personal affairs.

But, on death, who has the right of access to a decedent's digital footprint? More importantly, what is the scope of that access? Can a fiduciary figuratively step into the decedent's shoes and gain full access to the decedent's digital assets and electronic communications?

The digital world has been hurtling through space at the speed of light. The law, however, until recently, has been moving like the Pony Express and is quite a few steps behind when it comes to addressing access to a decedent's digital assets. This article addresses New York's recently-enacted digital asset legislation, Article 13-A of the Estates, Powers and Trusts Law (hereinafter "Article 13-A"), as well as the decision in *Matter of Serrano*, 56 Misc.3d 497 (Surr. Ct., New York County, 2017), which appears to be the first reported case in New York to examine the nature and extent of a fiduciary's access to the "digital assets" and "electronic communications" of a decedent. See generally EPTL §13-A-1 for the statutory definitions of the quoted terms referenced in this article.

In 2016, the New York legislature, following the lead of 19 other states, enacted its version of the Uniform Law Commission's Revised Uniform Fiduciary Access to Digital Assets Act (the Act). The legislature recognized the urgency of placing the administration of the digital assets of a "user" on par with a fiduciary's ability to manage a decedent's more traditional tangible assets. Assembly Sponsor's Mem., Bill Jacket, L. 2016, ch. 354. The reach of Article 13-A is not limited to requests by an executor or administrator to gain access to the digital assets of a decedent but also extends to requests by the fiduciary of an incapacitated person, an agent acting pursuant to a power of attorney and a trustee,

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regardless of whether the appointment was before, on or after the effective date of the legislation. The statute does not apply to digital communications used by an employee in the ordinary course of employment. EPTL §13-A-1-2.1(c).

Prior to the enactment of the various state versions of the Act, "custodians" or "electronic communication services" relying on the "terms-of-service agreement" and the federal Stored Communications Act, 18 U.S.C. §2701, successfully thwarted efforts by fiduciaries and family members who sought access to a decedent's digital assets. The Stored Communications Act generally precludes an electronic communication service from knowingly divulging the contents of certain electronic communications to persons other than the intended recipients of the communications, 18 U.S.C. §2702, and criminalizes intentional unauthorized access to certain electronic communications, 18 U.S.C. §2701. In addition, the Stored Communications Act distinguishes between content and non-content based communications, authorizing an electronic communications service to disclose certain non-content-oriented information to parties other than the user of a particular account. 18 U.S.C. §2702.

Article 13-A seeks to balance the tension that may exist between (1) the well-settled notion that the fiduciary of a decedent's estate stands in the user's shoes after death, and (2) the public policy that favors respecting the user's privacy upon death.

Under Article 13-A, access to digital assets and electronic communications is user-directed. EPTL §13-A-2.2. That is, Article 13-A permits the user the benefit of self-direction and provides a hierarchy for the instruments by which the user may express the user's intent regarding disclosure to others. A user may direct, by means of an "online tool," the custodian to disclose or not to disclose some or all of the user's digital assets, including the "content of electronic communications," to designated recipients. EPTL §13-A-2.2(a). The directive contained in the online tool overrides any communication to the contrary in a will or an inter vivos instrument. Id. In the absence of any such online directive, the user may direct disclosure by means of a will or inter vivos instrument. EPTL §13-A-2.2(b). That directive may address "some or all of the user's digital assets, including the content of electronic communications sent or received by the user." Id. Any such directive by means of an online tool, will or inter vivos instrument overrides contrary provisions in the terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service. EPTL §13-A-2.2(c). Thus, the online tool has the highest rank, followed by a will or inter vivos directive, and the terms-of service agreement is most subordinate.

Article 13-A represents a **significant step forward** in resolving some of the inherent tension between privacy and inheritance rights.

As to the custodian's obligation to disclose, Article 13-A makes a critical distinction between disclosure of digital assets and disclosure of the content of electronic communications. A custodian's obligation to disclose the digital assets of a deceased user, first involves an inquiry as to whether the user made a directive *prohibiting* disclosure. EPTL §13-A-3.2. On the other hand, a custodian's obligation to disclose the content of electronic communications of a deceased user first involves an inquiry as to whether the user made an *affirmative* directive to disclose the content. EPTL §13-A-3.1. This distinction was central to Surrogate Mella's well-reasoned opinion in *Matter of Serrano*.

Except where a user has prohibited disclosure of digital assets before death, or a court orders otherwise, the custodian of digital assets, has a statutory obligation to disclose to the fiduciary "a 'catalogue of electronic communications' [EPTL §13-A-1(d)] sent or received by a deceased user and digital assets, other than the content of the electronic communications" upon receipt by the custodian of a written request for disclosure, a copy of the death certificate and a certified copy of the instrument appointing the fiduciary as such. EPTL §13-A3.2 (a-c). The custodian may, prior to disclosure, request certain enumerated identifying and linking information as well as an affidavit from the fiduciary attesting to the reasonable necessity of the digital assets for the administration of the estate. EPTL §13-A3.2(d)(1-3). Disclosure is mandated by the statute upon compliance with the foregoing conditions. However, a custodian may seek further protection from claims of violation of privacy by taking the additional step of seeking a court order directing disclosure. EPTL §13-A-3.2(d)(4)(A-B).

With respect to the "content of electronic communications," Article 13-A provides that the custodian's obligation to disclosure is founded upon an affirmative directive by the user followed by the fiduciary's written request for

such disclosure, a copy of the death certificate, a certified copy of the letters appointing the fiduciary and "unless the user provided direction using an online tool, a copy of the user's will, trust or other record evidencing the user's consent to disclosure of the content of user's electronic communications." EPTL §13-A-3.1(a-d). Again, the custodian may, prior to disclosure, request certain additional enumerated identifying and linking information. EPTL §13-A-3.1(e)(1-2). However, recognizing the primacy of the user's affirmative directive, the statute does not permit a custodian to demand a statement of reasonable necessity of disclosure for the administration of the estate. Nevertheless, the recalcitrant custodian has the option to seek a judicial determination that (1) the deceased user "had a specific account with the custodian"; (2) "disclosure of the content of electronic communications … would not violate [the federal Stored Communications Act (18 U.S.C. §2701, et seq), or other applicable law"; (3) "unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications"; or (4) "disclosure of the content of electronic communications of the user is reasonably necessary for administration of the estate." EPTL §13-A-3.1(e)(3)(A-D). The statute thereby, again, recognizes the primacy of the custodian's contractual obligation created by the user's directive by means of an online tool.

In *Serrano*, 56 Misc.3d 497, Surrogate Mella addressed the extent to which the fiduciary of a decedent's estate has a statutory right under Article 13-A to access the decedent's Google "email, contacts and electronic calendar." *Matter of Serrano*, 56 Misc.3d 497 (Surr. Ct., New York County, 2017). The fiduciary argued that he needed such access in order to inform the decedent's friends of the decedent's passing and to "close [the decedent's] unfinished business." Id. Google responded to the fiduciary's application by requesting "a court order specifying that … disclosure of the content [of the requested electronic information] would not violate any applicable laws, including but not limited to the Electronic Communications Privacy Act and any state equivalent." Id.

The recited facts do not state whether the decedent directed disclosure of digital content to the fiduciary of his estate. Since *Serrano* involved a small estate administration, we assume there was no will. We also assume that there was no online directive or some other instrument directing disclosure of content. Thus, as to content disclosure, the statutory scheme, EPTL §13-A-3.1, does not precisely cover these facts. Relying upon the distinction between disclosure of digital assets and disclosure of the content of electronic communications under Article 13-A, Surrogate Mella concluded that the fiduciary was entitled to disclosure of the contacts and calendar information associated with the decedent's Google email account, but not the content of the emails attached to that account. Id. This is because, under Article 13-A, Google has a statutory obligation to disclose the non-content material associated with the decedent's Google email account to the fiduciary of the decedent's estate in the absence of a prohibition. EPTL §13-A-3.2. However, in the absence of an affirmative directive by the decedent, Google had no statutory obligation to disclose the content-based material associated with the decedent's Google email account. EPTL §13-A-3.1.

Under these circumstances, the fiduciary had the burden to justify disclosure of the content of the decedent's email account by showing that the content disclosure was reasonably necessary to the administration of the decedent's estate. EPTL §13-A-3.1(e)(3)(D). The fiduciary failed to make that showing as to disclosure of the content. The Surrogate denied the fiduciary's application for access to the content of the decedent's Google account, without prejudice to a future application on notice to Google.

Absent from the *Serrano* opinion is a determination whether disclosure of the content of the decedent's electronic communications would violate the applicable federal and state laws, despite the fact that Google requested such a finding. However, because the fiduciary failed to meet the necessity element, the Surrogate apparently did not need to address that question. EPTL §13-A-3.1(e)(3)(D).

Until recently, New York law struggled to keep pace with the development of digital assets and the associated privacy and inheritance rights. Fortunately, Article 13-A represents a significant step forward in resolving some of the inherent tension between those rights. Yet, many questions remain unanswered, left only to arguments of counsel for fiduciaries, custodians and electronic communication services and ultimately the Surrogate's Courts as they come to interpret Article 13-A going forward.