

Matter of Scandalios
2019 NY Slip Op 30113(U)
January 14, 2019
Surrogate's Court, New York County
Docket Number: 2017-2976/A
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Surrogate's Court

Date: JANUARY 14, 2019

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In the Matter of the Petition of Nicholas G. Scandalios,
Executor of the Estate of

RIC SWEZEY,

DECISION and ORDER

File No.: 2017-2976/A

Deceased,

Pursuant to SCPA 2103.
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M E L L A, S.:

In this SCPA 2103 proceeding, Nicholas Scandalios, in his capacity as executor of the estate of decedent Ric Swezey, petitions for turnover from Apple, Inc. of photographs stored in decedent's iTunes and/or iCloud account ("Apple account").¹ Specifically, petitioner seeks an order directing Apple to disclose this data. According to petitioner, he was informed by Apple that a court order would be required before it discloses "data contained within [an] Apple ID."² Apple has not filed a responsive pleading and did not appear on the September 4, 2018

¹ Originally, petitioner sought to "access and obtain control of decedent's personal property stored on [decedent's] computer, iPhone and in the iCloud, and iTunes account under [decedent's] Apple IDs," but, in an affidavit filed on October 1, 2018, he clarified that "the sole purpose" of this application was to "access and obtain control of [petitioner and decedent's] photographs stored in [decedent's] iTunes and/or iCloud account(s)." In light of this, the court finds it unnecessary to address the broader relief originally sought.

² Attached to the petition is a copy of an email dated November 2, 2017, from Apple's Digital Estate team in response to petitioner's request for access, in which Apple requires a court order making the following findings in order to allow petitioner to change the passwords and access data contained within decedent's Apple ID:

- (1) "The decedent was the user of all accounts associated with the Apple ID";
- (2) "The requestor is the legal personal representative of the decedent";
- (3) "As legal personal representative, the requestor is the 'agent' of the decedent, and their [sic] authorization constitutes 'lawful consent' as those terms are used in the Electronic Communications Privacy Act"; and
- (4) "Apple is ordered by the court to assist in the recovery of decedent's personal data from their accounts, which may contain third party personally identifiable information or data, from their accounts."

return date of the citation of this proceeding.

Decedent died unexpectedly in 2017, at age 45, survived by petitioner, his spouse, and their two minor children. Under decedent's will admitted to probate on January 26, 2018, decedent left to petitioner all of his personal property, with some exceptions that are irrelevant to the relief sought here, along with the residuary estate. According to petitioner, decedent was an "avid photographer" who took the majority of their family photographs as well as artistic photos using both a digital camera and an iPhone. Petitioner believes that decedent stored his photographs in his Apple account because decedent used his iPhone for many of the family photographs and thus the images were automatically stored there. In addition, petitioner and decedent often viewed the photographs together on decedent's computer and used the Apple system to make holiday photo cards. Petitioner further states that decedent had two email accounts which could be the Apple ID associated with the Apple account and identifies those email accounts based on his personal knowledge. Petitioner states that, had decedent not died unexpectedly, he and decedent would have transferred the photographs to petitioner's Apple account as they had intended to.

No provision in decedent's will expressly authorizes the executor to access decedent's digital assets and petitioner points to no other documents authorizing such access. Nor does petitioner provide proof of decedent's use of any online tool granting his personal representative access to his digital property. Nevertheless, petitioner alleges that he and decedent gave to each other implicit consent to access each other's digital assets as evidenced, for instance, by the fact that their computers were adjacent to each other in their home office and there was "never any effort to shield [their] computer screens or [their] access to [their] digital assets from one another."

In this age, a decedent’s property—which is defined as “anything that may be the subject of ownership,” real or personal (EPTL 1-2.15; *see* SCPA 103 [44])— must include assets kept in a digital form in cyberspace. The New York legislature enacted Article 13-A of the Estates, Powers and Trusts Law to apply traditional laws governing fiduciaries to this “new type of property” and authorize fiduciaries to “gain access to, manage, distribute and copy or delete digital assets” (Sponsor’s Mem, Bill Jacket, L 2016, ch 354). Fiduciaries are now charged with the same duty of care, loyalty, and confidentiality to marshal and protect a decedent’s digital assets as they do to manage a decedent’s tangibles (EPTL 13-A-4.1 [a]).

Digital assets are “electronic record[s] in which an individual has a right or interest” (EPTL 13-A-1 [i]), which consist of electronic communications³ and other digital assets that are not electronic communications. This distinction is significant in that disclosure of electronic communications, unlike disclosure of other digital assets, requires proof of a user’s consent or a court order (EPTL 13-A-3.1; *see Matter of Serrano*, 56 Misc 3d 497 [Sur Ct, NY County 2017]).

Here, decedent’s photographs stored in his Apple account are not “electronic communications,” the disclosure of which, in the absence of a court order, requires consent of the account holder in any form listed under EPTL 13-A-2.2. Therefore, Apple is required to disclose the photographs stored in decedent’s Apple account associated with his Apple ID identifiable by decedent’s two email accounts as listed in the petition (EPTL 13-A-3.2).

³ “Electronic communication” means “any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce,” with exceptions (18 USC § 2510 [12]; EPTL 13-A-1 [k]; *see* Revised Unif. Fiduciary Access to Digital Assets Act § 2, comment at 7 [2015] [describing “electronic communication” to include “email, text messages, instant messages, and any other electronic communication *between private parties*” [emphasis added]).

Accordingly, and in order to provide petitioner with the order that he seeks to satisfy Apple's request, the court makes findings and enters directions as follows (EPTL 13-A-3.2 [d][4]): (1) decedent was the user of an account with Apple, the ID for which is either of the two email accounts provided by petitioner, an individual with personal knowledge that decedent was the user of those email accounts; (2) petitioner is the fiduciary of decedent's estate; and (3) no lawful consent is required for disclosure of these photographs under the Stored Communications Act (18 USC §§ 2701 *et seq.* [part of the Electronic Communication Privacy Act of 1986]) or the New York Administration of Digital Assets law (EPTL Article 13-A) and, in fact, EPTL 13-A-3.2 mandates disclosure of such.

Based on these findings, upon service of a copy of this decision and order, Apple shall afford petitioner the opportunity to reset the password to decedent's Apple ID.

This decision constitutes the order of the court.

Clerk to notify.

Dated: January 14, 2019



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