

# Social Media and Family Law

By the Honourable Justice Garry Watts  
(a well known luddite with thanks to the younger  
people who helped me put this together)

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“In recent years, the evidence in family trials typically includes reams of text messages between the parties, helpfully laying bare their true characters. Assessing credibility is not nearly as difficult as it was before the use of e-mails and text messages became prolific. Parties are not shy about splattering their spleens throughout cyberspace.” (J.W. Quinn J in *Bruni v Bruni*, 2010 ONSC 6568)

“I really do not care what people put on their Facebooks, to be frank. I suspect, like photographs, Facebook entries may reflect a mood at the moment, which is transitory...But the thing about Facebooks and photographs is that they just reflect a moment in time and people act up for the camera or the computer...I think it would be unwise for me to act on the basis of what people put on Facebook.” (Brown FM in *Vecchi & Vecchi* [2009] FMCAfam 1464)

## **Entries on social media websites as evidence in family law proceedings**

At this event two years ago I had just experienced, for the first time, a parent being confronted in cross examination with material she had posted to her Facebook page. In the general forum, I reflected upon and we discussed, what role social media websites might play in family law litigation in the future.

It seems since then more judicial officers are thinking like Quinn J rather than Brown FM. The courts seem to have quickly developed an understanding of sites like Facebook. Not long ago Quinn J found it necessary when referring to Facebook to explain “*Facebook is a popular website where one registers and posts personal information*”. Other earlier judgments have referred to ‘Facebooks’ and ‘emailing’ through Facebook, giving small descriptions of the site (like Quinn J), or referring to it in inverted commas. However, now judgments often refer to the site without any such context, and it is increasingly rare for references to Facebook to contain incorrect cyber terms. A full text search in Austlii for ‘facebook’ comes up over 40 results for the Family Court alone. Only two reported cases so far deal with twitter, an entirely more baffling concept.

The following cases involve instances where things said on social media websites have been used as evidence in Family Law proceedings, involving parenting orders, Hague child abductions, costs and contraventions.

Photos and comments published on sites like Facebook and Twitter are ending up as evidence in court cases. One lawyer on a recent ABC news program said that 1 in 3 cases over the past 12 months have used evidence from facebook. Eighty-one percent of the members of the American Academy of Matrimonial Lawyers had used social media sites to gather evidence in the past five years. Facebook pages of litigants, children, friends and family members have all been tendered in evidence in Family Law proceedings.

*Naylor & Hernandez* [2009] FamCA 1191 was a Magellan matter where amongst other serious allegations, the Mother asserted a lack of vigilance of father’s supervision of child. The child was exposed to the inappropriate MySpace page of father’s partner’s daughter, who the child was said to look up to. Fowler J comments:

*“The contents of the site are unseemly. It contains, in general terms, pictures of young girls making rude gestures and some of young girls smoking or drinking. The titles under those pictures include “farkeen trassheeed” and “DrunkBitchesz” and “soo farkeen drrunnk...”, “...everyonesz wasteed”, “fuccckyou”, “just a bit drunk” and “fucking wrecked and a half”, to name a few. The images portray young women and suggest that they are drunk. A consideration of the photographs themselves would lend support to that suggestion being accurate and it is this behaviour and its adulation and the language and communicating gestures used (aside from the total ineptness of the spelling) which gives rise to some concern. A number of them display young women protruding their tongues apparently to display an article of current ornament attached to them.”*

*“Whilst it is true that [the father] gave evidence that that child was under the control, discipline and supervision of her father and mother nevertheless those pages indicated that his household was not one in which one could have confidence that children were supervised. His comments during the course of the trial indicated that his partner liked consuming alcohol and that she did so. This behaviour appears not to have discouraged EP, her daughter, from doing likewise.”*

*Barclay & Menzies and Ors* [2010] FamCA 671 was a case where Facebook communications between the Mother and Father were admitted into evidence. In response to a message from the mother questioning the father about why he lied, the father responded “Because...[expletive, expletive, expletive]” without denying he lied. The trial Judge opined that response more suggestive of revenge than denial of a lie. Facebook evidence was also used to show the father had opened Facebook sites for his children but restricted access of their communication with the mother through facebook. This was evidence of the father’s lack of facilitation of the children’s relationship with the mother. Messages the father wrote to his friends on facebook were used as evidence about another incident the father was allegedly involved in.

*Preston & Mcpherson* [2010] FamCA 255 is a particularly sad case where Facebook was the domain where the father raised baseless allegations of sexual abuse against the mother, where the child could view the allegation. The Judge said this demonstrated that *“the father did not show any real appreciation as why it would be detrimental to his already fragile relationship with his daughter.”*

The case of *Parkinson & Lofts* [2009] FMCAfam 155 evidence was tendered of the father’s MySpace blogs which are rants against the mother, medical practitioners and the Court. He gave insights into his attitude towards the child’s autism and its management that were contradictory to the position he instructed his counsel to put before the Court. As a consequence of this evidence, the mother was granted sole parental responsibility in respect of medical issues.

Similarly, *Gilkes & Lenton* [2008] FMCAfam 775 involved evidence of MySpace communications that give insight into the mother’s attitude towards the father. FM Phipps comments *“there needs to be minimal conflict, effective communication and respecting each other as parents. The evidence shows that those factors do not exist in this case.”* This was part of the reason why the Federal Magistrate refused to make an equal time order.

The case of *Department of Communities & Compton* [2010] FamCA 711 is one where Facebook evidence was said to prove elements of the mother’s case “clearly and unequivocally”. This case was about the wrongful retention of the child in Australia with the mother, and the father’s assertion that there was no agreement that the child was going to Australia indefinitely. The Facebook entries demonstrated that the father had essentially said the child was no longer welcome to live with him. Facebook evidence was used to meet the standard of proof required under the Hague regulations to show that

consent was real, positive and unequivocal (the words used in *Re K (abduction: consent)* [1997] 2 FRL 212).

In a similar vein, a number of other Hague cases have used social networking evidence. The case of *Department of Communities (Child Safety Services) & Fraser* [2010] FamCA 340 saw Facebook evidence being used to show the parties' agreement had been that the children be returned to their father rather than be retained in Australia. In *Department of Communities & Clementine* [2010] FamCA 746, facebook entries were used as evidence to show the mother's relocation to Australia with the children was not by agreement. *Department of Communities & Helscher* [2010] FamCA 703 considered Facebook evidence which ultimately did not assist the father's case when considered in the light of other evidence.

In *Maloney & Maloney* [2011] FMCAfam 51 the mother was engaged in prostitution. Evidence was tendered to show the mother's Twitter page featured a suggestive photograph of herself under the username "sexytiger77" with a description "good girl and a bad girl that don't get caught!" In conjunction with evidence about a sticker with the same message on the family car and the child's access to the mother's computer, the FM concluded that the child was at risk of being exposed to an inappropriate lifestyle, which impacted negatively on the assessment of mother's attitude to parenting.

In *Bolton & Whittaker and Anor* [2010] FamCA 286, Facebook evidence was admitted to show that mother was using her surname and not that of the father's when identifying the parties' child. This went to her willingness to facilitate a relationship between the father and the child and led to an order restraining her from allowing the child to be known by a name other than the name on his birth certificate.

Contravention proceedings in *Depit & Depit* [2010] FamCA 157 relied in part upon evidence from mother's Facebook page inviting friends to a farewell function for herself and the child.

Another case involving a contravention was *Wadmal & Amrita (No. 2)* [2008] FamCA 1062 where the father's time with the children was to be supervised by his mother at or around her home. Photos posted on facebook show the father spending time with the child at the beach in contravention of that order. The photo was dated to a time after the order was made, with the aid of the facebook post date and evidence about when the child had received a haircut. The Facebook material was shown to the father's mother in the witness box. She gave evidence that she had not accompanied the father and his child to the beach.

In *Rose & Barwon (No. 2)* [2010] FamCA 738 a facebook post by the mother was evidence to demonstrate her litigious behaviour was to attract legal fees for the father. The facebook post was in the terms "*I was worried for a while there he wouldn't turn up, but he was running late. I don't care. I've still got my babies. Felt like being a smart arse and telling him to be afraid that I won't take them back for another six months which would equal another \$20,000*". This aided the other evidence which ultimately led to a costs order being made against the mother.

In *Peters & March* [2010] FamCA 151 there was an issue of whether the parties could live in close proximity. The mother and her partner alleged that the father was stalking and intimidating them. Part of the mother's case was that the father inappropriately used her friend to gain access to her Facebook profile.

Facebook provided the wife in *Hiu & Ling* [2010] FamCA 743 with startling evidence that her husband had another wife. This revelation led to court proceedings where the marriage was declared null and void on the ground of bigamy.

The Courts have not always found social media evidence to be probative, I have cited the comments in *Vecchi & Vecchi* [2009] FMCAfam 1464 at the start of the paper. In that case His Honour placed no weight upon the comments and photos pasted on Facebook to establish the mother had been going out and drinking to excess with her friends rather than looking after the children.

In *Marsh & Anor & Marsh* [2010] FMCAfam 289 no weight was given to Facebook evidence where the 'products' (similar to 'interests') listed on the mother's boyfriend's page of "Piss up and a BBQ" and "deliberately driving slower when being tailgated" were attempted to be used as evidence about the mother's boyfriend's drinking and driving habits.

### **Orders about the use of social media (including its use in the service of court process)**

Social networking has played a part in orders made in the family court to facilitate relationships. In the relocation case of *Height & Rhett* [2010] FMCAfam 1268 there was discussion about whether the father had access to and the ability to use email, MSN, Skype and Facebook to communicate with his children. Orders were made to facilitate communication by Facebook in *Valone & Sambrook* [2010] FamCA 428. Wider orders were made in *Hardie & Capris* [2010] FamCA 1046, allowing the children to communicate with each parent by email, Skype, Facebook and Twitter, but with a time limit of 30 minutes a day.

A number of issues about the use of Facebook were raised in *Meston & Bamford* [2010] FMCAfam 66, where the father was ordered to add the mother as a 'friend' for the purpose of communication, that the mother was to view the father's Facebook 'friends' to ensure photographs of her children on the father's site were only viewed by appropriate people, and that no photos of the children were to be posted on other social media sites or otherwise.

*Claringbold & James* [2011] FamCA 211 was a case where it was deemed inappropriate to allow a child of 12 years to use Facebook. The family consultant in the case advised that children under 13 should not use the site without supervision and talked about the possibility of cyber-bullying. An order was subsequently made for the child to have no access to this site.

Social media has been used as a weapon by parties in some family litigation. Quinn J in *Bruni & Bruni* notes that:

*“In 2007 Larry created a false Facebook account in the name of Catherine on which he posted derogatory comments that appeared as if they had been authored by her.”*

Injunctions have been made by the Court in relation to parties' activity on social networking sites. In *Talcott & Talcott* [2009] FMCAfam 1384 the wife was restrained from denigrating the father on social networking sites. In *Darcy & Cameroon* (No. 3) [2010] FamCA 347 there was an order that the mother remove, and be restrained from posting further, material in relation to the case including all material that identifies the parties or the child. In *Fenuel & Graham* [2008] FamCA 386 there was an order that the mother be restrained from contacting the father and children through MySpace and MSN which she then proceeded to contravene.

Social media sites have become useful in the service of documents. In *Monty & Villamont* [2010] FamCA 970 the husband ascertained through Facebook that the wife had moved to Canada. All other avenues of communication were closed, and the husband was unable to ascertain the wife's whereabouts. It was shown that the wife had cancelled her Facebook account not long before the hearing and this was a factor which founded an order for the dispensation of service. The court proceeded to pronounce a decree of nullity of marriage. *Byrne & Howard* [2010] FMCAfam 509 used Facebook and MySpace as means by which substituted service could take place where no other avenues of communication were available. The site was identified to be that of the father, and the father was found to be a regular user of the website.

### **The role of social media in the breakdown of relationships**

An article from 2011 entitled *“Facebook the new fast track to divorce courts”* describes the increase of the role of sites like Facebook in divorces and relationship breakdowns. Both lawyers and psychologists have reported more breakups and marital problems directly related to social networking. The paths to this end result are numerous. It was noted that many do not think typing suggestive material is actually 'cheating' and this removal from reality has encouraged relationships that would not ordinarily form. It also provides an easy way to get in contact with people from the past, or simply to communicate with new people. The ease with which people may monitor their partner's online activity is also a source of concern, particularly in relationships characterised by suspicion and jealousy. Private Investigators acknowledge that where a physical affair has taken place, the Facebook arena offers a 'minefield of information' from which offenders are sprung. Tragically, one woman in 2009, who changed her status from 'married' to 'single' on Facebook, was murdered in a fit of rage after her husband accessed this information. The frequency of Facebook having a role in divorce has led to a group, ironically on Facebook, entitled “Facebook ruined my marriage”.

### **Improperly obtained information**

Privacy settings in social media sites are becoming more stringent in response to community expectations. Facebook has set up a privacy guide to advise their users about the safeguards available to them. A prudent person

can ensure which 'friends' and 'networks' of non-friends can view various online activity. What a prudent person cannot control (except through having loyal online friends) is one of those friends sharing information with a non-friend, or allowing that person to use their account to view online activity. More intrusive would be the person that hacks into a person's account to view online activity if they know or guess a password, which has been known to happen, especially in relationships where these details may purposely or inadvertently be shared.

Section 138 of the Evidence Act 1995 (Cth), which is preserved by s 69ZT(1) FLA, gives a discretion to Judges to refuse to admit evidence if it was obtained illegally or improperly. This provision requires a balance to be made between the right of a person to bring material before a court, particularly in child related proceedings and the dangers of allowing people to engage in improper or illegal activities in obtaining that material. As Facebook and other social media evidence becomes more commonplace, consideration of section 138 may also become more common in this context.

The ordinary meanings of "improper" include, "not in accordance with truth, fact, reason or rule; abnormal, irregular; incorrect, inaccurate, erroneous, wrong" (per French CJ in *Parker v Comptroller-General of Customs* cited above at para 29). Most of the reported cases of "improperly" obtained evidence relate to behaviour by the police and other public officials in obtaining admissions from persons accused of criminal offences.

However, one example in this court is Dawe J's decision in *Ames & Ames* (2009) 42 Fam LR 95, where Her Honour found that a father, who had used a swab that he had obtained from a child for the purposes of obtaining a paternity test (as well as probably behaving in contravention of an Australian law), obtained the evidence improperly because the father had admitted that he had lied to the child about the reason for taking the swab. Also Her Honour, when exercising a discretion, under s 138 EA, refused to admit the report obtained from the laboratory who had analysed the swab, not only because of the threat of the integrity of the process, that normal testing procedures guarantee but also because of the improper way the father had obtained the biological material for the test.

Another example is found in *Huzan & Elias* [2011] FamCA 376, where evidence of a secrete recording by a father of his interview with a family consultant for the preparation for a family report was excluded under s 138 EA.

Section 138(3) of the Evidence Act gives some guidelines as to what matters may be considered when making a decision about whether to admit improperly or illegally obtained evidence. Without limiting the discretion, those matters are:

1. *The probative value of the evidence*
2. *The importance of the evidence in the proceeding*
3. *The nature of the subject matter of the proceeding*

4. *The gravity of the impropriety*
5. *Whether the impropriety or contravention was deliberate or reckless*
6. *Whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the international covenant on civil and political rights (eg Article 17 which reads “No one shall be subjected to arbitrary or unlawful interference with his privacy....”)*
7. *Whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention*
8. *The difficulty (if any) of obtaining the evidence about impropriety or contravention of an Australian law*

It remains to be seen how these provisions will be applied to social media evidence obtained in a dishonest way.