

**Steve Leimberg's Estate Planning
Email Newsletter Archive Message #2606**

Date:30-Nov-17

Subject: Marc Soss on *Ajemian v. Yahoo!, Inc.* - What Rights Does Your Personal Representative Have to Your E-Mail Account

*“In *Ajemian v. Yahoo!, Inc.*, a case that has been the subject of litigation dating back to 2010, the Massachusetts Supreme Judicial Court addressed the issue of whether the personal representative of a decedent’s estate was entitled to access their email account. Yahoo had refused to provide the personal representative with access and the estate was subsequently forced to commence a declaratory judgment action to gain the access it sought. In reliance on the Stored Communications Act (SCA), 18 U.S.C. §§ 2701 et seq., which prohibits unauthorized third parties from accessing communications stored by service providers, the Probate and Family Court Judge entered an order of summary judgment in favor of Yahoo. The personal representatives then appealed the ruling.*

The Massachusetts Supreme Judicial Court ultimately reviewed the issue, reversed the lower court ruling and found that the SCA did not prohibit the personal representatives, who stepped into the shoes of the decedent, from accessing the decedent’s emails since the personal representatives consented to the disclosure. The ruling does not order Yahoo to immediately disclose the emails only that the SCA permits the disclosure.”

We close the week with **Marc Soss’** analysis of [*Ajemian v. Yahoo!, Inc.*](#)

Marc Soss’ practice focuses on estate planning; probate and trust administration and litigation; guardianship law; and corporate law in Southwest Florida. Marc is a frequent contributor to **LISI** and has published articles in the Florida Bar, Rhode Island Bar, North Carolina Bar, Association of the United States Navy and Military.Com. Marc also serves as an officer in the United States Naval Reserve.

Here is Marc’s commentary:

EXECUTIVE SUMMARY:

In Ajemian v. Yahoo!, Inc., (Mass., No. SJC-12237, Oct. 16, 2017), a case that has been the subject of litigation dating back to 2010, the Massachusetts Supreme Judicial Court addressed the issue of whether the personal representative of a decedent's estate was entitled to access their email account. Yahoo had refused to provide the personal representative with access and the estate was subsequently forced to commence a declaratory judgment action to gain the access it sought. In reliance on the Stored Communications Act (SCA),ⁱ 18 U.S.C. §§ 2701 et seq., which prohibits unauthorized third parties from accessing communications stored by service providers, the Probate and Family Court Judge entered an order of summary judgment in favor of Yahoo. The personal representatives then appealed the ruling.

The Massachusetts Supreme Judicial Court ultimately reviewed the issue, reversed the lower court ruling and found that the SCA did not prohibit the personal representatives, who stepped into the shoes of the decedent, from accessing the decedent's emails since the personal representatives consented to the disclosure.ⁱⁱ The ruling does not order Yahoo to immediately disclose the emails only that the SCA permits the disclosure.

FACTS:

John Ajemian passed away on August 10, 2006, with no testamentary documents but a Yahoo email account. The email account did not designate an authorized representative who could access the account after his death. The personal representatives of the decedent's estate sought unrestricted accessⁱⁱⁱ to the contents of the email account by claiming them to be "property of the estate" which Yahoo declined to grant them pursuant to both the SCA and under its terms of service agreement. Yahoo advised that it would "furnish subscriber information only if presented with a court order mandating disclosure to the account holder's personal representatives."

The personal representatives obtained the court order and subscriber information and were then forced to commence a declaratory judgment action in the Probate and Family Court against Yahoo to gain unfettered

access to the email account. Yahoo responded with a motion for summary judgment, based upon the argument that disclosure was prohibited by the SCA, which was granted. The personal representatives then appealed the ruling. The matter subsequently made it up to the Massachusetts Supreme Judicial Court.

Before the Massachusetts Supreme Judicial Court, the personal representatives argued that they fell under one of the few exceptions to the SCA. Their first argument, that they were agents of the decedent, was dismissed since they did not “fall within the ambit of this common-law meaning; they were appointed by, and are subject to the control of, the Probate and Family Court, not the decedent.” The Court reasoned that “[a] person appointed by a court to manage the affairs of others is not an agent of the others.”

Their second argument, “that they lawfully may consent to the release of the contents of the decedent's e-mail account in order to take possession of it as property of the estate” provided them with the necessary traction to have the Court reverse the lower court ruling. In opposition, Yahoo argued that the personal representatives of the estate could not lawfully consent to release of the email account on behalf of the decedent.

In reversing and remanding the case back to the Probate and Family Court Judge the Massachusetts Supreme Judicial Court held that the SCA did not prevent Yahoo from divulging the contents of the decedent's email account where a personal representative provided the necessary consent on behalf of the decedent. However, the ruling does not order Yahoo to immediately disclose the emails to the personal representatives, only that the SCA permits the disclosure.

COMMENT:

In a similar California case, a magistrate judge of the U.S. District Court for the Southern District granted a Facebook motion to quash a subpoena compelling the social media site to provide the content of the Facebook account of a woman to her surviving family members. However, as more states adopt the Uniform Fiduciary Access to Digital Assets Act or variations of it fiduciaries (agents, personal representatives, executors, trustees, guardians, powers-of-attorney, etc.) and designated

representatives will be provided with greater access to a decedent or incapacitated individuals digital assets (email account(s), Facebook, iTunes music, social media accounts, electronically stored data, domains, bitcoins, etc.). These digital assets may possess actual or sentimental value to them.

On July 1, 2016, the Florida Fiduciary Access to Digital Assets Act became effective and provided the legal authority for third parties to manage digital assets and electronic communications on behalf of others. Both Rhode Island and Connecticut, two states that border Massachusetts, already have laws in place that provide the administrator of an estate the right to request from electronic mail service providers access to or copies of the contents of the account of a deceased individual upon receipt of a written request or an order from the probate court.

An issue not specifically addressed involves the decedent's right to privacy. Facebook has argued that "allowing heirs and executors to access the online accounts of deceased users could pose significant privacy issues. Opening the private e-mails of a deceased person could potentially expose information that would damage that person's memory or the interests of others still living."

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Marc Soss

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CITES:

Ajemian v. Yahoo!, Inc. (Mass., No. SJC-12237, Oct. 16, 2017); Stored Communications Act Bars Disclosure of Facebook Records to Surviving Family Members in the UK; Court Orders Facebooking Juror to Disclose Additional Facebook Posts—Juror No. 1 v. Superior Court
Ajemian v. Yahoo!, Inc., (Mass., No. SJC-12237, Oct. 16, 2017)
Ajemian v. Yahoo! Inc., Case No. 09E-0079-GC1 (Nov. 10, 2010)
Massachusetts General Laws, Chapter 190B, Section 3-709 could allow the Personal Representative of an estate to have access to the decedent's assets, however, the law begins with "[e]xcept as otherwise provided by a decedent's will." As a result, a decedent's Last Will could deny access to email accounts and other such digital assets; In re Request for Facebook, Inc. to Produce Documents and Things; *Theofel v. Farey-Jones*.

CITATIONS:

ⁱ The SCA provides protection of stored communications managed by electronic service providers. It prohibits unauthorized third parties from accessing communications stored by service providers, regulates when service providers may voluntarily disclose stored electronic communications, and prescribes when and how a government entity may compel a service provider to release the information.

ⁱⁱ Earlier cases involving Facebook addressed the waiver issue but did not resolve it.

ⁱⁱⁱ The personal representatives had been previously provided with subscriber record information after they obtained a court order.