Menchella v. Menchella

Case considers angry text messages, e-mail as violence

BY JUDY VAN RHIJN
For Law Times

When spouses use e-mail, text messaging, and other electronic forms of communication to intimidate their partners, the courts will now label it a form of non-physical violence. In one case, it provided the grounds for an order for exclusive possession of the family home. As a result, lawyers see other applications for this easily accessible evidence.

In a Nov. 6 ruling in *Menchella v. Menchella*, the Superior Court of Justice considered two issues. First, can text messages received by a spouse constitute violence pursuant to s. 24(3)(f) of the Family Law Act to justify an order for exclusive possession? Second, can text messages between spouses affect the best interests of a child in a manner that supports an order for exclusive possession?

In her analysis, Justice Heather McGee wrote: "Violence through words and deeds is a concept well established in both criminal and civil law. Words may be delivered in many different forms. The facelessness and ubiquitous nature of electronic messaging imposes no variation on the usual analysis." In addition, the court specifically stated that direct physical injury isn't required.

McGee referred to the 2008 case of *Kutlesa v. Kutlesa* in which text messages were part of a series of acts the court found to constitute violence by a spouse who had already left the matrimonial home. In *Menchella*, the husband was still residing in one part of the home and his proximity to the wife magnified the effect of the texts. McGee found the "vitriolic communications" not only made it impractical for the parties to continue to share the home, they also gave evidence of a relationship dynamic that suggested the child living there was at risk.

"I will have no mercy on you this time! Can't wait for court this time! It's going to be fun making you crumble for everyone you have hurt! You are pathetic and everyone here is disgusted in you as a mother!" McGee's ruling quoted the husband as writing in a text message.

Andrew Feldstein of the Feldstein Family Law Group in Markham, Ont., says it's not new for parties to use e-mails and texts as evidence. But what has changed is their use, on their own, to make an order for exclusive possession. Feldstein is surprised it didn't happen sooner. "To me, it shows an abundance of common sense. People know when they push the send button that a judge is likely to read it, whereas if they're face to face they're thinking, 'Who can prove it?' You can only imagine what the balance of their communication is like if they are saying this online."


Andrew Feldstein

According to the Superior Court, determining non-physical violence involves an inquiry into the purpose of the relevant words. In this case, McGee found the words were "threatening, intimidating, and were intended to be taken seriously."

"A reasonable person could not view the father's texts as either jestful or ambivalent," she noted.

Steven Benmor of Benmor Family Law Group in Toronto points out that it takes more guts to say something face to face than in electronic form and those "easier" types of communication are on the rise. "These days, we spend more time communicating by e-mail than face to face. For every minute you spend speaking to someone's eyes, you spend 10 minutes on electronic communications. There are a vast number of communications and there are increasing avenues to communicate."

Benmor lists e-mail, text, Facebook, Twitter, and LinkedIn as some of the methods. "In some cases, it's one-on-one; in other cases, one on a million. As society uses more electronic means, there is a higher likelihood of misguided and reckless and potentially criminal acts that will form the grounds of court and police actions."

To find all the potential uses in family law, Benmor says the answer is in the legislation. "The Family Law Act and The Children's Law Reform Act are different to the Criminal Code. They provide that you can get a restraining order because you are fearful. It doesn't say the fear has to come from a physical act or telephone call. That's been around for over 20 years. Justice McGee applied the test for exclusive possession and found that e-mails constitute harassment sufficient to prove the sender is a threat, so exclusive possession is now a possible byproduct."

Benmor believes electronic evidence would be even easier to use for a restraining order and Feldstein sees many other applications. "I would use it in any form you could in family law, including proof of income or assets, as long as the evidence is admissible," he says. In *Menchella*, in fact, the judge said the messages were a rich resource for clearing up discrepancies in other evidence.

Given the uncertainty around some privacy rights online, Feldstein warns that the main concern regarding admissibility is how someone obtained the evidence. "If someone puts comments against their own interest on Facebook, the question is how did your client get a copy of that? Did one of the spouse's friends forward it on? If they did, it's OK. But if they have surreptitiously taken their spouse's password, then you get into the tort of invasion of privacy." He suggests clients think of how many friends they have. "If they have one or two thousand friends, then it is easy for someone to get a copy of it. Even five or 10 friends may be too many."

As a result, family lawyers are increasingly trying to educate their clients on the risks of social media. "I always tell my clients to think before they push the send button," says Feldstein.

"They should assume that a judge is going to read everything. Some people can't help themselves, but we must work to prevent them from pushing that dangerous button." LT