

STOP IT! FAMILY LAW AND SOCIAL MEDIA

In family law matters, a spouse's credibility is important, and the popularity of social media is now proving a shortcut to finding damaging evidence, particularly in children's parenting cases. As it is often difficult to obtain evidence showing absentee-parenting and behaviour which is not child-focused, the Court are increasingly seeing late-night tweets, risque Facebook photographs, or toxic status updates used as primary evidence in circumstances where there may otherwise be no evidence to rely on.

Couples going through stressful and ugly separations often make the mistake of venting their emotions online. In family law such evidence commonly includes a party admitting on wall posts that they are pursuing extra funds in retaliation, or saying that they are relieved the children are gone for the week. Other examples include photos or anonymous posts suggesting the Father or Mother had been at parties drinking or doing drugs when they should have been at home with their children. Something that, to some, may be considered funny, such as a post of a photo of themselves with a beer in their hand and a stupid hat on their head with the caption "Drunk Again!" can be used by the other parent as fuel to argue a diminished capacity to parent, or lack of judgement in caring for the children.

But can this really be used as evidence?

Family Law proceedings raise a particular set of evidentiary concerns, most notably in connection with evidence in children's cases. To deal with that, the Family Law legislation in Australia relaxes some of the rules of evidence, for example, evidence of a representation made by a child about a matter that is relevant to the welfare of the child or another child is admissible even if it offends against the "hearsay" rule.

As a result of this leniency, evidence from social media sources that arguably goes to the "welfare of a child" will more than likely be accepted as evidence, unless the actual authenticity of the evidence or author of the evidence is contested.

The more relevant question to ask however is not whether it can be used as evidence but what weight the Court will give to that evidence? The Court may determine that such evidence should be given little weight, and therefore it may not have an impact upon the decision the Court would have otherwise made but for that evidence. However, this will entirely depend upon the nature of the evidence and is a matter for the discretion of the Judge dealing with a matter on that day.

In a recent interview for the Courier Mail a Brisbane Federal Magistrate commented "It's Facebook, not evidence". While conceding "it may raise concerns, you can't ignore it" his overriding view was "you can't give it the weight of evidence...we're not running a Facebook Court".

However, though some judicial officers demonstrate a reluctance to allow such evidence to be determinative, there are a number of recent Family Court decisions that have dealt with evidence from Facebook.

In one recent decision, the Father sought that the Mother and child be returned to New Zealand from Australia. The Mother argued that the relocation to Australia was by agreement and that it was the Father's original intention to also move and get a job in Australia. However, the Mother's comments on Facebook that "*I have made the decision to stay in aussie*" were determined by the Court to indicate a unilateral decisions, not a prior agreement. In addition, the Mother's Facebook comment "*was just meant 2 have extended holiday after [the Father] abandoned us at least till fare were cheap*" seemed to be an admission by the Mother that the departure from New Zealand was for the purpose of a holiday. In this case, the Court ordered that the child be returned to New Zealand.

It does seem as though Australia is on the brink of following the trend being observed in America, where some Facebook postings have been deemed crucial on determining the outcome of Court cases.

As a consequence, monitoring the other spouse's movements and comments on social media websites is a good precautionary step to take, as well as making sure that you log off and stay offline.

Social media and online communication presents both traps and opportunities in family law matters. If you are involved in a family law matter yourself, assume that anything and everything may be used as evidence - updates, comments, uploads - so, "stop it" and log off!