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'Monitoring' another via social media may bring felony stalking charges

Under the Illinois Domestic Violence Act (750 ILCS 60/101, et seq.), a civil order of protection is available to victims "abused" by persons with whom they have a dating, familial or household relationship. "Abuse," in turn, is defined as "physical abuse, harassment, intimidation of a dependent, interference with personal liberty or willful deprivation."

If warranted by the facts, these civil protections may be invoked in conjunction with divorce proceedings commenced pursuant to the Illinois Marriage and Dissolution of Marriage Act.

Notably, one of the stated remedies that may be included in a civil order of protection is to prohibit the stalking of the victim, as defined in Section 12-7.3 of the Criminal Code (720 ILCS 5/12-7.3), where such stalking has occurred or "otherwise appears likely to occur if not prohibited."

In *People v. Gauger*, 2018 IL App (2d) 150488, the Illinois Appellate Court provides a vivid warning of how a party's use of social media to keep tabs on a former spouse may result in a criminal felony charge of stalking by way of "monitoring" her activities.

First, a bit of background: In the more than 25 years since the criminal offense of stalking was first enacted in 1992, the General Assembly has amended these provisions several times, resulting in an expansion of the definition of this crime.

Originally, stalking required an intentional threat of a violent crime combined with multiple acts of following or surveillance in furtherance of that threat. Although that threat-focused definition has been retained in one subsection, new subsections have been added over the years to include additional conduct from which the threat requirement has been eliminated.

At the same time, numerous societal changes have occurred, including the creation and proliferation of social media platforms such as Facebook, Twitter and such, where personal information

regarding the activities, acquaintances and location of a party are documented on a regular basis.

Statistics show that social media has increased the amount of stalking, as a party can now be victimized by being followed and harassed from afar, without the stalker being physically present.

This was the case in *Gauger*, where the parties had been married and had two children together. Crystal Carswell had an active civil order of protection against her former husband, Donald R. Gauger Jr., when she discovered he had engaged in numerous fictitious activities involving her on Facebook, including that he had reactivated her old account which he then used to issue new "friend" requests to third-parties in her name as well as creating a false account in the name of one of her friends and then using that account to send Carswell social invitations and messages.

Ultimately, police discovered images on Gauger's computer of Carswell's Facebook posts, photos of Carswell and the parties' children taken from her Facebook page and e-mails pertaining to Carswell and her family. After at first denying any involvement, Gauger then admitted to using the fake Facebook accounts to obtain photos and to "access" Carswell's homepage, although he denied sending her any messages.

The lesson of Gauger is that conduct involving social media can result in criminal prosecution for felony stalking by way of "monitoring" another through online sources.

Gauger was charged and found guilty of violating an order of protection (720 ILCS 5/12-3.4(a)), stalking and aggravated stalking (720 ILCS 12-7.4(a)(3)). The trial court specifically found that the evidence "overwhelmingly establish[ed] that the defendant directly or indirectly through third persons monitored and communicated to or about Ms. Carswell through his Internet activities,"

MODERN FAMILY



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and ultimately sentenced Gauger to five years in prison.

On appeal, Gauger alleged that because his conviction was based on his Facebook messages to Carswell, it was dependent on him having "communicated to or about" her; and, therefore, was invalid due to the Illinois Supreme Court's recent decision in *People v. Relerford*, 2017 IL 121094.

In *Relerford*, the court held that this specific provision was overly broad and impermissibly infringed upon speech protected by the First Amendment and therefore

for his or her safety" or "suffer other emotional distress." 720 ILCS 12-7.3(a)(1), (a)(2).

In turn, the statute defines a "course of conduct" as "two or more acts, including but not limited to acts in which a defendant directly, indirectly or through third parties, by any action, method, device or means follows, monitors, observes, surveils, threatens or communicates to or about, a person, engages in other nonconsensual contact, or interferes with or damages a person's property or pet. A course of conduct may include contact via electronic communications." 720 ILCS 12-7.3(c)(1).

Stalking becomes aggravated stalking if the defendant, as here, violates an order of protection. 720 ILCS 12-7.4(a)(3).

The appellate court rejected Gauger's reliance on *Relerford*, noting that the "monitoring" provision of the stalking statute was unaffected by that decision. Acknowledging the statute does not define "monitoring," the appellate court relied on the dictionary definition of that term: "to watch, keep track of or check usu[ally] for a special purpose."

The court held that the evidence showed that Gauger created at least one fictitious Facebook account posing as Carswell's friend and downloaded pictures of her and her family to his own computer along with information about her that was not available to the general public.

The court concluded that "[t]his course of conduct satisfies that definition," and it was reasonable for the trial court to find that Gauger "knew or should have known that this course of conduct would cause a reasonable person to suffer other emotional distress."

The lesson of *Gauger* is that conduct involving social media can result in criminal prosecution for felony stalking by way of "monitoring" another through online sources.

Accordingly, clients must be fully advised of these proscriptions and the potential serious consequences.