Social Networking

The Future of Evidence in Matrimonial Litigation?

By Laurence J. Cutler and Robert A. Epstein

Social networking Web sites have ushered in an age of technological interpersonal relationships, bringing millions of people together and providing an open platform for account holders to say literally whatever is on their minds. From Facebook to MySpace to Twitter to LinkedIn, there are countless ways to "reach out and touch someone," but in a way never previously thought imaginable, and far beyond the more private realm of electronic mail, and text and instant messaging.

However, with what can only be described as a great expansion in communication come greater risks and responsibilities that people often do not consider from a legal standpoint. From an evidentiary perspective in a matrimonial law context, it is all too common for people to reveal on their social networking pages many intimate details of parts of their lives (including photographs), such as their marriages, finances, spending habits, infidelity, substance use and children. Anecdotal experience shows that the use of such evidence in matrimonial matters is quickly on the rise, often providing a "smoking gun" moment for litigators looking to bolster their client's position and credibility.

Matrimonial Litigation

How does a matrimonial litigator effectively utilize such evidence? Obtaining the information or documentation is often not the issue, as even your client may have access to the other party's social networking page, typically by being a chosen member of that person's online "community." Certain pieces of information are also available in the public forum as well, even if one does not have specific account access. For instance, as opposed to Facebook, one can log onto a person's MySpace page without any restrictions in place. Even Facebook accounts have public profile pages, containing limited information of a person's Facebook profile, including photographs. Thus, any issue with how the information was procured and questions as to admissibility can be easily eliminated or even moot, considering the account holder's knowledge that certain portions of his/her "pages" are available for public viewing. Should the information be procured otherwise, however, evidentiary issues might arise requiring verification and authentication from the information source.

Using the Evidence

What can this form of evidence be used for? Many states have fault-based causes of action for which this form of evidence might constitute relevant proof. How about in a "no-fault" situation? Simply put, this form of evidence can be used to prove a wide variety of claims, while also playing a role in shedding doubt on the account holder's credibility. By way of example, while evidence of one spouse's adultery is largely irrelevant when the cause of action at issue is irreconcilable differences, such evidence may be useful to prove that the same spouse has engaged in a wrongful dissipation of marital assets (*i.e.*, spending marital money on the paramour for restaurants, vacations, gifts, and the like). As a result of such dissipation of marital assets toward a "non-marital" purpose, your client would be entitled to a credit for one-half of any marital funds spent. Information or pictures posted by a spouse may also be useful in a custody dispute when addressing the account holder's parenting skills, judgment, maturity, any issues with substance abuse, or any other component that contributes to an analysis of what is in the child's overall best interests.

An opposing attorney will, in many instances, question the relevance and probative nature of such evidence, whether it be utilized at trial, attached to your client's certification in support of a motion, or otherwise. At the very least, such evidence can arguably almost always be used to cast doubt on a spouse's credibility. As family lawyers well know from experience, matrimonial disputes, perhaps more than in any other area of legal practice, are often largely predicated on he-said/she-said versions of events, leaving the family court to make findings of fact and credibility without much else to rely upon. In fact, certain trial courts prefer not to see the attached documentation, preferring to make their findings solely on statements made in certifications and during oral argument. Evidence derived from a social networking site could aid the family judge in resolving these issues based on more than mere certified statements or testimony.

An objecting attorney might also raise a hearsay objection in an effort to preclude the admissibility of such evidence. There are several exceptions to the hearsay rule that may apply here, the most likely of which is that the online posting constitutes an admission by the posting spouse on an issue before the court. For instance, if the spouse on his Facebook page states that he just purchased a new luxury automobile while contemporaneously claiming poverty in a certification submitted for the trial court's review, the family judge will likely allow such evidence to overcome the hearsay rule as a party admission. This form of evidence arguably can also be construed as no form of hearsay at all. Rather, an attorney can argue that the questioned evidence provides insight into the spouse's state of mind, thereby removing it entirely from the hearsay context. Thus, any concern that a litigant might have in utilizing such evidence can seemingly be overcome via several applicable evidentiary rules.

A Case in Point

While there are few cases that address this developing topic, one

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opinion worth discussing is that of *Gainey v. Edington*, 24 So.3d 333 (Miss. Ct. App. 2009). There, the Court of Appeals concluded that the Chancery Court did not abuse its discretion by excluding evidence from the father's MySpace account in a post-judgment custody modification proceeding. Specifically, the mother claimed that the introduction of evidence from the father's page, which included "sexually explicit, highly suggestive and violent content … "should have been permitted by the trial court in rendering its determination.

The appellate court disagreed, however, concluding that, because the mother was allowed to cross-examine the father regarding the content of the MySpace page, her inability to introduce such content into evidence was found not to violate her substantial rights. Thus, at the very least, the father could be questioned as to the content, which was certainly relevant to the issues of his parenting skills and credibility.

Conclusion

With new technology comes great responsibility for litigants. While there are few cases to address this subject matter in a matrimonial context, that is about to change with tens of millions of people utilizing social networking Web sites on a daily basis. For family lawyers, an entirely new world of evidence never previously imagined is now moving to the forefront as the notion of "he-said/she-said" becomes more a relic of the past. While the intrigue associated with this form of evidence is clear, a litigator's intelligent use of such evidence in representing a litigant in a matrimonial dispute can prove to be the difference maker in a case.

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College Expenses

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parents' ability to pay for their child's college expenses." *In re Marriage of Street*, 325 Ill.App.3d 108, 756 N.E.2d 887, 893 (Ill.Ct.App. 2001).

Times of emancipation can also be litigated. In an unusual fact situation, early in 2010, the Supreme Court of Illinois in *In re Marriage of Baumgartner*, 930 N.E.2d 1024 (Ill. 2010), held that incarceration of a 20-year-old child for a felony did not terminate the parent's obligation to contribute to his post-secondary education. Rather, incarceration was merely a relevant factor that had to be considered in determining whether the support obligation would terminate.

Procedural Aspects

In re Marriage of Petersen, 932 N.E.2d 1184 (Ill.Ct.App. 2010), a recent case decided in Illinois, turned a procedural aspect of petitioning for college expenses upside-down in that state. In that case, a $200,000 college contribution award was reversed because the petition for college expenses was deemed a modification of child support, and in Illinois, relief could not be granted prior to the time the petition was filed and served. Since the expenses had been paid prior to the filing of the petition, the court was held to have no jurisdiction over those expenses. The court cited and distinguished an earlier case that had indicated the opposite result. It should be noted that at press time, a Petition for Leave to Appeal to the Supreme Court of Illinois was currently pending.

Occasionally, the issue of whether or not the child has standing to pursue an action is litigated. What theory is used can often make a difference. For example, in *In re Marriage of Garrison*, 425 N.E.2d 518 (Ill.Ct.App. 1981) the parties' son sued under the Illinois statute providing for college expenses. He was held to lack standing to seek enforcement of judgment provisions to which he was not a party. It was stated that there were no allegations that he was a third-party beneficiary of the contract. Conversely, third-party beneficiary status was alleged and was successful in *Orr v. Orr*, 592 N.E.2d 553 (Ill. Ct.App. 1992).

Is Consultation Required?

Often as a result of a divorce, there is a breakdown in the relationship between the supporting parent and the child. There are many cases where there are consultation requirements that are conditions precedent in the settlement agreement, but even when there are not, local law needs to be consulted on this ever-increasing issue.

One state where this is extremely material is New Jersey, where its Supreme Court held in the case of *Gac v. Gac*, 897 A.2d 1018 (N.J. 2006), that contribution to college was not required where the child had alienated the non-custodial parent and the non-custodial parent had not been consulted as to the choice of college. One of the 12 factors set forth in the seminal case of *Newburgh v. Arrigo*, 443 A.2d 1031 (N.J. 1982) is whether the parent in question, if still living with the child, would have contributed to college. This factor weighed against the private college-attending daughter in *Gac*, since she returned her father's gifts and letters and while age 16 sent him a note saying, "We don't want to hear from you. We don't want anything to do with you." But the most important factor in this case was the fact that the request came after all the college loans had been incurred. This prohibited the father from being able to participate in the decision, or to plan his financial future. On appeal, the father also raised the equal protection issue discussed elsewhere in this article, but it was deemed waived because it was not raised in the trial court.

More Federal Law Issues

An appellate court in Illinois recently decided the case of *In re Marriage of Truhlar*, 2010 WL 3667117 (Ill. Ct. App. 2010). In that case, portions of the Social Security Act were interpreted. The father had

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