DOES THE USE OF SOCIAL MEDIA EVIDENCE IN FAMILY LAW LITIGATION MATTER?

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TO OLD FRIENDS, NEW FRIENDS, AND FACEBOOKS FRIENDS[3]

I. INTRODUCTION

The use of social media evidence in family law litigation has increased exponentially over the last several years. However, evidence of Bad Behavior[4] has been an integral part of these disputes, probably since the beginning of time. Arguments that "he did this" and "she did that" are omnipresent in most divorce cases, litigated or not. In the past, the evidence presented in court was mostly limited to he said/she said testimony, and the use of physical evidence such as income tax returns, paycheck stubs, bank statements, bills, letters, and photographs. Nowadays, evidence of Bad Behavior can be supported through the use of social media such as Facebook, MySpace, YouTube, Twitter, LinkedIn, Instagram, text messages, and email,[5] just to

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[3] *See* Claire Cook, *Seven Year Switch* (HarperCollins 2011).
[4] We are loosely defining Bad Behavior as anything a party puts before the court that is intended to denigrate, shame or embarrass the opposing party, somehow implicate the opposing party, and/or otherwise harm the opposing party's chances of winning the battle.
[5] To be thorough and complete, text messages and emails are included in this Article as types of social media evidence.

name a few.[6] This Article examines whether or not social media evidence has made a difference in the final outcome of family law cases.

Prior to the advent of social media, litigants marched into court with physical evidence such as the kind previously mentioned, as well as items like cancelled checks, diaries, calendars, and conversations secretly recorded on a telephone answering machine. Today, litigants still use this type of evidence in states that require a fault-based reason for a divorce. It is used as a basis to be awarded (or denied) alimony or child custody, and/or perhaps a bigger (or smaller) piece of the marital property pie. However, nowadays this old-fashioned type of evidence, although still relevant, has been somewhat relegated to second-class citizenship. It has been replaced by the multitude of social media evidence that is so readily available.

Social media has brought a wide variety of evidence into the courtroom.[7] Emails and text messages are used instead of secretly recorded telephone conversations. Facebook photos, as

[6] Social media is arguably the cause of the most fundamental shift in human relations in the twenty-first century. With very few age restrictions, social media websites are accessible to, and used by all generations. By signing up, users create an online profile of themselves for all the world to see. Without hesitation, users upload personal information, share interests among groups, and post pictures and videos. For those unfamiliar, the following is the nutshell explanation of four of the most popular social media sites: Facebook, MySpace, Twitter, and LinkedIn. Facebook is social media's top contender. Through Facebook, one can communicate with friends, family, and co-workers. Facebook features wall posts, private messages, status updates, tagging of pictures, friend requests, and liking of posts and pictures. A Facebook profile can share, depending on the user's choice, photos, videos, interests, education, relationship status, sexual preference, and contact information. Moreover, a Facebook profile can reveal a user's location at the time of a post. Similar to Facebook, but on its way out, is MySpace, which launched in 2003, a year before Facebook's startup. The primary difference between MySpace and Facebook is that MySpace users can uniquely customize their pages by changing the color, fonts, graphics, and adding music. Launched in 2006, Twitter is the newest addition to social media. As of March 2012, Twitter was the second most popular site with 250 million monthly visitors. Twitter allows users to instantaneously tell the world what they are doing and thinking, by posting short messages of 140 characters or less. LinkedIn, launched in 2003, stands out from the rest as the largest professional/business network. In 2013, LinkedIn reported having 175 million members in over 200 countries. LinkedIn allows its users to upload a profile picture of themselves, and post their resumes to their main pages. The purpose of the site is to broadcast oneself in a professional online world: the epitome of social networking. Perhaps the most important thing across all of these sites is that not everything a user posts is always accessible by others. In fact, many social networking sites provide measures of privacy; however, the majority of users post freely and willingly, or forget to adjust who can and cannot view their information. An astounding number of social media users (including our students during class time) are constantly updating the world, via the Internet, as to their whereabouts, friends, employment, and relationship status through sites like Facebook, LinkedIn, Twitter, and MySpace. Currently, 65% of adult Americans have at least one presence on a social networking site. For those who find themselves in divorce, custody and alimony battles, their whereabouts, friends, employment, and relationship status are often highly sought after issues; and each issue almost perfectly aligns with the use and purpose of social media websites.

well as other posted information of a litigant on vacation in Fiji, or posing in his or her new Corvette, are cheaper and more convenient pieces of evidence than are pictures of a party in compromising positions secretly taken by a private detective. A party's financially related "tweets" on Twitter may be more informative and revealing to the court than his or her bank records to prove that the party has more money than reported. LinkedIn may provide evidence of a party's employment or employability, even though he or she may claim otherwise. Disclosures on MySpace, pictures on Instagram, and/or videos posted on YouTube can all be used to incriminate the opposing party and undermine his or her credibility. It is not just a party's postings on Facebook, for instance, that can be used as evidence, but postings by friends or relatives of either party can also be used. The possibilities are endless.

In response to the explosion of social media evidence, divorce attorneys have had to up their game when preparing and arguing a family law case. Articles in law journals, online news sources, and family law blogs have appeared reviewing and educating divorce attorneys and litigants about the use of social media evidence in court.[8] Legal information websites now include relevant discussions on the subject, for example, *Facebook Divorce*, on FindLaw.com.[9] Even venerable newspapers and magazines such as the New York Times and Forbes have gotten into the act by printing articles such as *Divorce Lawyers' New Friend: Social Networks,*[10] *How*

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[7] *See id.*

[8] *See, e.g.*, Judge Michele Lowrance; Pamela J. Hutul, *Social Media in Divorce Proceedings,* 2013 WL 7121057 (July 19, 2013), http://www.familylawyermagazine.com/articles/social-media-in-divorce-proceedings; *see also*, *Social Media and the Family Court: How do social media websites effect a divorce case?* divorcesouce.com, http://www.divorcesource.com/ds/newjersey/social-media-and-the-family-court-3934.shtml; Bari Zell Weinberger, *Don't Let Social Media Sabotage Your Divorce*, HUFFINGTON POST (June 24, 2012), http://www.huffingtonpost.com/bari-zell-weinberger-esq/dont-let-social-media-sab_b_1417972.html.

[9] *See* FindLaw, *Facebook Divorce*, 2013, http://family.findlaw.com/divorce/facebook-divorce.html#sthash.4mag1j5p.

[10] Nadine Brozan, *Divorce Lawyers' New Friend: Social Networks*, NY TIMES (May 13, 2011), http://www.nytimes.com/2011/05/15/fashion/weddings/divorce-lawyers-new-friend-social-networks.html.

Social Media Can Affect Your Divorce,[11] and *Facebook and Divorce: Airing the Dirty Laundry.*[12]

Additionally, law firms are posting warnings and advice to their clients on their law firm websites.[13] Clients (and potential clients) are told, for example: Do not post post-separation vacation pictures or pictures of recent or expensive purchases on Facebook; Do not post pictures of you using a bong at a family gathering on your MySpace page; Your electronic communications can be used against you in court.[14] Even the American Society of Matrimonial Lawyers has entered the online advice arena by informing readers, "If your status is separated or going through a divorce, you might want to stay off Facebook."[15] It is very telling that law firms are providing this important legal guidance, at no charge, to anyone who looks at their firm websites.

This Article attempts to answer the following question: Does the use of social media evidence actually have a noticeable impact on family law litigation? Simply said, does the use of social media evidence matter; is the ultimate outcome of the case any different from pre-social media days? Is the decision a court makes actually influenced by the introduction of social media evidence in a hearing or trial?

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[11] Jeff Landers, *How Social Media Can Affect Your Divorce*, FORBES (August 20, 2013), http://www.forbes.com/sites/jefflanders/2013/08/20/how-social-media-can-affect-your-divorce/.
[12] Belinda Luscombe, *Facebook and Divorce: Airing the Dirty Laundry*, TIME (June 22, 2009) http://content.time.com/time/magazine/article/0,9171,1904147,00.html.
[13] *See, e.g.*, Roberts & Robold, P.A., *Social Networking Sites & Your Divorce Case*, (2014), http://www.aggressivefamilylaw.com/social-networking-sites-divorce/; Clifford J. Petroske, PC, Molly Zamoiski, *He Posted What? How Social Networking Can Hurt Your Divorce Or Custody Case*, (February 18, 2014), http://www.petroskelaw.com/he-posted-what-how-social-networking-can-hurt-your-divorce-or-custody-case.html.
[14] *See, e.g.*, McKinley Irvin Family Law, *The Hazards of Email, Text Messages & Social Media in a Divorce*, (September 16, 2013), http://www.mckinleyirvin.com/Family-Law-Blog/2013/September/The-Hazards-of-Email-Text-Messages-038-Social-Me.aspx.
[15] American Association of Matrimonial Lawyers, *Facebook is Primary Source for Compromising Information*, (February 10, 2010), http://www.aaml.org/about-the-academy/press/press-releases/e-discovery/big-surge-social-networking-evidence-says-survey.

The main thesis of this Article is that the use of social media evidences in family law cases changes nothing. Family law cases, and all of the blaming and shaming testimony and evidence, continue on the same path they always have, with or without the introduction of social media. Litigants still need to "tell" on the other side to the judge. Litigants still want to see the court punish the other side for what he or she did or did not do. Litigants continue to expect the judge to understand how the other side wronged them and why they deserve some retribution.[16] Social media evidence is definitely more sophisticated and more technologically impressive than a bank statement or a paycheck stub, but the reality is that it also falls into the age-old category of evidence used to prove Bad Behavior. And, this continued use of Bad Behavior evidence means that litigated domestic relations cases will stay on the same road that they have been on for decades.

Evidentiary concerns regarding social media evidence, such as hearsay, authentication, relevancy, materiality, and any other admissibility issues are not the focus of this Article. Similarly, discovery issues and concerns are also beyond the scope of this Article. Instead, the focus remains on social media's *impact*. That is, assuming all evidentiary and discovery issues are resolved, what relationship or impact, if any, does the use of social media have on the outcome of a family law case?

Part II provides a general background on no fault divorce, which was at one time touted as the cure-all to messy, ugly divorces.[17] It has fallen short of this goal since. Even though many states have adopted a no fault option, they still maintain fault-based divorce options as well, or use fault to resolve other issues in the case besides simply dissolving the marriage. The

[16] *See, e.g.*, Barbara Bennett Woodhouse, *Sex Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 62 Geo. L.J. 2525, 2545-48 (1994). Among other issues, the author discusses how fault based divorce puts the parties in a positon of creating a narrative of their marriage.

[17] *See, e.g.*, Lawrence Friedman, *Rights of Passage: Divorce Law In Historical Perspective*, 63 Or. L. Rev. 649, 664 – 67 (1984).

relationship or connection between no fault, fault, and the use of social media evidence will also be discussed.

Part III focuses on the use of social media in court, generally, and what courts do with this newer form of evidence. Privacy issues arising from the use of social media evidence are also introduced.

Part IV analyzes specific court decisions in domestic relations cases where social media evidence was introduced. The cases involve either custody or alimony issues. Sometimes the use of social media evidence mattered, and sometimes it did not.

Part V provides a concluding discussion on the use and misuse of social media evidence in domestic relations cases. Final thoughts about the future development of social media evidence are also presented.

II. THE DEMISE OF THE BLAME GAME THAT NEVER HAPPENED

There cannot be a more appropriate illustration than Mark Twain's famous expression, "the report of my death was an exaggeration,"[18] when it comes to describing and analyzing what has gone on with no fault divorce in America. No fault divorce was intended to do away with, or at least minimize the arguing, accusing, acrimony, and just plain ugliness that a divorce can evolve into. Unfortunately, it has not worked out this way. Bad Behavior in divorces continues, and no fault divorce has not truly accomplished its intended purpose.

No fault divorce has been undermined in at least two ways. First, it has been undermined by states that allow fault to be used in determining, for example, child custody, property division, and alimony determinations. Second, no fault divorce has been undermined by states that only

[18] *See http://en.wikiquote.org/wiki/Mark_Twain.*

went so far as to add no fault as a basis to obtain a divorce; that is, it was added to a list of pre-existing fault based grounds such as adultery, abandonment, or cruelty.

The Uniform Marriage and Divorce Act [hereinafter UMDA] was promulgated by the National Conference of Commissioners on Uniform State Laws in 1970.[19] Part of the intention of the UMDA was to rid fault from the divorce process by substituting the term "irretrievable breakdown" for fault based grounds.[20] Once fault is eliminated from the equation, the focus can be on dissolving the marriage in a saner manner. This leads to protecting the best interests of the parties and hopefully, the children. A comment to § 305, *infra* of the Act states: "The legal assignment of blame is here replaced by a search for the reality of the marital situation: whether the marriage has ended in fact…."[21]

Section 305 provides as follows:

> § 305. [Irretrievable Breakdown]
> (a) If both of the parties by petition or otherwise have stated under oath or affirmation that the marriage is irretrievably broken, or one of the parties has so stated and the other has not denied it, the court, after hearing, shall make a finding whether the marriage is irretrievably broken.
> (b) If one of the parties has denied under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to filing the petition and the prospect of reconciliation, and shall:
> (1) make a finding whether the marriage is irretrievably broken; or
> (2) continue the matter for further hearing not fewer than 30 nor more than 60 days later, or as soon thereafter as the matter may be reached on the court's calendar, and may suggest to the parties that they seek counseling. The court, at the request of either party shall, or on its own motion may, order a conciliation conference. At the adjourned hearing the court shall make a finding whether the marriage is irretrievably broken. (c) A finding of irretrievable breakdown is a determination that there is no reasonable prospect of reconciliation.

[19] Uniform Law Commission, http://www.uniformlaws.org/ActSummary.aspx?title=Marriage and Divorce Act, Model.
[20] *See* Lynne Carole Halem, *Divorce Reform*: *Changing Legal and Social Perspectives*, 269-70 (Free Pr June 1980).
[21] UMDA, pg. 33.

By removing a legal assignment of blame, the UMDA set up the potential for ridding divorces from the doldrums of Bad Behavior, thus, potentially eliminating the emotion and drama from the litigation process. Proponents of divorce reform advocated that divorce should not be based solely on traditional fault grounds, since the reality is that marital breakdown is not always based on the fault of one guilty party. Instead, the breakdown of the marriage is often caused by the incompatibility and irreconcilable differences of both spouses.[22]

No fault divorce grounds were seen as helping to reduce the hostility, bitterness and distress of the divorcing couple.[23] In addition, no fault divorces were thought to protect the integrity of the legal system, by eliminating the need to manufacture or doctor evidence to fit the fault based provisions of existing divorce law.[24] In another comment to § 305, the Act states: "Because it is expected that the parties themselves will be the primary source of evidence as to irretrievable breakdown, the Act has eliminated any requirement of corroboration." [25] In other words, remove all the outside and unnecessary venomous testimony and evidence, and let the parties go on with their lives as unscathed by the divorce process as possible.

In 1970, California passed the first law endorsing the recommendations of the UMDA.[26] The new law removed consideration of fault from the grounds for divorce, spousal support, and division of property.[27] By 1989, forty-nine states and the District of Columbia had adopted some no fault grounds for divorce, with twenty states allowing divorce only on no fault grounds.[28]

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[22] *See* Peter Nash Swisher, *Reassessing Fault Factors in No Fault Divorce*, 31 Fam. L.Q. 269, 269 (1997).
[23] *See* Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U.L. Rev 79, 92 (1991).
[24] *Id.* at 93.
[25] UMDA, pg. 35.
[26] The UMDA was not endorsed by the ABA until 1974.
[27] *See* Allen M. Parkman, *Good Intentions Gone Awry*: *No-Fault Divorce and the American Family*, 72 (Rowman & Littlefield Publishers, Inc. 2000). *See also* Friedman, *supra* note 17, at 667.
[28] *See* Meghan L. Kruger, *Separation Anxiety: The Implications of Rhode Island's Reluctance to Remove Fault from Divorce Proceedings*, 19 Roger Williams U. L.R. 808, 817 (2014).

However, approximately thirty-two states retain fault based grounds in addition to the no fault alternative.[29] Most significantly, marital fault is still a relevant factor in at least twenty-eight states for determining alimony and division of property.[30] No fault state or not, Bad Behavior is always considered relevant when determining the best interests of the children in contested custody cases.

Herein lies the problem. As earlier stated, no fault divorce is not the sole criteria for granting a divorce in the majority of the states. In the many states that allow fault based testimony and evidence in order to grant a divorce or for other reasons, the use of Bad Behavior testimony and evidence has not gone away. It only follows that in the twenty-first century, social media evidence has rushed in to modernize and pick up the slack of pre-social media evidence in litigated domestic relations cases.

Guy v. Guy[31] provides a great example of fault based divorce and no fault divorce stumbling over one another – and in *Guy*, this occurred through the use of social media evidence.[32] In *Guy*, the husband appealed from the trial court order granting the wife a fault-based divorce. The wife cross appealed asserting that the trial court erred in the division of a particular marital asset.[33]

The New Hampshire Supreme Court reversed the trial court order granting the wife a fault-based divorce on the ground of an injury to health and the danger to reason suffered by her.[34] The trial court based its ruling on the fact that after the wife had somehow discovered the husband's email password, she read through his email account. The wife discovered email

[29] *See* Peter Nash Swisher, *Marriage and Some Troubling Issues With No-Fault Divorce*, 17 Regent U. L. Rev. 243, 253 (2005).
[30] *See id.* at 254.
[31] *Guy v. Guy*, 158 N.H. 411 (2009).
[32] *Id*.
[33] *Id*.
[34] *Id*. at 413.

exchanges between the husband and an old girlfriend, professing their love and containing sexually suggestive content.[35] Relying on the email evidence, the trial court granted the wife a divorce on the ground that the husband, through the emails, had "so treated [her] as to injure [her] health or endanger [her] reason."[36]

In its order reversing the trial court, the New Hampshire Supreme Court held that the husband's conduct was insufficient as a matter of law to amount to a fault-based divorce.[37] The Court further held that the emails did not do any harm to the wife's well-being nor did they cause her mental anguish as contemplated under RSA 458.7, V.[38] Lastly and most significantly, the Supreme Court set aside the trial court's division of marital property because it was based on the trial court's incorrect determination that the husband was at fault in causing the breakdown of the marriage.[39]

In *Guy*, the trial court and the New Hampshire Supreme Court had opposite opinions or interpretations of the significance of social media evidence, the husband's emails. As a result, each court came out with a completely different application of the law. This is extremely important since it not only shows how the use of social media evidence impacted the ultimate outcome of the case, but that at least to the lower court, the use of social media evidence mattered because the husband's actions as depicted on the emails swayed the trial court's determination of property division. Yet, to the New Hampshire Supreme Court, the social media evidence in the form of husband's emails was not at all persuasive.

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[35] *Id*.
[36] *See* RSA 458:7, V, which provides in pertinent part: "A divorce from the bonds of matrimony shall be decreed in favor of the innocent party for any of the following causes … V. When either party has so treated the other as seriously to injure health or endanger reason."
[37] *Guy*, 158 N.H. at 414.
[38] *Id*.
[39] *Id*. at 414-15.

This 180 degree difference in outcomes between the two courts in *Guy* reflects the overall diversity of opinion on the impact or value of social media evidence – sometimes it matters and sometimes it does not. The case law analyzed in Part IV *infra* clearly reflects this dichotomy.

Part III. GENERALLY SPEAKING: SOCIAL MEDIA EVIDENCE IN COURT

Quick question: How common is social media evidence in court, and what do judges do with it? Answer: social media is so common that it is practically taking over courtroom proceedings. Approximately 81% of the 1,600 attorneys who handle divorce cases, prenuptial agreements, custody battles, and property division, and who are members of the American Academy of Matrimonial Lawyers [hereinafter AAML], attest to the rise in the number of cases using social media evidence.[40] In fact, social media has become such a force in family law that attorneys often spend as much time researching Facebook pages as they do reviewing and analyzing relevant case law.[41]

As stated by Marlene Eskind Moses, past president of the AAML, "Going through a divorce always results in heightened levels of personal scrutiny. If you publically post any contradictions to previously made statements and promises, an estranged spouse will certainly be one of the first people to notice and make use of that evidence."[42] For example, if cohabitation is an issue in a case of alimony between a couple post-divorce, all the offering party has to do is search the ex-spouse's Facebook page and present photographs of him or her living with a new partner. Suppose a party seeks to prove the other side's unfitness to care for their child. The offering party will put quotations describing inappropriate behavior copied from his or her soon-

[40] Reaney, Patricia, *Facebook Divorce Evidence,* Windsor Star (Feb. 11, 2011).
[41] *See id.*
[42] *See id.*

to-be ex's Twitter page into evidence, as a rather undeniable attempt to attack his or her character or fitness as a parent.

Knowing that social media evidence is permissible, questions arise such as how it is used and to what extent a party can go digging. Users may be a little more lackadaisical with their public postings, as they should be, since courts have granted full access to an opposing party's social media account by compelling the production of the login and password credentials.[43] This is personal information that the opposing party most likely intended to keep private, and probably never imagined otherwise.

Courts cite three reasons for allowing social media evidence: (1) It does not violate privacy as there is no expectation of privacy; (2) It can be relevant; and (3) It does not violate any privilege. Assuming, *arguendo,* that reasons (2) and (3) can be easily accepted, the first reason is not necessarily a given, especially in cases where the court grants access to an opposing party's social media account. A party may accept that there is no reasonable expectation of privacy for public postings; but, what about when a judge grants unlimited access to a party's personal account, to messages that were intended to be kept private?

The question turns on whether a party in a divorce case has a reasonable expectation of privacy when using social media. Though the populace is seemingly addicted to social media's presence, and newly aware of its use in court, at the same time, society is somewhat forced to accept a lot of its unknowns. With hacking scandals in the news almost daily, people have become more aware that any posting online can be stored on a website's server indefinitely,[44] as well as susceptible to exposure by hackers. Yet, people go on posting their life stories. Family

[43] *See, e,g., Gatto v. United Air Lines, Inc.*, 2013 U.S. Dist. LEXIS 41909 (D.N.J. Mar. 25, 2013) (plaintiff ordered to execute an authorization for the release of information from Facebook).
[44] Lindsay M. Gladysz, *Status Update: When Social Media Enters the Courtroom*, 7 I/S: J.L. & POL'Y FOR INFO. SOC'Y 691 (2012).

courts are in the challenging position of figuring out what a reasonable person's expectation of privacy should be when it comes to social media evidence.

Take Facebook, for example, perhaps the most popular social media outlet today. Facebook's ever-evolving nature since its inception in 2004 calls into question what reasonable expectations of privacy its users have. A decade has come and gone since its pilot, and now Facebook's 750 million users may not consider their accounts as secure as they did in the past. (This may be a good time for users to find out about the 5,000+ friends out there that they never knew they had!) In 2011, a USA Today/Gallup study found that heavier users of social media tend to be less concerned about privacy issues than those who made less frequent use of sites like Facebook and Twitter.[45] The social media phenomenon seems to mysteriously remove most users from the once overwhelming concerns of privacy. Given social media's popularity and power, it is untenable to suggest to users to change or monitor their use.

As an aside, state or federal statutory protection of a social media user's right to or expectation of privacy is incipient and limited. In 1986, Congress enacted the Stored Communications Act [hereinafter SCA], which prohibits social media sites from disclosing personal information to nongovernment entities without the user's consent. In *Jennings v. Jennings*,[46] the Court of Appeals of South Carolina held that a daughter-in-law violated the SCA by accessing her father-in-law's Yahoo email account without authorization.[47] She surreptitiously read his email during his divorce proceedings in order to expose emails between him and his girlfriend to his wife. The court found that the plaintiff's daughter-in-law violated

[45] John G. Browning, *With "Friends" Like These, Who Needs Enemies? Passwords, Privacy, and the Discovery of Social Media* Content, 36 Am. J. Trial Advoc. 505, 506 (2013).
[46] *Jennings v. Jennings*, 697 S.E.2d 671, 675-80 (S.C. Ct. App. 2010) *rev'd*, 736 S.E.2d 242 (2012).
[47] *Id.*

the SCA by accessing his email account.[48] Although so far application of the SCA has rarely been seen in family law litigation, the SCA could be used in the future when and if it is applied to social networking companies that disclose substantive content from user profiles in response to a civil subpoena.[49] The SCA might also serve as a model for similar state statutory protection.

Established Fourth Amendment protections, although not normally relevant in domestic relations cases, definitely create right to privacy arguments that might someday be applied to family law litigation. For instance, people normally have a reasonable expectation of privacy in the contents of their home computers.[50] However, this reasonable expectation of privacy is not always supported by the courts. In *United States v. Meregildo*,[51] the government obtained a warrant to search the defendant's Facebook profile, and eventually accessed the defendant's account through one of the defendant's "friends." The defendant challenged the government's use of the "friend" to gain access to his profile.[52]

In denying the defendant's motion to suppress evidence seized from his Facebook account, the federal district court found that the Fourth Amendment might preclude access to the user's Facebook profile depending upon the user's privacy settings.[53] The court held that while the defendant thought that his Facebook profile would not be available to the government, he had no reasonable expectation of privacy when he shared his posts with his Facebook "friends." The defendant's "friends" were free to use the defendant's Facebook information however they wanted since the defendant had surrendered his expectation of privacy as soon as he posted and

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[48] *Id.*
[49] *See* Emma W. Sholl, *Exhibit Facebook: The Discoverability and Admissibility of Social Media Evidence*, 16 Tul. J. Tech & Intell. Prop. 207, 214 (2013); Evan E. North, *Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites*, 58 U. Kan. L. Rev. 1279, 1307 (2010).
[50] *See United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004).
[51] *United States v. Meregildo*, 883 F.Supp.2d 523 (S.D.N.Y. 2012).
[52] *Id.*
[53] *Id.* at 524.

shared.[54] *See also Katz v. United States*[55] (the U.S. Supreme Court held that once an individual voluntarily exposes information to the public, the individual no longer has a reasonable expectation of privacy in that information).

In a personal injury case, *McMillen v. Hummingbird Speedway, Inc.*,[56] the defendant moved to compel content on the plaintiff's Facebook wall. The court was not convinced of the plaintiff's argument that the communications were subject to a "social network privilege." The court reasoned that Facebook, MySpace, and their ilk are social networking sites people utilize to connect with friends and meet new people. This is their purpose, and they do not bill themselves as anything else. Thus, according to the holding in *McMillan*, while it is conceivable that a person could use them as forums to divulge and seek advice on personal and private matters, it is unrealistic to expect that such disclosures would be considered confidential.[57]

In *Romano v. Steelcase Inc.*,[58] another personal injury case, the Supreme Court of New York found that a reasonable expectation of privacy means no expectation of privacy, and that nothing is safe on the Internet. In *Romano*, the Court granted the defendant's motion for access to the plaintiff's current and historical Facebook and MySpace pages and accounts, including all deleted pages. The Court reasoned:

> Both Facebook and MySpace are social networking sites where people can share information about their personal lives, including posting photographs and sharing information about what they are doing or thinking. Indeed, Facebook policy states that 'it helps you share information with your friends and people are you,' and that 'Facebook is about sharing information with others.' Likewise, MySpace is a 'social networking service that allows Members to create unique personal profiles online in order to find and communicate with old and news [sic] friends;' and, is self-described as an 'online community' where 'you can share photos,

[54] *Id. See also, Mazzarella v. Mount Airy Casino Resort*, 2012 WL 6000678 (Pa.Com.Pl.) (2012) (Those who elect to use social media, and place things on the Internet for viewing, sharing and use with others, waive an expectation of privacy.)
[55] *Katz v. United* States, 389 U.S. 347, 361 (1967).
[56] *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD, 2010 WL 4403285 (Pa. C.P. Sept. 9, 2010).
[57] *Id.* at *3.
[58] *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650, 653-54 (2010).

> journals and interests with your growing network of mutual friends; and, as a 'global lifestyle portal that reaches millions of people around the world.' Both sites allow the user to set privacy levels to control with whom they are their information.[59]

In *Romano*,[60] the defendant requested access to the plaintiff's Facebook and MySpace pages. The court rejected the plaintiff's privacy objections using reasoning similar to that of the *McMillen* court: "Indeed, that is the very nature and purpose of social networking sites else they would cease to exist. Since [Romano] knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy."[61]

The general position of the courts *supra* is that a person who writes about his or her personal life on a publicly available site should understand that anyone with an Internet connection could access the content; hence, he or she should not have an expectation of privacy regarding that information. This same reasoning applies when the person only expects a limited number of people to view the information.[62] The challenge becomes finding a balance between absolutely no expectation of privacy, and a limited one.[63] The situation is further complicated by the fact that even when a user adjusts his or her privacy settings to allow only "friends" to access the user's posts, the posts still become a permanent part of the Internet, and potentially viewable by anyone.

Invasion of privacy arguments (as opposed to Fourth Amendment right to privacy) have been tried in some domestic relations cases. *White v. White*, a divorce case out of New Jersey, involved social media and a reasonable expectation of privacy.[64] In *White*, the husband claimed his wife intruded on his privacy by accessing his email account. The computer where the

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[59] *Id*.
[60] *Id.* at 657.
[61] *Id.*
[62] Most social media sites come with privacy settings, which set them apart from traditional blogs of forums.
[63] Evan E. North, *Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites*, 58 U. Kan. L. Rev. 1279, 1296 (2010).
[64] *White v. White*, 344 N.J.Super. 211, 222, 781 A.2d 85, 86 (2001).

husband's emails were found was located in a room in the martial residence that both parties and their children regularly accessed.[65] The court stated that, "[t]he crux of the issue is that the intrusion must be 'highly offensive to a reasonable person.'"[66] The court acknowledged that privacy expectations are established by general social norms, which are constantly changing and which social media has severely impacted. The court found that a reasonable person cannot conclude that his or her privacy rights have been infringed upon when there is common access to the room where the computer is located.[67]

In *In re Marriage of Tigges*,[68] the court analyzed an intrusion of privacy claim that allegedly took place during the time the couple was still living together. The wife presented evidence that her then husband had installed a video camera in their bedroom. The court concluded that she successfully presented evidence that her then husband videotaped "private matters which could later be exposed to the public eyes."[69] The court reasoned, "The fact that potentially 'private matters' were videotaped means they could possibly be viewed by others."[70] The *Tigges* court went on to hold that the intentional intrusion of privacy in that case was one that would be highly offensive to a reasonable person and thus found in favor of the wife.[71]

In summary, no social media provider can guarantee complete privacy. Presently, a party has no legitimate reasonable expectation of privacy regarding any information posted on these sites. However, the courts have only considered the following issues: the expectation of privacy in a public account, the effect of a user's privacy settings, account data, and browsing history.[72]

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[65] *Id.* at 224, *Id.* at 92.
[66] *Id.* (citing *Restatement (Second) of Torts*, § 652B (1977), comment b. 378-79.
[67] *Id.*
[68] *In re Marriage of Tigges*, 752 N.W.2d 452 (Iowa Ct. App. 2008), *aff'd*, 758 N.W.2d 824 (Iowa 2008).
[69] *Id.* at *5.
[70] *Id.*
[71] *Id.*
[72] Wooster, Ann K., J.D., *Expectation of Privacy in and Discovery of Social Networking Web Site Postings and Communications*, 88 A.L.R.6th 319 (2013).

This is just a start, and more issues are likely to arise, as are additional privacy arguments against the use of social media evidence. Domestic relations cases provide fertile ground for this emerging area of law. Once this happens, the influence of social media evidence on the outcome of a case may matter even more, or perhaps even less.

Part IV. WHAT'S LOVE GOT TO DO WITH IT?[73]

Notwithstanding the previous discussion, when social media evidence is used in family law cases, privacy issues still emerge, particularly when email messages or otherwise tricky access tactics are involved. At this point, however, once the social media evidence is made public by a party, any right to or invasion of privacy argument will probably not prevent the evidence from being used in court, so long as the evidence was lawfully and ethically obtained.

The two areas of family law where social media evidence is most often utilized are not to prove fault as the basis for the divorce, but rather, when decisions about child custody or alimony are before the court. A review of cases in both of these areas shows mixed results; that is, sometimes the social media evidence made a difference in the outcome of the case, it *mattered*, and sometimes it did not. None of the cases reviewed *infra* raise privacy issues as a means to prevent disclosure of social media evidence in court.

The unpublished case of *Gallion v. Gallion*[74] is a perfect stepping-stone before diving into the case law on social media evidence in custody and alimony cases. *Gallion* is only about a half page long, and all it contains is a court order about social media. However, from this court

[73] Thank you Tina Turner for recording and releasing the 1984 song titled, "What's Love Got To Do With It?"
[74] *Gallion v. Gallion*, 2011 WL 4953451 *1 (CT. Sup Ct. 2011).

order, one can easily surmise what has been going on between the parties thus far. Here is the order in its entirety:

> By way of a clarification of the court's September 29, 2011 oral order:
> 1) Counsel for each party shall exchange the password(s) of their client's Facebook and dating website passwords.
> The parties themselves shall not be given the passwords of the other.
> If either party already possesses the password of the other, the party whose password is in the possession of the other party may change their password and give the new password to opposing counsel only.
> Neither party shall visit the website of the other's social network and post messages purporting to be the other.[75]

Fighting, bickering, and arguing, a/k/a Bad Behavior, is what had been going on in *Gallion* way before the case got to court for a final divorce hearing. And, what is the reason for the dispute? Social media evidence! Hence, a quick answer to the query posed in the first part of this Article could be: yes, the use of social media evidence in litigated domestic relations cases matters. It matters, if for no other reason than to give the parties something else to be angry or fight about. In other words, even if social media evidence does not matter in terms of the final outcome of the case, it still matters because it provides the litigants with more ammunition to act out their Bad Behavior.

1. Social Media and Child Custody Determinations

Social media evidence seems to be used most often in cases involving contested custody, where social media has opened up a whole new world of Bad Behavior to use against the opposing party. There is not a plethora of cases, published or unpublished, that clearly depict exactly how much weight is given to social media evidence or how much it matters to the court. What can be said is that when it comes time for a court to make a decision regarding the best interests of the children, sometimes social media evidence matters and sometimes it does not.

[75] *Id.*

A. In *Groom v. Groom*,[76] an unpublished case out of Kentucky, the Kentucky Court of Appeals affirmed the circuit court's award of joint custody of the parties' minor son with the wife being designated the primary residential parent.[77] The appellant husband argued that the circuit court failed to take into consideration the best interests of the children in making the custody determination. He further argued that the circuit court erred in not including certain Internet communications into evidence.[78]

In entering its order, the circuit court specifically set out the factors it used to determine custody. These factors included: the wishes of the child's parents; the wishes of the child; the interaction of the child with parents, siblings and others; the child's adjustment to home, school, and community; and the mental health and physical health of all individuals involved.[79] Regarding the mental and physical health issues of both parties, the circuit court determined that the parties' testimony was in direct conflict with one another. Both claimed the other was abusive during the marriage. The circuit court also found that it could not tell who was being truthful and who was lying, and/or if both were exaggerating.[80]

Most relevant to the purpose of this Article, is the husband's argument that the circuit court erred in not permitting into evidence an Internet communication that took place between the wife and a third party. This conversation was sexual in nature, and also revealed the location of the wife and the parties' son. The circuit court found that although the communication was "highly inappropriate," there was no serious risk to the son.[81] The circuit court allowed evidence that showed the wife's inappropriate Internet conversations with the husband, but disallowed

[76] *Groom v. Groom*, 2011 WL 6306722 *1 (Ky. Ct. App. 2011).
[77] *Id.*
[78] *Id.*
[79] *Id. at* *2-*3.
[80] *Id. at* *3.
[81] *Id. at* *4.

other communications and Internet activity. In finding no error on the part of the lower court, the Court of Appeals, citing Kentucky statute QKRS 403.270(3), held that there was no evidence that the other Internet communication affected the wife's relationship with the parties' son.[82]

In *Groom*, a typical divorce case, the social media evidence of Bad Behavior that occurred between the parties was allowed, but social media evidence of Bad Behavior by one party with a third party was not allowed. Taking the evidence and findings in the case as a whole, did any of the social media evidence make a difference in the ultimate outcome of the case? Probably not.

B. Another unpublished case out of Kentucky, *Bramble v. Bramble*,[83] involved a mother and father, and one daughter. The trial court adopted the parties' stipulation to joint custody, but designated the father as the daughter's primary residential parent during the school year and equal time-sharing during the summer. The mother appealed the designation, and the Court of Appeals affirmed.[84]

Several witnesses testified, such as the mother's father and grandmother, and the father's father and sister. The problem in *Bramble* was two-fold: the mother's live in boyfriend and the trial court's reliance on, and taking judicial notice of, a University of Missouri study that indicated that children residing with a stepfather or the mother's boyfriend were much more likely to be physically harmed than children residing with both biological parents.[85] The Court of Appeals determined that the trial court's reliance on and taking judicial notice of the University of Missouri study was erroneous. The Court of Appeals also found that the trial

[82] *Id.*
[83] *Bramble v. Bramble*, 2011 WL 6003929 *1 (Ky. Ct. App. 2011).
[84] *Id.* at *1-*2.
[85] *Id.* at *3-*4.

court's decision was not based primarily or exclusively on the study, but rather on the actions and behavior of the mother and the mother's boyfriend.[86]

The findings of the trial court indicated that: (1) the mother permitted the boyfriend to move in with her and her two minor children - the child of the parties' plus another child from a previous relationship – after dating him for only five months; (2) The boyfriend spanked the parties' naked daughter; and (3) Facebook postings of the mother's boyfriend include the boyfriend in a hot tub with other people, including a naked man. Furthermore, the boyfriend discussed his interaction with the parties' daughter after drinking various alcoholic beverages. The trial court's findings also reflect concern about the parties' daughter informing the boyfriend that his breath smelled like gas. In response to the daughter's statement, the boyfriend posted a recounting of the interaction on Facebook, writing that the smell resulted from his use of alcohol.[87]

In affirming the trial court's findings and order, the Court of Appeals was most troubled by the boyfriend's Facebook postings. The Court of Appeals stated and emphasized that "placing such information in a public, or at least semipublic, domain where many people can observe such conduct might adversely affect the daughter if she is confronted with such negative depictions when she grows older."[88]

In *Bramble*, also not an atypical divorce case, the social media evidence of Bad Behavior, the Facebook postings, were not only allowed, but were ultimately used as the basis to the final court order. Once again, taking the evidence in the case as a whole, did the social media evidence make a difference in the ultimate outcome of the case? Absolutely.

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[86] *Id.* at *3.
[87] *Id.* at *3-*4.
[88] *Id.* at *4.

C. In *Dexter v. Dexter*, [89] an unpublished case out of Ohio, the mother appealed the trial court's ruling on the basis that, *inter alia*, the trial court erred in interjecting its own biases regarding her lifestyle and religious choices when making its custody determination.[90] The case was initially heard by a Magistrate, and upon motion by the mother, the trial court held a hearing on the mother's objections to the Magistrate's report. The trial court overruled the mother's objections and motion, and adopted the Magistrate's recommendation regarding custody.[91] The Ohio Court of Appeals affirmed the trial court decision.[92]

Upon review of the trial court's findings of fact and conclusions of law, the Ohio Court of Appeals concluded that the lower court considered relevant statutory factors such as the wishes of the parents and the relationship between the minor child and her parents, and not just the mother's lifestyle choices and religious and sexual preferences.[93] The Court further indicated that the type of evidence the mother is objecting to – evidence of her lifestyle choices, religious and sexual preferences – could be considered to the extent it has a direct adverse impact on the child.[94]

Here, the mother admitted both in her testimony at trial and in her online blogs that she practiced sado-masochism, was a bisexual and a pagan. In her Myspace writings, the mother stated that she was on a hiatus from using illicit drugs during the pendency of the proceedings, and that she planned on using drugs again in the future, even when the child was sleeping at her home.[95]

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[89] *Dexter v. Dexter*, 2007 WL 1532084 *1 (Ohio Ct. App. 2007).
[90] *Id.* at *2.
[91] *Id.*
[92] *Id.* at *1.
[93] *Id.* at *5.
[94] *Id.* at *6.
[95] *Id.*

In affirming the trial court decision, the Court of Appeals found that the Court considered the mother's personal choices, her statements and writings, as well as other factors in determining the best interests of the child and ultimately awarding of custody of the child to the father. The Court of Appeals was unwilling to find an abuse of discretion when there were a number of factors that support the trial court's decision.[96]

In *Dexter,* both the trial court and the Appellate Court seem to downplay the importance of the mother's online blogs and MySpace postings made in the custody determination. However, experience and intuition say otherwise. Bottom line: Did social media evidence matter in *Dexter*? Most likely.

D. In *Sisson v. Sisson,* [97] the husband filed a post-decree motion for change of custody and for emergency relief. The trial court dismissed both.[98]

In his motion, the husband alleged, *inter alia*, that the mother had been unstable since the divorce, she had moved several times, changed jobs several times, had a history of drinking, and exposed the children to boyfriends.[99] At trial, the husband testified that he had been monitoring one of the children's Facebook page for a long time. On some of the postings, the mother discussed her relationship with a Mr. Root. The husband also produced police reports and criminal filings against Mr. Root concerning violence toward women and children.[100]

The trial court ruled that the husband had not met his burden of showing a material change in circumstances justifying a change in custody. The court determined that the husband's evidence - Facebook postings and police documents - was primarily speculative.[101]

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[96] *Id.* at *7.
[97] *Sisson v. Sisson*, 2012 Ark. App. 385, 421 S.W.3d 312 (2012).
[98] *Id.* at 386, *Id.* at 313.
[99] *Id.*
[100] *Id.* at 387, *Id.* at 314-15.
[101] *Id.* at 389, *Id.* at 316.

The Court of Appeals reversed the trial court holding that there is no requirement to wait until the children are actually harmed before finding a material change of circumstances warranting a change of custody. The Court further found that the evidence presented by the husband made a prima facie showing and that he did not have to show that the children had already suffered harm.[102]

In *Sisson*, the weight given to the Facebook postings was not explicitly made clear, yet seemed to play at least a minor role at in the Appellate Court's decision. Hence, in *Sisson*, the use of social media evidence most likely mattered.

E. In *LaLonde v. LaLonde*,[103] the wife appealed the trial court order awarding joint custody of the minor child, but granting physical custody to the husband. The Kentucky Court of Appeals affirmed.[104]

At trial, the husband introduced pictures of the wife taken off of her Facebook page. The pictures show the wife enjoying parties and consuming alcohol against the advice of her mental health treatment providers.[105] In affirming the trial court order admitting the Facebook pictures into evidence, the Court of Appeals held that the trial court considered and analyzed each required factor for a custody determination, and that there is nothing in the record that indicated the trial court gave extra weight to the Facebook evidence.[106]

In *LaLonde*, did the use of social media evidence matter? Probably so.

F. In *SC v. IC*,[107] the wife appealed the Family Court order awarding custody of the minor child to the husband and admitting certain of the husband's exhibits at trial.[108] The

[102] *Id.* at 391, *Id.* at 319.
[103] *LaLonde v. LaLonde*, 2011 WL 832465 *1 (Ky. Ct. App. 2011).
[104] *Id.*
[105] *Id.* at *2.
[106] *Id.* at *3.
[107] *SC v. IC*, 128 Hawai'i 130, 284 P.3d 223 (2012).
[108] *Id.* at 131, *Id.* at 224.

exhibits that the wife challenged consisted of her Facebook postings, her text messages to the husband, and the husband's cell phone statements. All of these exhibits had previously been admitted into evidence in a prior hearing on the husband's petition against the wife for an order of protection.[109]

In the Family Court hearing, the above referenced exhibits were offered to show, among other things, the wife's mental fitness. The Court of Appeals held that the Family Court's admission of the challenged exhibits was harmless and did not affect the wife's substantial rights. The Court of Appeals further found that the challenged exhibits were either cumulative or to the extent the exhibits were not cumulative, they had no material or substantial effect on the Family Court's decision.[110]

In *SC v. IC*, did the use of social media evidence matter? According to the Appellate Court, probably not.

G. Lastly, the facts in *Melody M. v. Robert M.*[111] also involve a wife's Facebook postings. In post-decree filings, the husband and wife both filed various petitions; most relevant is the petition filed by the husband requesting a change of custody. At the hearing, the trial court found a sufficient change of circumstances to support the husband's request to modify joint custody to sole custody, and for the issuance of an order of protection. The wife appealed and the Supreme Court, Appellate Division affirmed the lower court order.[112]

Specifically, at trial, there was sufficient evidence of the wife's use of physical force, and her demeaning and disparaging of the oldest child on Facebook to support the issuance of an order of protection. Although the trial court order modifying custody was also granted, it is not

[109] *Id.* at 135, *Id.* at 228.
[110] *Id.*
[111] *Melody M. v. Robert M.*, 103 A.D.3d 932, 962 N.Y.S.2d 364 (2013).
[112] *Id.* at 932-33, *Id.* at 364-66.

clear from the court order how much this Facebook evidence influenced the trial court's decision.[113]

It seems implausible that both the Appellate Court and the trial court in *Melody M. v. Robert M.* did not use the wife's Facebook postings, even just a little bit, in making the decision to grant the husband's petition to change custody. Hence, in this case, the use of social media evidence probably mattered.

The above seven cases show that when social media evidence is used, the courts diverge as to its valuation of this evidence, as to the relevance and materiality of the evidence, and even as to the concern over the use of this evidence. In five cases the social media evidence presented seemed to matter. That is, in five cases social media evidence influenced the final court decision. In two cases, it probably did not matter, and did not seem to play a part in the final outcome of the cases.

What is the reason for this lack of clarity as to when social media evidence matters and when it does not? How can the absence of consistency be explained? Is it because of the facts of the case? Is this because social media is suspect to some courts? Is this because courts do not know how to incorporate social media evidence in its decision-making? Is the reason that social media evidence mattered in some cases and did not in others because courts are reluctant to clearly specify the influence or non-influence of social media evidence on its decision?

[113] *Id.* at 934, *Id.* at 367.

2. Social Media and Alimony Awards

The case law involving social media evidence and alimony decisions is even skimpier than the case law for social media evidence and custody determinations. The following two cases provide a glimpse into how some courts have handled the situation.

A. In *O'Brien v. O'Brien*,[114] the parties agreed to withdraw their fault grounds for divorce and proceed with a no fault divorce. Several issues remained for the court to decide, one of which was the wife's request for an award of alimony.[115] The husband appealed the trial court's award of alimony to the wife, and for other awards unrelated to this analysis.[116]

In making the determination to award the wife alimony, the trial court considered all of the requisite factors established through case law precedent. The court also considered the social media evidence presented by the wife. She had discovered Facebook solicitations to the husband from a female who posed in suggestive photos. Based on this evidence, the trial court found that the breakup of the marriage was the husband's fault, vis a vis, his outside relationships with other women.[117]

The Court of Appeals affirmed the trial court decision regarding the award of alimony to the wife. The Court held that evidence of marital fault or misconduct is relevant and admissible when the court considers awarding alimony.[118]

Social media evidence showing fault in an alimony case where fault matters are like two peas in a pod. Here, the use of social media evidence avoided the necessity of he said/she said testimony in that it provided objective and concrete evidence to the court. Hence, social media evidence in the *O'Brien* case mattered, a lot.

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[114] *O'Brien v. O'Brien*, 2014 WL 521375 *1 (Miss. Ct. App. 2014).
[115] *Id.*
[116] *Id.*
[117] *Id.* at *3-*4.
[118] *Id.* at *4.

B. The *B.M. v. D.M.*[119] case involved several hearings and several issues. The only issue that is relevant to this discussion is the wife's request for an award of maintenance (alimony). At trial, the wife claimed that due to an accident, she is totally disabled, unable to work in any capacity, and rarely leaves the home because she is in too much pain. To counter these claims, the husband presented the wife's Internet writings and blogs about her belly dancing, and hence, her ability to work.[120]

In the writings, the wife indicated that she used a screenname on the websites tribe.net, Facebook, and MySpace. The content of her writings included photos and descriptions of her belly dancing activities, and her physical and mental recovery from her accident. The postings and writings extend over at least a four-year time period.[121]

In deciding whether or not to award the wife maintenance, the trial court applied the relevant case law and statutory factors. Although the wife wanted lifetime maintenance, that is not what she got. The trial court found that although the wife claims to be permanently disabled and not capable of working, the evidence, particularly the wife's own Internet postings, and even the wife's own testimony at times, prove otherwise. The court awarded the wife durational alimony for a period of two years.[122]

The wife in *B.M. v. D.M.* did herself in by her own words, writings, photos, and inconsistent and incredible testimony. The use of social media evidence hugely mattered in this case.

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[119] *B.M. v. D.M.*, 31 Misc.3d 1211(A), 927 N.Y.S.2d 814 (2011).
[120] *Id.* at 1214, *Id.* at 819.
[121] *Id.* at 1214-15, *Id.* at 819-20.
[122] *Id.* at 1223-25, *Id.* at 826-29.

A discussion of only two cases does not prove much. However, in both, social media evidence made the case for the litigant who introduced the evidence. It mattered. It made a difference in the ultimate decision of these cases because in both cases, the social media evidence was so compelling that even a court that does not know Facebook from Instagram could not ignore the significance of the evidence, and thus, had to rule accordingly.

Taking the custody cases and the alimony cases together, the scale definitely tips in the direction of social media evidence affecting the ultimate outcome of the case. However, this observation brings up even more questions than those raised earlier. Would the outcome of the cases be the same without the introduction of social media evidence? Would old-fashioned evidence such as secretly taken photos or credit card receipts from hotels be as effective in court? How can we know what evidence judges like best unless they tell us directly through their rulings and decision-making? Aren't there situations where social media cannot replace some types of evidence that have traditionally been part and parcel of a domestic relations case?

Part V. CONCLUSION: THE USE (OR NOT) OF SOCIAL MEDIA EVIDENCE IN DOMESTIC RELATIONS CASES

To use or not to use social media in court – that is the question! Like it or not, social media evidence has arrived, and lawyers have an ethical obligation to provide competent representation to a client. Even the American Bar Association has joined the social media bandwagon, by modifying Comment 8 to ABA Model Rule 1.1. Model Rule 1.1 states:

Client-Lawyer Relationship
Rule 1.1 Competence

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[123]

Comment 8 indicates the impact of technology on a lawyer's obligation to provide competent representation. Comment 8 states:

Maintaining Competence

> [8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.[124]

Without getting too side tracked, social media not only updates and broadens the type of evidence used in divorce court, it also opens up the potential for divorce attorneys to face disciplinary proceedings based upon their misuse of social media evidence. Moreover, the nature of the misuse may ultimately influence the outcome of the case. For example, in a contentious divorce case, a North Carolina attorney was disciplined for sending emails to the judge and clerk arguing the merits of the case. The attorney also sent what the disciplinary committee deemed inappropriate and non-objective emails to the client. The attorney was disciplined for this as well.[125] In two similar cases, one in Philadelphia and one in New York City, the respective attorneys were disciplined for Facebook "friending" under false pretenses. By doing so, the attorneys were in violation of Model Rule 4.1 (prohibition against knowingly

[123] *See* American Bar Association Model Rules of Professional Conduct.
[124] *Id.*
[125] *See* In the Matter of Claire J. Samuels, NC Case No. 13G0801 (May 23, 2014), http://www.ncbar.com/orders/samuels,%20claire%20reprimand%2013g0801.pdf.

making a false statement of fact to a third person), and also Model Rule 5.4 (conduct involving dishonesty, fraud, deception or misrepresentation).[126]

The actions of the attorneys in the latter disciplinary cases also raise, and possibly infringe upon, the right to or expectation of privacy concerns discussed in Part III. That is, when someone sneaks access to a party's social media disclosures, is the evidence obtained infringing upon the party's right to privacy? Does it constitute an invasion of privacy? Regardless, the bigger question is: Would such evidence affect the outcome of the case; would it matter?

Social media evidence has not totally usurped the place of old fashioned, pre-social media evidence, but it has made a huge dent in the use and effectiveness of non-social media evidence. Generally speaking, case law shows that social media evidence *matters*; it affected the outcomes of almost all of the sample cases discussed in Part IV of this Article. But, did it really? What evidence could have been offered in its place; and would the outcome have changed? The tricky part is this: social media evidence simply offers technological fuel to the fire, so to speak, but does not change the underlying dynamics of Bad Behavior; and it is the Bad Behavior that continues to have the greatest influence on a court's decision making. Or, is it this: Can the information obtained via social media be obtained elsewhere, so the end result is the same, social media or not? Should the focus be on the presentation of evidence of the Bad Behavior rather than the Bad Behavior itself? What if some other type of evidence was offered instead of social media evidence; would the outcomes be different? Is it fair to say that social media evidence just makes the burden of proof a little less burdensome for the offering party?

Human nature being what it is, it seems mostly likely that it is the Bad Behavior that keeps influencing court decisions, not the method of delivery. Social media evidence, however,

[126] *See* FAMILY LAWYER MAGAZINE, http://www.familylawyermagazine.com/articles/social-networking-ethical-minefield; Laura A. Provider, *Current Ethics Issues and Trends in Family Law*, 2013 WL 7121057.

removes some of the guesswork for the trier of fact. Photos posted on Facebook might alleviate a party's dependence upon he said/she said testimony and evidence. Social media disclosures, written or visual, can be unequivocal and manipulated to solidly support a litigant's argument.

Absent any discovery, admissibility, or relevance issues, and, at least for now, little or no viable right to or invasion of privacy claims, the use of social media evidence will only continue to develop and expand.[127] Consequently, since the original intent of no fault divorce has, in a way, been put on the back burner, there is a continuing need to present evidence - in the form of social media – that disparages one party or the other. To successfully meet the evolving needs of society, state legislatures and courts need to shed the current, standard dualistic thinking about the right to privacy and family law, and give way to creative thinking.

There are still so many unanswered questions about what the impact of social media evidence in domestic relations really is, the extent of the impact, and the reasons and motivations for this impact. There is no going back, and as society's dependence on social media continues to grow, the more the use of social media evidence can be studied, thus making it easier to determine if it really does matter to the ultimate outcome of a family law case.

[127] So as to gain the litigation upper hand, the manipulation of social media evidence continues to creatively push the envelope. *See, e.g.*, Jodi Kantor, *Lawsuits' Lurid Details Draw an Online Crowd*, NY Times (February 22, 2015), http://www.nytimes.com/2015/02/23/us/lawsuits-lurid-details-draw-an-online-crowd.html?emc=eta1. The focus of this article is on the downside of electronic filing requirements in civil lawsuits. Court pleadings and filing are being posted on electronic case databases, blogs and social media, which put an otherwise private case into a public forum. Plaintiffs get unexpected support for their claims, while defendants are tried in the court of public opinion. A great example discussed in the article is the experience of a Manhattan lawyer, who got a phone call from his shocked wife. She had been emailed a copy of a complaint alleging that the lawyer-husband had harassed a younger female colleague and coerced her to have sex with him. The lawyer-husband had no idea that he was even being sued, and the complaint was soon proliferating online.