New York Law Journal

Social Media in Divorce and Family Law: A Trap for the Unwary

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July 31, 2017

We live in the information explosion and "social media" age in which websites and applications enable users to share information and network with other users. Despite life altering social media blunders, people continue to use social media with abandon, to document and share all aspects of their life—the good and the bad.

Along with the blessings of the Internet have come the pitfalls. Private lives have been exposed and damaged. Persons have been subjected to cyberbullying.

As matrimonial attorneys, we need not only to be aware of the joys, but also of the pitfalls of social media. They are so perilous that it is essential to add a cautionary discussion on the topic of social media use to the matrimonial lawyer's intake checklist. "Have you hit the 'post' button recklessly or in anger?" "Are you aware of the unintended consequences that may ensue if you can't restrain yourself from doing so in the future?" "Do you agree to refrain from problematic posts?" And finally, the reminder, "Don't post or tweet anything that you wouldn't want published on the front page of the New York Times." Imagine the shock and distress when the 10 high school students who posted sexually and racially charged provocative social media posts found their acceptances to Harvard rescinded. Hannah Natanson, "Harvard Rescinds Acceptances for At Least Ten Students for Obscene Memes," The Harvard Crimson (June 5, 2017). Anthony Weiner's "private" message showing a lewd photograph of himself that inadvertently went to the public on Twitter led to his political demise and the demise of his marriage. Bianca Bosker, "The Twitter Typo That Exposed Anthony Weiner," Huffpost (June 7, 2011).

This article discusses a sampling of recent matrimonial cases in which New York courts handling family matters have addressed the use and misuse of social media by litigants and their consequences as well as cyberbullying, a word to the wise about "apps," and other incidental thoughts. We start off, however,

with a Court of Appeals case that may prove useful in trying to get a picture on a social media site into evidence.

Court of Appeals, Social Media and Evidence.

On June 27, 2017, the Court of Appeals addressed the question of "how a party may authenticate a printout of a digital image found on a social media website." *People v. Price*, 2017 N.Y. LEXIS 1694, 11, 2017 NY Slip Op 05174 (2017) (Rivera, J., concurring). In *Price*, six members of the Court of Appeals (one judge did not take part) agreed that the prosecution did not sufficiently authenticate a photograph of the defendant holding a gun which was admitted into evidence during the defendant's criminal trial for robbery, and reversed an order of the appellate division that had affirmed the holding below. Id. The photograph was obtained from an alleged social media profile of defendant's on a website titled "BlackPlanet.com."

Judge Leslie E. Stein, on behalf of four judges, wrote the majority opinion in which she examined the rules for laying a proper foundation of a photograph and applied that to the photograph at issue here which was obtained from a social media website. Judge Stein noted that the prosecution failed to proffer any evidence that would "actually demonstrate that defendant was aware of—let alone exercised dominion or control over—the profile page in question." Id. at 10. Specifically, Judge Stein wrote:

… notably absent was any evidence regarding whether defendant was known to use an account on the website in question, whether he had ever communicated with anyone through the account, or whether the account could be traced to electronic devices owned by him. Nor did the People proffer any evidence indicating whether the account was password protected or accessible by others, whether non-account holders could post pictures to the account, or whether the website permitted defendant to remove pictures from his account if he objected to what was depicted therein.

Id. at 9-10.

The concurring opinion, written by Judge Jenny Rivera, held that to authenticate a photograph obtained from a social media website there should be two levels of authentication: (1) is the print out an accurate representation of the web page; and (2) is the web page in the dominion and control of the defendant allowing him to post on it. Id. at 18 (Rivera, J., concurring). While the test differed, the holding did not.

Price is an important case in that it provides guidance to the practitioner as to how to authenticate a posting or a picture obtained from a social media website—something that matrimonial and family law practitioners are confronting more often these days.

The Court as Parens Patriae Has Restrained Parents from Posting Demeaning Posts on Facebook about Children; the Courts Have Also Issued Orders of Protection Prohibiting the Abuse of Adults Where Appropriate.

Litigants have been known to take to social media sites to disparage, harass or demean their partners or children. Courts have exercised their powers to stop such negative use of social media in the following and other cases.

In *Matter of Melody M. v. Robert M.*, 103 A.D.3d 932 (3d Dep't 2013), an appellate court affirmed a decision to impose an order of protection against a mother who called the parties' oldest child an "asshole" on Facebook. Id. at 934. If the mother violated the order of protection, she would be held in contempt. Her social media conduct was a factor that led to her loss of joint custody. The father, whom the appellate court called "stable and nurturing," became the sole custodian. Id.

In *Matter of Driscoll v. Oursler*, 146 A.D.3d 1179 (3d Dep't 2017), a mother who had a history of disparaging the father and his new family on Facebook, but apparently not the parties' own child, fared somewhat better. While the Family Court judge scolded and prohibited her from "'posting on Facebook, Twitter, or any other social media [s]ite any mention' of the child, the father 'or any members of their

household,'" id. at 1181, the appellate court reversed the prohibition against her posting communications about the child whom she had never previously disparaged. Id. at 1183.

Cyberbullying.

When it comes to "cyberbullying" (the right to be safe from bullying), competing interests collide. As Judge Victoria A. Graffeo, reasoned for five members of the New York Court of Appeals (two dissents):

Under the Free Speech Clause of the First Amendment, the government generally "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Consequently, it is well established that prohibitions of pure speech must be limited to communications that qualify as fighting words, true threats, incitement, obscenity, child pornography, fraud, defamation or statements integral to criminal conduct. Outside of such recognized categories, speech is presumptively protected and generally cannot be curtailed by the government.

Yet, the government unquestionably has a compelling interest in protecting children from harmful publications or materials. Cyberbullying is not conceptually immune from government regulation, so we may assume, for the purposes of this case, that the First Amendment permits the prohibition of cyberbullying directed at children, depending on how that activity is defined.

People v. Marquan M., 24 N.Y.3d 1, 7-8 (2014).

In *Marquan M.*, a high school boy, the defendant, had created an anonymous Facebook page on which he had posted photographs of his high-school classmates with detailed descriptions of their sexual lives and practices. Id. at 6. He was charged with cyberbullying under an Albany County local law. He had pled guilty to one count of cyberbullying, but he had preserved his right to raise the constitutional rights issue on appeal. The Court of Appeals reversed and found the Albany County local law provision that outlawed cyberbullying against "any minor or person" situated in the County was too broad, and, therefore, unconstitutional. Id.[1] The law did not adequately reflect that the intent of the law was to protect children from cyberbullying. Id. at 9.

Facebook Postings and Fitness for Parenting; Are "Private" Accounts Really "Private"?

A parent's judgment as reflected on social media can play a role in determining whether his or her parental judgment is adequate to raise a child. For example, using one's minor child's picture on a dating website profile, or posting disparaging and demeaning things about the other parent, may be deemed to be problematic behaviors that a court may consider in determining fitness. These examples of poor judgment will certainly be brought to the attention of court-ordered neutral forensic mental health examiners.

A court awarded the father sole legal custody of the children, citing the parents' ongoing conflict in *Matter of Rutland v. O'Brien*, 143 A.D.3d 1060 (3d Dep't 2016). The court specifically referred to the mother's regular communications with the parties' daughter via Facebook that denigrated the father (alienating behavior). The mother appealed from the court's decision arguing, inter alia, that the court erred in admitting the Facebook messages. However, the appellate court disagreed and held that because the mother's Facebook account was accessible to the father and the other children via the son's iPad without a password, the lower court had ruled correctly. Id. at 1062. In addition, the "privacy" of a Facebook profile or other social media profile was not deemed to in actuality bar the father from having access to the posting or to provide a basis to keep it out of evidence at trial. The mother's arguments that it was improper to admit her private messages with the daughter because the father had accessed the messages without authorization failed since the father could access these messages through his son's iPad. The messaged were admissible.

In other instances, a court may order a litigant to turn over his or her posts if the opposing party demanding such posts can persuade the court that they are material and relevant to an issue at hand. In a dispute over custody, the father challenged the amount of time the mother had spent with the child since the child's birth through the commencement of the matrimonial action. *A.D. v. C.A.*, 50 Misc. 3d

180, 16 N.Y.S.3d 126 (Westchester Co., Aug. 13, 2015). The mother, a medical doctor and psychiatrist, had traveled outside of New York often for work. The father asked the court to order the mother to turn over "printouts of all pictures, posts and information posted on her Facebook pages over the past four (4) years." Id. at 182. The father argued that these postings would confirm her time away from the child because the mother would upload pictures and post comments on her Facebook page about and from her travels. The mother argued that the Facebook postings were not proof of her travel dates. The court ruled that since the issue of the time spent by the parties with the child would be relevant to the ultimate determination of custody, the discovery sought by the defendant was appropriate. The mother was ordered to produce "printouts of her Facebook postings depicting or describing her whereabouts, outside the New York City area, from the time of the child's birth through the commencement of the proceeding, whether of her alone, or together with the parties' child." Id. at 184-85.

Evading Service/Unable to find Spouse for Service/Facebook Service.

Finding a spouse who may be evading service may just have become easier because of Facebook. In *Baidoo v. Blood-Dzraku*, 48 Misc.3d 309 (New York Co., March 27, 2015), Justice Matthew F. Cooper, J.S.C., permitted a wife to serve her husband with a summons with notice by sending it to him through Facebook private messenger. The wife was able to show that she did not know her husband's whereabouts; the last known address she had for him was in 2011 and she was not aware of any place of employment for him. Id. at 312. She even hired an investigative firm to assist in locating him, and the investigative firm could not find him. The Department of Motor Vehicles had no record of him. Justice Cooper stated that the fundamental question of whether service by Facebook is a possible alternative means of service under CPLR 308(5) is whether there is a "good chance he will receive it … ." Id. at 314. Ultimately, the court permitted the wife to serve her summons with notice through Facebook private messenger, because she submitted an affidavit in which she attached copies of exchanges she had had with the husband through Facebook. Id. However, since litigants are not permitted to serve each other personally, the court permitted the wife's attorney to serve the husband by logging into the wife's Facebook account and sending the husband a message, first identifying himself as her lawyer, and then sending a copy of the summons with notice. Id. at 317.

Requesting a court to permit one to use Facebook or another social media site as an alternative method of service of process is not as easy as just showing that a spouse has a Facebook profile. It must be shown that the spouse regularly uses his or her Facebook account. There also must be some evidence that the profile presented is really the profile of the spouse.

In *Qaza v. Alshalabi*, 54 Misc.3d 691 (Kings Co., Dec. 5, 2016), Justice Jeffrey S. Sunshine, J.S.C., denied the wife's request for permission to personally serve her husband with a summons for divorce by Facebook, where the wife did not show that her husband actually used this Facebook page for communicating. The wife attested that she had attempted to locate her husband by contacting family members, searching public records, and making requests from governmental agencies, including the New York State Department of Motor Vehicles. Id. at 692. The wife stated that it was her belief that her husband was living in Saudi Arabia, as she had discovered two Facebook profiles he maintained. Id. at 693. The trial court agreed that under the circumstances of this case, alternate service pursuant to CPLR 308(5) would be appropriate; however, the court denied the wife's request to use Facebook as the means. The court stated: "Plaintiff has failed to sufficiently authenticate the Facebook profile as being that of defendant and has not shown that, assuming arguendo that it is defendant's Facebook profile, that defendant actually uses this Facebook page for communicating. As such, plaintiff has not demonstrated that, under the facts presented here, service by Facebook is reasonably calculated to apprise defendant of the matrimonial action." Id. at 694.

The court in *Qaza* also specifically commented on the fact that there was no sworn statement from the wife stating that she had communicated with the husband through this Facebook page, nor did she submit a copy of the exchanges she told her lawyer she had had with defendant through Facebook.

Hidden Assets.

The unintended consequences of matrimonial and family litigants' social media posts are not limited to custodial issues. For example, when determining if an opposing party is hiding assets or actually disabled and unable to work, attorneys and forensic accountants often first search through that party's social media activity. A post to Facebook or Instagram of the brand new Ferrari by a litigant who claims poverty, a picture of a fabulous ski trip by a litigant who claims he or she is too disabled to work, or a picture of a sparkling large diamond engagement ring on the finger of the fiancée of the husband who is claiming poverty are gifts to the other side.

As the old saying goes, "one picture is worth a thousand words."

GPS and Divorce.

The ability to locate one's smartphone is also the ability to locate one's spouse/partner. This personal ability has cut down substantially on the use of and expense for private investigators. iPhones and Android phones both have easily downloadable applications that allow someone to track another's smartphone without that other's knowledge. In these days of the information explosion, practitioner should add a word of warning to the intake checklist on being "found," and/or a "how to," if seeking to find an errant spouse to the intake checklist. New York may have adopted "no fault" grounds for divorce, but information is power, and leverage has not been obviated.

Conclusion.

The practice of matrimonial and family law has not been immune to the information explosion and the development of social media. The sharing of information and content and networking with other users has led to unintended consequences. Clients need to be counseled not to hit "post" or treat their social media outlets as safe or private, because to do so is to court disaster. Attorneys need to stay abreast of all developments in the world of technology and keep themselves as educated as possible, as the information era and the use of social media sites continue to explode, as surely they will.

Endnotes:

1. In 2012, the New York State Legislature amended the "2010 Dignity for All Students Act" to specifically add "cyberbullying" to the crime of "bullying." However, prior to 2012, the County of Albany had adopted its own law to tackle the problem. That is the law that was held to be overbroad and unconstitutional.

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