

LAWYERS OF THE YEAR 2017

THOMAS E. KENNEY AND ROBERT L. KIRBY JR.

PIERCE & MANDELL, P.C.

Robert L. Kirby Jr. and Thomas E. Kenney notched a groundbreaking victory for probate lawyers across the country in 2017.

At issue in *Ajemian v. Yahoo!, Inc.* was the increasingly germane question of the extent to which estate administrators control the “digital assets” of their decedents.

The pair convinced the Supreme Judicial Court that the federal Stored Communications Act does not prohibit Yahoo from divulging the contents of a decedent’s email account to the personal representatives of the decedent’s estate. No other state supreme or federal appeals court has addressed the issue.

In its October decision, the SJC held that the statute permits service providers such as Yahoo to divulge the contents of an email account when a personal representative consents to disclosure on the decedent’s behalf.

Kirby and Kenney represent Robert and Marianne Ajemian. The plaintiffs were appointed representatives of the estate of their brother, John, who died at age 43 as the result of a bicycle accident in 2006.

For now, the ruling in *Ajemian* is only persuasive authority outside of Massachusetts, but the next decision in the case could become binding precedent in all 50 states. That’s because *Ajemian* could soon be accepted for review by the U.S. Supreme Court.

Neither attorney has argued a case before the nation’s high court, though they certainly appreciate the larger significance of the case and can’t deny the thrill of pressing their arguments before its justices.

But Kenney is quick to emphasize that their case involves “real people” who have suffered “real tragedy.” He says the Ajemians demonstrated “incredible perseverance” by taking their case to the SJC.

Having already won a significant victory for their clients, the Boston lawyers are now gearing up to oppose Yahoo’s petition for certiorari.

“As the chief justice of the SJC said in his concurrence, the Ajemians should not have to pay one more penny to get these emails,” Kenney says.

Q. *What’s the current status of the case?*

Kirby: It has been remanded to the Probate Court, where the court will take up the remaining issue in the case: the enforceability of one of Yahoo’s terms of service [purportedly giving the service provider the right to deny access to the contents of John’s account].

In the meantime, Yahoo lawyers have advised us that they intend to file a petition for a writ of certiorari in the United States

Supreme Court. If they proceed in that manner, that will be due sometime in mid-January, and so before the Probate Court takes up the case, we may be dealing with a cert petition.

Q. *Would you be excited about the prospect of arguing before the Supreme Court?*

Kirby: Of course I’d be excited. But it’s obviously not in our clients’ interest for the court to grant cert. We will be opposing cert and hoping that that opportunity comes in another case [at] another time, but not in this one.

Q. *Why is it important for estate administrators to have access to a decedent’s email account?*

Kenney: Administrators, in order to perform their duties, need to have access to all assets and potential assets of the estate. Traditionally, in the pre-digital days, that included every manner of writing of the decedent, which could include diaries, letters and materials held in lockboxes or safe deposit boxes.

It’s the duty of the administrators to marshal the assets, which means bring everything together and decide the proper distribution of the assets to those who are entitled to them. If there’s one class of assets — like digital assets — that are unavailable to the administrators, then the administrators are hamstrung in performing their obligations fully.

Q. *Why is Ajemian an important decision?*

Kirby: It’s important because the case confirms that personal representatives of a decedent’s estate may gain access to a decedent’s digital assets — in this case, emails — just as they may gain access to any other

“When someone dies, there is always the possibility that you might find scandalous materials in a box under grandpa’s bed. That shouldn’t change the legal analysis.”

assets of the decedent. It confirms that digital assets are property of a decedent just like any other asset.

Q. *What was the basic hurdle that the Stored Communications Act presented to your clients?*

Kirby: There were two. One was whether or not our clients were deemed to be agents of the decedent. The SJC found against us on



THOMAS E. KENNEY



ROBERT L. KIRBY JR.

that. The second hurdle was one we were able to overcome. That was whether or not, as personal representatives of the estate,

the first court to reach this issue, I think it’s going to be very instructive for other courts who take up issues under the Stored Communications Act, because it does come up from time to time, particularly with respect to third-party subpoenas in civil cases.

Q. *What was the toughest question you had to field from the bench during oral argument?*

Kirby: There was a question about the possibility that there was sensitive information contained in the emails that a decedent may not want the estate to have access to. The answer to that is that that has been true for time immemorial. When someone dies, there is always the possibility that you might find scandalous materials in a box under grandpa’s bed. That shouldn’t change the legal analysis.

— PAT MURPHY

they could lawfully consent to disclose the contents of the email accounts. And there the SJC said that personal representatives can indeed lawfully consent to the disclosure.

Q. *Do you see Ajemian as a predictor of how other courts will handle emails and other digital assets?*

Kenney: I hate to be a predictor of other issues in other courts, but because it was