SOLARI & STOCK
LAWYERS

NEWSLETTER • APRIL 2021

MARKET REVIEW

With COVID19 infection rates in Australia continuing to fall, with multiple 'zero' weeks across all the states and borders opening between states; Australia is slowly starting to adjust to our 'new normal'. With the Job Keeper program winding up on 28 March 2021, Josh Frydenberg will no doubt be watching carefully to see if the recovery package has achieved what it was intended to do in keeping businesses afloat until after the pandemic subsides.

The coming months will be a nervous time for businesses as they adjust to functioning without the additional help from the Government, additionally, it will be interesting to see how the unemployment rate changes over the coming months, as it has continued to fall further in February 2021 to 5.8% (down from January 2021's 6.3% rate, according to the Australian Bureau of Statistics).

We have selected a number of articles produced by our Solari and Stock lawyers relating to current topics, we trust that you find these articles useful. Articles include; Can your SMS and Social Media posts be used in Family Law proceedings?, Is walking up to my neighbour's door a trespass?, Challenging a Will in NSW, how and who pays the costs?, and we introduce our newest Team member-Valentina Abouzeid.

If you require an appointment with one of our Team or would like to discuss any of these articles further of our please contact us on 8525 2700 or send an email to kate.allenby@solariandstock.com.au.

INTRODUCING VALENTINA ABOUZEID

Solari and Stock is pleased to welcome a new addition to the team, Valentina Abouzeid.

Valentina is an experienced Lawyer who commenced her career in the legal industry as a legal secretary. After gaining thorough experience in her field she took on a role as a Property Paralegal before becoming qualified as a Licensed Conveyancer in 2003 and began practicing as a licensed Conveyancer in 2004.

Valentina completed her Diploma of Law in 2014 whilst working with a Sydney city law firm and completed her Practical Legal Training in 2015. Valentina was admitted as a Solicitor in July 2015 and since her admission has been responsible for Residential Conveyancing, Off the Plan Sales and Purchases and Commercial/Industrial Leasing with a city law firm and then a local large suburban firm.

Valentina prides herself on her organization skills and attention to detail and was welcomed into the Commercial Law Team in February 2021

As a member of the Solari and Stock Commercial Law Team, Valentina will specialize in commercial and residential conveyancing, commercial/industrial/ retail leasing and other commercial matters. We trust you will join us in welcoming Valentina to the team.

Our team of experienced lawyers can provide you with expert legal advice for your legal needs including

- Business & Commercial Law
- Leases – Commercial, Industrial
- Sale & Purchase of Businesses
- Litigation
- Franchising
- Environmental & Local Government Law
- Family Law
- Property & Parenting Settlements
- Divorce
- De Facto Relationships
- Spouse Maintenance
- Child Support
- Estate Planning
- Wills, Powers of Attorney & Enduring Guardianships
- Deceased Estates
- Property Law & Conveyancing

CAN YOUR SMS TEXT MESSAGES AND SOCIAL MEDIA POSTS BE USED AS EVIDENCE IN FAMILY LAW PROCEEDINGS?

Article written by Nikita Ward | Photo by William Iven on Unsplash

We all love to share our lives on different social media platforms. It's not uncommon for people to post revealing information or photographs on these public forums. Unfortunately, depending on what information you share, posting on social media can potentially do more harm than good. It can be used as evidence against you during court proceedings and adversely affect your Family Law matter outcome. Reliance on text messages and social media posts as evidence in family law Court proceedings is not new. However, if you think that your social media posts will not be used against you by your former partner and their solicitor, then frankly you are mistaken.

Not only are SMS text messages admissible as evidence in the Family Court (and all other family law jurisdictions), but so are emails, Facebook posts, Twitter tweets, skype transcripts, and any other electronic messaging.

The impact of social media on a future Family Law Dispute is not something contemplated at the time of posting to social media. If we all had the ability to turn back time, there would definitely be things from our youth we would probably remove from social media. Historical social media posts can become an issue in a Family Law Dispute years after they are posted. Even more impactful can be social media interaction during your family law matter. A reactive post can seriously impact the outcome of your matter.

It is normal to feel overwhelmed, anxious and angry when going through separation or divorce. The process takes a toll on everyone involved. Unfortunately, parties to a family law matter often turn to social media to air their grievances and frustrations. Posting to social media may be the only option they see available to achieve any type of justice or feel that they have a voice.

What Evidence can be sourced from Social Media posts?

Evidence from social media can be relevant to a wide range of family law disputes and proceedings including those relating to parenting matters, financial disputes, spousal maintenance and child support. Some examples of what could be used against you in family law proceedings include:

- An album on Facebook of your lavish holiday or new car could be relied upon as evidence of your capacity to pay your former partner spousal maintenance;
- Your previous employment history or your side business listed on LinkedIn that you forgot to disclose could be evidence of your failure to provide full and frank disclosure in financial proceedings;
- Photos on Instagram of your drunken night last Friday when your solicitor previously wrote a letter to your former partner's solicitor stating that you were unable to care for the children that night;
- Your derogatory twitter tirade about your former partner from 2006 could be evidence of your attitude to parenting or your character generally; or
- Your dating profile which states that you drink and do drugs casually could be used as evidence as to your parenting ability.

What to remember when using social media

1. Think before you post. Consider how an objective person who is not familiar with your case or the parties involved will view the post. If emotions are high at the moment, it's better to rest on the post/comment and decide later if you still want to share it.
2. Check your email and computer security. Make sure that your former spouse cannot access social media networks such as Facebook or Instagram. We recommend that you make your profile private.
3. Hide your location and whereabouts when posting if your safety is an issue. It poses a great danger, particularly if you are at risk of domestic violence if you are posting your location on your profile.
4. Be mindful on what you post. Your behaviour via social media posts may give rise to assumptions of your behaviour during your marriage or

relationship. Ensure that what you post is always of a tasteful nature. Avoid:-

a. Sharing negative comments about your former partner on social media are regularly annexed to affidavits filed in a Family Law parenting matter. Negative social media posts don't support both parents being able to co-parent the children and support the other parent's relationship with the children.

b. Sharing explicit images and videos. Never post disparaging comments about the judge, the Court and the legal process as this information will be available to the Courts.

IS WALKING UP TO MY NEIGHBOUR'S FRONT DOOR AND KNOCKING ON IT A TRESPASS?

Article written by Michael Solari | Photo by Vincent Wright on Unsplash

A recent High Court case touched on this topic. Although the case related to a Police Officer's right to enter a person's land and walk up to the front door and ring the doorbell the Court also addressed this topic in general.

The law recognises an implied licence to enter a person's property and knocking on their door for a lawful purpose. It is known as an implied licence to enter property. However, the implied licence has limitations which can be implied or express. An implied limitation is one that is inherent in the case of someone just walking onto your property. Their right to come onto your property does not apply if they intend to commit any breach of the law. However, if it is not for an unlawful purpose then they have the right to do so.

An express limitation would be something where you specifically make known (by way of a sign) that certain conduct is prohibited, or entry is to be refused. This you will commonly see in say shopping centres or public buildings where the implied restrictions on the licence for entry may be insufficient. So, if for example a shopping centre operator or building owner wishes to restrict conduct which they consider to be undesirable such as pushing delivery trolleys through lobbies, talking in a library, skating in a shopping centre etc a sign may be necessary to be erected where people enter the property as it then creates an express limitation as a condition of you being entitled to enter the property.

CHALLENGING A WILL IN NSW: HOW AND WHO PAYS THE COSTS?

Article written by Rebecca Exley | Photo by Noah Silliman on Unsplash

Not just anyone can bring a claim against the estate of someone who has died. Firstly, there are strict legal pathways for challenging a Will, and the applicant must prove that they have "standing" – that is the legal right to start litigation.

Challenging a Will, on any pathway, is a very different beast to other forms of litigation and cost implications can play a big role in choosing to take estate litigation forward. So, what are the pathways to challenge a Will?

Challenges to the Validity of a Will:

To challenge a Will on the basis that something is wrong with it, the applicant must be able to show that there are reasonable grounds to show that the:

1. Testator lacked mental capacity;
2. Will was made through fraud;
3. Testator was under undue influence at the time of making the Will;
4. Will or signature was forged;

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5. Testator did not know or approve the contents of the Will.

If any of those grounds are appropriate, the only people entitled to bring litigation include those named in the current Will, those named in a previous Will, or those who would be a beneficiary under the rules of intestacy.

Challenges relating to Reasonable Financial Provision:

This type of litigation is often referred to as a 'Family Provision Claim' and they are often sought by people who have either been left out of the Will, or who feel that they haven't received an adequate share of the deceased's estate. In order to bring a Family Provision Claim the applicant must fit within the classes of eligible persons which include a spouse, de facto partner, child, former spouse, a dependant or someone living in a close relationship with the deceased.

The applicant must also be able to satisfy the Court that *"adequate provision for the proper maintenance, education or advancement in life"* of the applicant has not been made by the deceased person in their Will.

What about costs?

Justice Gaudron in Singer v Berghouse[1] summarized the position of costs in these types of cases:

"family provision cases stand apart from cases in which costs follow the event...costs in family provision cases generally depend on the overall justice of the case. It is not uncommon, in the case of an unsuccessful applicant, for no order to be made as to costs, particularly if it would have a detrimental effect on the applicant's financial position. And there may even be circumstances in which it is appropriate for an unsuccessful party to have his or her costs paid out of the estate".

The main thing to remember, is that the Court has wide discretionary powers when it comes to awarding costs, and such orders can range from:

1. Defendant's costs associated with defending a claim are to be paid from the estate;
2. an unsuccessful plaintiff's costs are to be borne by them;
3. a successful plaintiff's costs are to be paid from the estate;
4. an unsuccessful plaintiff also to pay the defendants costs; or
5. any other order that the Court sees fit.

In exercising their discretion, the Court will take a number of factors into account such as the size of the estate, the merits of the claim, any genuine attempts to settle the claim, the role of the parties in acting reasonably and in good faith, and not unnecessarily engaging in litigation (or prolonging it).

This latter point can be seen in Carey v Robson & Anor and Nicholls v Robson & Anor[2] in which the Judge was mindful of poorly drafted affidavit evidence presented by the plaintiffs which unduly wasted Court time and increased legal costs. This undoubtedly supported the Court's decision to award costs against the Plaintiff in respect of the affidavit, and on a party/party basis in relation to the defendant's costs.

Conclusion:

When deciding whether or not to challenge a Will, individuals need to be aware that there are no guarantees when it comes to costs. They may find they have their own costs to pay even if they are successful and of course possibly other parties' costs where their challenge is unsuccessful.

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[1] Singer v Berghouse (1993) 114 ALR 521 at 552
[2] (2009) NSWCA 1142

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