



## Facing Facebook, Facing Ourselves

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### **Social Media's Impact on Family Law**

In an unpublished decision filed on Feb. 25, 2011, the Court of Appeals of Kentucky unanimously affirmed a lower court ruling awarding primary custody of a divorcing couple's three-year-old child to the father. On appeal, the mother argued that Facebook photographs showing her "enjoying parties and apparently consuming alcoholic beverages against the advice of her mental health providers" were improperly admitted into evidence. Even though the mother conceded that the photographs accurately depicted her conduct, she took the position that the evidence was inadmissible because she never authorized their publication — even though "Facebook allows anyone to post pictures and then tag or identify the people in the pictures." Her evidentiary objection was overruled by the lower court, which held that the Facebook photographs were properly authenticated and therefore admissible. *Jessica J. LaLonde v. Adam N. LaLonde*, 2011 WL 832465 (Ky. Ct. App. 2011).

### **Social Networking and Child Custody**

The Kentucky case is far from unusual. Indeed, scores of custody cases from across the country involve the admission of Facebook evidence. According to a 2010 survey by the American Academy of Matrimonial Lawyers, more than 80% of its members have used or faced evidence plucked from Facebook, MySpace, Twitter and other social networking sites, including YouTube and LinkedIn, over the past five years. The evidence is used not only to question parental fitness, but to prove marital misconduct. It arises in cases involving the involuntary termination of parental rights, as well as in dependency and juvenile proceedings. It is admitted in domestic violence cases, sometimes to prove whether abuse occurred or to determine whether an order for protection has been violated. Simply put, in the context of domestic relations, Facebook evidence is ubiquitous. It can even be used in support proceedings to determine a party's earning capacity. For instance, do the photographs or posts on Facebook contradict a party's assertion of disability? Do they show a party engaged in conduct that interferes with childrearing, suggesting that employment is feasible? The headlines say it all. One article in *The Philadelphia Inquirer* is titled, "Divorce, Facebook Style" (July 12, 2010), and another one in the *New York Post* shouts, "Facebook 'Em! Online Evidence Nailing Straying Spouses" (Feb. 11, 2010).

### **Impact on Family Law**

But Facebook and family law intersect in other ways, too. On Feb. 27, 2011, the *Los Angeles Times* published an article entitled, "Child Custody Expert Linked to Lewd Web Photos." The article revealed that the President of the American Society for Adolescent Psychiatry — a prominent Beverly Hills psychiatrist who had helped to decide hundreds of child custody cases — was thrown off one recent case and had been challenged in at least two others after posting lewd photos of himself on Facebook and "allegedly promoting illegal drug use, unprotected sex and male prostitution." Sound familiar? In 2008, the same newspaper broke a story about the Chief Judge of the Ninth U.S. Circuit Court of Appeals, who at the time was presiding over an obscenity trial while simultaneously maintaining a publicly accessible website featuring sexually explicit photos and videos. A judicial council issued an admonishment in 2009, concluding that the judge's "possession of sexually explicit offensive material combined with his carelessness in failing to safeguard his sphere of privacy was judicially imprudent," and that his actions "can reasonably be seen as having resulted in embarrassment to the institution of the federal judiciary."

### **How Wide Is the Problem?**



Increasingly, many custody evaluators are examining Facebook evidence as part of their forensic review of the parties and the child. But what happens when a custody evaluator's own postings on Facebook and other social media websites call into question his/her capacity to make recommendations in a child's best interest? Most qualified mental health professionals in child custody cases have quasi judicial immunity from suit because as evaluators, they perform a judicial function. In the case of the Beverly Hills psychiatrist, however, attempts will undoubtedly be made to modify custody orders based on his prior recommendations, and in all likelihood, the Facebook imbroglio will result in the filing of complaints with the state licensing board. As the Roman poet Juvenal wrote, "*Quis custodiet ipsos custodiet?*" Translated literally, "Who will guard the guards themselves?"

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### Recent Family Law Cases Involving Facebook

*In re R.P.*, 2011 WL 768778 (Iowa Ct. App. 2011) (in juvenile proceeding, mother called father a degenerate on Facebook; this and other Facebook evidence was admitted to show that parents' behavior was emotionally traumatizing to children).

*In re Marriage of Anderson*, 2011 WL 768797 (Iowa Ct. App. 2011) (in child custody proceeding, lower court examined Facebook evidence to contradict mother's claim that she was not involved with her landlord; children had complained about landlord's treatment of them, but mother failed to call landlord as witness; Facebook evidence showed that mother called landlord sexy baby).

*H.L.W. v. Dawson*, 2011 WL 722252 (N.J. Super. Ct. App. Div. 2011) (in domestic violence proceeding, defendant accessed victim's Facebook page three times in 24-hour span; lower court found pattern of unwanted conduct that rose to level of harassment).

*Baber v. Baber*, 2011 WL 478622 (Ark. 2011) (in child custody proceeding, mother testified that patient in drug and alcohol recovery program sent Facebook messages to her stating that father was not sober and was worse after leaving treatment).

*Bauer v. Bauer*, 2010 WL 5491298 (Conn. Super. Ct. 2010) (lower court interim order stated that child was permitted and encouraged to initiate calls, texts, e-mail or Facebook exchanges with mother, but that mother was not permitted to initiate such contact).

*In re A.F.*, 791 N.W.2d 711 (Iowa Ct. App. 2010) (in termination proceeding, mother posted Facebook entry: Someone save me he's drunk again; lower court's order involuntarily terminating rights of both parents affirmed).

*Olson v. Olson*, 2010 WL 4517444 (Conn. Super. Ct. 2010) (in divorce proceeding, Facebook evidence used to support wife's allegation that husband was having an affair).

*In re S.A.*, 786 N.W.2d 269 (Iowa Ct. App. 2010) (in termination proceeding, Facebook evidence showed one teen-aged child using inappropriate language after midnight; lower court's order involuntarily terminating rights of both parents affirmed).

*Preuett v. Preuett*, 38 So.3d 551 (La. Ct. App. 2010) (in custody relocation hearing, mother alleged that father was alienating children's affection for her; in reversing lower court's order, father was found to be justified in retrieving children from mother after receiving text and/or Facebook messages at 2:00 a.m. from children that they were scared due to fighting between mother and her new husband).

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