Focus FAMILY LAW

Social media increasingly relevant to litigation

Anna Wong

The amount of time people are spending online, particularly on social networking sites, has important ramifications for family law litigation.

Courts have endorsed service of legal documents via social networking sites. For example, service of a notice of action by, inter alia, sending it to the defendant's Facebook account was deemed acceptable in *Knott Estate v. Sutherland* [2009] A.J. No. 1539. In *Eastview Properties Inc. v. Mohamed* [2014] O.J. No. 4220, the court permitted the plaintiff to serve its claim by sending a Facebook private message to the defendant.

Electronic service has been given the nod of approval in family law cases as well. In *J.R.P. v. D.D.* [2012] N.B.J. No. 19, service of a notice of application for child custody was held to have been substitutionally effected by way of Facebook exchanges between the respondent and the sister of one of the two applicants. In *Fehervari v. Kiss* [2013] O.J. No. 5334, Justice Craig Perkins validated service of documents uploaded to the Support Information Exchange website.

Ontario's *Family Law Rules* do not explicitly speak to electronic data, unlike, for example, the Nova Scotia *Civil Procedure Rules*, which codify duties to preserve and disclose electronic information.

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The jurisprudence suggests that basic discovery principles apply to social networking postings like any other document, and parties are obliged to preserve such content in the same way that they have to preserve potentially relevant documentation. As Justice Timothy Ray stated in *Ottenhof v. Kingston (City) Police Services Board* [2011] O.J. No. 976, "The pages at a social networking site or internet site including a Facebook page is a document for the purpose of discovery and should be listed in a party's affidavit of documents, if relevant ('relating to any matter in issue')." However, "the mere existence of a Facebook account is insufficient to require its production on discovery."

Evidence obtained from social media accounts has taken centre stage in many family law cases where conduct and lifestyle information are pertinent.

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Even at just 140 characters maximum, tweets can sabotage a support claim, as illustrated by *Beattie v. Beattie* [2013] S.J. No. 209. *Beattie* concerns a woman's claim for extended spousal support from her former husband based on need. Her ex-husband responded by tendering her tweets about hotel stays, gala events, symphony nights, generous donations, and overall glitterati lifestyle with her new partner. In denying her claim, Justice R.S. Smith noted: "The juxtaposition of the petitioner's life with Mr. Sanderson from their Twitter account is difficult to reconcile with her affidavit evidence which suggests that she and her new spouse are essentially part of the working poor."

If there is any doubt that photographs and comments on social networking sites can be game-changing, one need look no further than the recent case of *Stokes v. Stokes* [2014] O.J. No. 924. In *Stokes*, the mother, who has joint custody of the children with the father, relocated with the children to Orangeville, Ont., to live with her new partner. The father did not consent to the move; indeed, he was not even advised of it beforehand. He discovered it through photographs the mother had posted on Instagram, showing a moving van, and she and the children at her partner's home in Orangeville with the caption "Living in Orangeville Now." Based on the social media evidence, the court was satisfied that the mother had moved the children to Orangeville without the father's agreement and without prior court approval, and was thus in breach of an existing court order. The court transferred primary residence of the children from their mother to their father.

Unlike litigants in civil actions, spouses are often privy to each other's social networking profiles; two-thirds even share passwords to their accounts, according to a 2014 U.S. Pew Research study. That being the case, parties in family proceedings should assume that everything they post online is accessible by the other side.

Lawyers may very well wish to advise their clients to suspend their social media activities for the duration of the proceedings. For clients for whom this kind of blanket moratorium is unrealistic, they should pause to think about how a comment, photo or video may be received by a judge before posting. Disparaging comments made online about one's former spouse can sway a custody determination (e.g., *M.J.M. v. A.D.* [2008] A.J. No. 1484), as can postings of ill-considered behaviour like buying and selling drugs (e.g., *M.N.S. v. J.T.S.* [2009] B.C.J. No. 1001).

Lawyers may also suggest to clients that they reset passwords and configure the privacy level on their social networking accounts to bar ex-spouses, and others who might share information with their ex-spouses, from accessing posted information.

At the same time, clients should monitor their partners' social networking pages for potential evidence.

Should family lawyers advise their clients to "sanitize" their social media accounts? There is no official guideline from the law society, but the safe and short answer is no, given the risk of spoliation and breach of professional ethics for coaching a witness to destroy evidence. Content-purging is permissible if steps are taken to save a copy of the content.

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Onus: Most temporary care motions adjourn for four to six weeks

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onerous, as it ought to be, given that the removal of a child from her family is perhaps one of the most significant infringements on a family's liberty and autonomy.

In practice, however, the temporary care motion is most often adjourned on consent for four to six weeks, with the court making a "without prejudice" order to place the child in the care and custody of the CAS. While access between the family and the child is often afforded in the "without prejudice" order, the child will remain in an unfamiliar foster home while the parties prepare to argue the motion.

The reasons for failing to argue the temporary care motion at the first appearance are numerous: CAS may serve its material at the last minute; parents may not have counsel; counsel may not have time to review and respond to the motion; and the court may not have time to hear the temporary care motion. These are valid considerations and where CAS has demonstrated a prima facie case it may not make sense to argue the temporary care motion at the first appearance.

However, there are instances when CAS apprehends a child without cause and even a cursory review of the temporary care motion material reveals that CAS has not discharged its onus. For example, there may be a misunderstanding between a social worker and the family; unfair or unrealistic expectations placed on the family; or conduct on the part of the family that simply does not rise to the level of posing a likely risk of harm to the child, such as an untidy or disorganized home. It is in these situations that counsel for families ought to respond immediately and insist that the temporary care motion proceed at the first appearance.

While it may prove difficult to gather the necessary information from our clients and prepare persuasive and compelling responding material at the last minute, there are practical solutions to addressing these concerns: commence preparing the responding affidavit before receiving the motion material from CAS; have a standard cross-examination template ready for questioning the worker; and develop a protocol with your local CAS when you know you will be arguing the temporary care motion at the first appearance. These steps will likely require after-hours attention and for those of us working on a legal aid certificate it may simply not be possible. However, we must remember that the forcible removal of a child is an extraordinary event that will likely affect a child and a family's life forever. Where that child is unjustly apprehended it will never be in her best interests to remain in an emergency foster home for a moment longer than absolutely necessary. And while her continued placement in a foster home may be deemed "without prejudice," there is significant prejudice suffered by a child who is unnecessarily and unjustly separated from her family.

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