COMMONWEALTH MASSACHUSETTS

APPEALS COURT

APPEALS COURT NO. 2018-P-1700

MASHA M. SHAK.
Plaintiff/Appellant

vs.

RONNIE SHAK,
Defendant/Appellee

ON RESERVATION AND REPORT FROM
THE NORFOLK PROBATE & FAMILY COURT

BRIEF OF THE APPELLANT, MASHA SHAK

Respectfully submitted,
MASHA SHAK
By her counsel,

April 24, 2019

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STATEMENT OF THE ISSUES

As framed by the trial court in its reservation and report, pursuant to Mass. R. Dom. Rel. 64(a):

> **1)** Are "Non-Disparagement" orders [issued in the context of divorce litigation] an impermissible restraint on constitutionally protected free speech?
>
> **2)** Are "Non-Disparagement" orders [issued in the context of divorce litigation] enforceable and not an impermissible restraint on free speech when there is a compelling public interest in protecting the best interests of minor children?

Framed slightly differently the issues are: **[1]** whether the best interest of a child can constitute a sufficiently compelling state interest to justify a trial court's prior restraint of a parent's First Amendment freedom of speech, and **[2]** under the circumstances of this case, whether the trial court's Further Orders on Disparagement that issued were constitutionally permissible.

STATEMENT OF THE CASE[1]

The case comes before this Court on a report[2] by a

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[1] References are made to the Record Appendix as "RA __."

[2] Given that the trial judge reported two specific questions of "this case" after verdict on Mother's contempt complaint, and also after the trial judge issued certain interlocutory orders during divorce proceedings that were stayed on the same date, it is unclear whether the report here has been made pursuant to the first or second sentence of Rule 64(a). Since

judge of the Probate & Family Court (Phelan, J.), pursuant to Mass. R. Dom. Rel. P. 64(a), following a hearing on Mother's Complaint for Contempt.[3] The trial court issued findings, entered Judgment, and stayed Further Orders on Future Disparagement pending appellate review of the two (2) questions above. The trial court reported the case because, in its view:

> it involves novel, systemic and important matters which appear in many if not most temporary orders and divorce agreements in the Probate & Family Court: "Non-disparagement orders, their enforceability via contempt complaint, and constitutionally protected speech.

RA 336.

STATEMENT OF FACTS[4]

Procedural History. After a marriage of roughly 15 months that produced one child (born on 1/25/2017),

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the contempt case is not "undecided" before this Court, and the implicit request centers around the correctness of the trial court's Further [interlocutory] Orders, it appears the "second path" of Rule 64(a) is the chosen one here. See Ciani v. MacGrath, 481 Mass. 174, 177 n.4 (2019)(citation omitted) (discussing reservation and report under G.L. c. 215, § 13).

[3] By agreement, the parties proceeded on representations of counsel, supplemented by an affidavit of Mother to which was attached various social media postings. See Milano v. Hingham Sportswear Co., 366 Mass. 376, 379 (1974).

[4] The facts derive from the trial court's findings, and such further facts as could be found by this Court. Keiter v. Keiter, 357 Mass. 772, 772 (1970).

on February 5, 2018 Mother filed for divorce. RA 13, 325. Father was served on February 21, 2018. RA 16-17.

On February 22, 2018, the Court (Ward, J.) ordered Father to vacate the marital home. RA 22-31 (Motion and supporting materials), and 66-68 (Order). The facts that gave rise to that Motion included claims of Father's escalating and concerning physical behavior, impulsivity, explosive temper, verbal threats, police involvement and substance abuse. RA 32-65 (Affidavit with attachments).

Due to Father's subsequent harassment of Mother on social media, on May 17, 2018, Mother asked the Court, *inter alia*, to prohibit him from posting disparaging remarks and details about the litigation on social media. RA 216 (p. 8 of transcript) 218 (p. 15 of transcript). A hearing was held on Mother's motion on May 24, 2018,[5] see RA 215 (transcript), after which the trial court judge (Ward, J.) ordered that Mother would continue to have temporary primary physical and legal custody of the minor child, Father to have parenting time seven (7) hours per week --

[5] Mother also requested that the Court impound the pleadings -- a suggestion successfully opposed by Father ostensibly because (as history now illustrates) he intended to attempt to litigate in the court of public opinion. RA 69, 216 (p. 5 of transcript).

spread over three (3) days -- to be supervised at all times by Mother or her designee, and that:

. . .

> 6. Neither party shall disparage the other -- nor permit any third party to do so -- especially when within hearing range of the child.[6]
>
> 7. Neither party shall post any comments, solicitations, references or other information regarding this litigation on social media.

RA 225 (Order).[7] Father was represented by counsel during the hearing, and did not seek relief from a

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[6] The trial court (Phelan, J.) found the "'within hearing range of the child' [language] may not constitute a clear and unequivocal order to sustain a complaint for contempt." RA 331. It then inconsistently concluded that "[a]lthough no arithmetic limits are contained within the order, 'within hearing' [language] is susceptible to common interpretation and sufficiently describes the proscription." RA 331. Adding even more confusion to the discussion, the trial court then found the very same language was "sufficiently clear from a due process notice standpoint to inform Father of what he is not to do." RA 331. It is thus unclear how the very same language can be both *clear* to protect Father's due process rights but unclear for proving Father's contemptuous behavior.

[7] The trial court also ordered the Father to execute releases for his psychiatric records, to be reviewed *in camera*. See RA 224 (Stipulation), RA 225 (Order at paragraphs 1 and 8), RA 276-277, 283 (Orders Concerning Medical Records). Those medical records, as explained to the Court during the contempt hearing on August 16, 2018, reference Father's admitted use of cocaine, opiates, and benzos, his acknowledgement of his "explosive behavior and explosions of anger," his admitted "mixing Xanax and alcohol until he blacks

Single Justice of the Appeals Court, see G.L. c. 231, § 118 (first para.), nor did he seek reconsideration, or request any amendments to this Order. See Mass. R. Dom.

Rel. 52 and 59. RA 9 (docket entry nos. 19-forward).

On June 1, 2018, Mother filed, and separately requested a Speedy Hearing on, a Complaint for Contempt, RA 230-233; she alleged that Father had violated the one-week-old May 24, 2018 Order by:

> publish[ing] numerous Facebook posts and commentary disparaging [her] and detailing the specifics of this litigation on social media. [Father] has shared his Facebook posts on the profiles of at least thirty (30) Facebook members including [Mother's] Rabbi, Assistant Rabbi, and members of [Mother's] religious community (including some of [her] business clients). [Father] has further attached a video of the parties' child to his Facebook posts and has solicited comments from third parties regarding the litigation.

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out." RA 314 (p. 11-12 of transcript). The propriety of those Orders and/or the use of Father's medical records are not before the Court and have been included here as additional **context** for the Court's orders. See Howcroft v. City of Peabody, 51 Mass. App. Ct. 573, 584-585 (2001)(since appellate inquiry directly raised First Amendment issues, "an appellate court has an obligation to 'make an independent examination of the whole record'...to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free speech.'") (citations omitted).

RA 228. In support, she also filed an affidavit together with multiple attachments, including copies of Father's Facebook posts. RA 234-275.

Father was served with Mother's Complaint for Contempt on July 5, 2018, RA 280; he filed an Answer on August 6, 2018, denying he was timely notified of the Court's May 24 Order, and further maintaining, for the first time and with a single sentence, that the Court lacked "authority to issue the prior restraint on speech..." RA 284.

A hearing on Mother's Contempt took place ten days later on August 16, 2018,[8] before a judge (Phelan, J.) different than the one who entered the prior orders (Ward, J.). RA 312 (Transcript) and RA 325. After the hearing, the trial judge issued 11-pages of Findings, legal analysis, Rationale, Judgment and Further Orders on Future Disparagement. RA 325-335.[9] He found Father not guilty of contempt on all claims.[10]

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[8] A hearing was originally scheduled for July 12, 2018, RA 278, but the hearing was continued, by agreement, to August 16, 2018. RA 281-282.

[9] A *subsequent* decision of the Probate Court, dated January 17, 2019, ordered Father to undergo a Rule 35 mental health evaluation, and found that he continues to disparage Mother on social media, appears "incapable of restraining his bitterness on media or is oblivious, indifferent to, or scornful of the Court's caution,"

Statement of Facts. Shortly after Mother filed and served her Complaint for Divorce, Father began disparaging her and posting details about the litigation on social media. RA 234. He created a GoFundMe Page entitled "Help me KEEP MY SON." RA. 91, 126, 234. He began airing the parties' "dirty laundry" in public and on Facebook. RA 234. He titled one post "Masha's wild allegations to the Court," and expressed how "disgusted" he is with Mother. RA 91, 126, 128,

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and "has demonstrated an inclination to confrontation." RA 340-341.

[10] Regardless of whether the trial court properly applied First Amendment principles to *Judge Ward's* May 24, 2018 Orders, it appears he overlooked the Quinn v. Gjoni decision upon which he specifically relied. As the Appeals Court there explained:

> Generally, whether the terms of an...order went too far has no bearing on whether someone could be prosecuted for violating it. **Even where the person subject to the court order claims it is invalid on First Amendment grounds, he generally can be prosecuted for a violation of the order regardless of its validity**.

Quinn v. Gjoni, 89 Mass. App. Ct. 408, 412 review denied, 475 Mass. 1102 (2016) (emphasis added). Cf. Matter of Providence Journal Co., 820 F.2d 1342, 1346-1347 (1st Cir.1986), cert. dismissed, 485 U.S. 693 (1988). Father simply did not have the luxury of ignoring and acting "in violation of [the] court order and then in" the subsequent contempt proceeding "assert[ing] as a defense that the order should not have issued." Commonwealth *v. Marrero*, 85 Mass. App. Ct. 911, 912 (2014). See also Mohamad *v.* Kavlakian, 69 Mass. App. Ct. 261, 264 (2007) ("Even if erroneous, a court order must be obeyed").

234.

After the Court (Ward, J.) issued its May 24 non-disparagement Orders, on Sunday, May 27, 2018, Father posted and made available via "friends" sharing to thirty (30) members of a Facebook group that mother was trying to deny him access to the minor child "for three years." RA 235, 238, 242. Hours later, he shared a video of the parties' child. RA 235, 244-245. Members of Father's Facebook "friends" -- which included Mother's family members, Mother's Rabbi, an assistant Rabbi and other members of Mother's religious community -- viewed and responded to Father's postings. RA 235, 242. Mother learned of the post at some point thereafter. RA 326.

Later that same day, Mother's counsel e-mailed Father's counsel to inform her of father's actions, and to demand -- consistent with the May 24, 2018 court order -- that he remove the posting and "refrain from publishing additional posts in the future." RA 235, 326. Father ultimately removed the post. RA 326. But, it did not deter him. In another posting that same day, the Court found that Father "evidenced awareness of the Court's...May 24, 2018 temporary orders:' (I have proof of about half the claims being

false, documented and unarguable) (I hope its enough to not have the judge err on her side of caution again)'." RA 326, 235-236, 242. At bottom, the Court found Father learned of the Court's May 24, 2018 orders as to social media posts on May 27, 2018. RA 326.

The very next day, May 28, 2018, Father *again* posted to Facebook about "false testimony," "blind and evil," and "evil lier [sic]," all in reference to Mother. RA 235, 247-248, 250, 326. He made those postings available to at least three (3) persons and asked those persons to "de-friend[]" the "evil liar," again in reference to Mother. RA 236, 250-251.

On May 29, 2018, Father posted to Facebook yet again in a manner to permit a group containing 776 members to potentially view his posted opinions regarding the ongoing divorce litigation. He insinuated that Mother was "self-righteous," and does "horrible things," is "immoral and cruel." RA 236, 257. On that same day, Father "shared" that post with nine (9) members of the parties' synagogue. RA 236, 260-265.

On May 30, 2018, Father shared his prior post with four (4) *more* members of the synagogue, writing

that he was defending himself, disgusted with himself and embarrassed but hopeful he will get his son back. RA 236, 274-275. In this posting, Father himself acknowledged the inappropriateness of his postings:

> If I saw someone post like I have been recently, I'd be like: k man stop throwing your shit on the feed, and it's not right, and no matter whose wrong don't make it public...I agree to all But I'm desperate I got nothing else I want to defend myself I actually am disgusted with myself and so embarrassed, I'll never be the same. But being under the microscope and defending all the allegations, I feel that creating public awareness might have a tiny chance of helping me and I'll take it. I want people to know what's going on because this can't happen this easily. People shouldn't be able to just do this to someone I'm disgusted with myself and totally embarrassed but maybe ill [sic] get my son back.

RA 273-274. Although she is not explicitly mentioned by name, viewers of the posts, who were members of the synagogue, could reasonably conclude that father was referring to Mother and the parties' ongoing divorce. RA 327.

Mother was later contacted by friends and others regarding Father's postings. RA 234, 327. She is a licensed social worker who sees private practice patients. RA 234, 327. Fearful that his public disparagement would have a negative impact on her, and

after receiving numerous communications from others expressing concern as well, Mother filed the underlying Complaint for Contempt. RA 234.

The trial court credited Mother's concerns that Father's postings:

- will become known in her professional community and might adversely impact her employment and self-employment; and
- will damage her reputation in the parties' religious community and subject her to gossip and scorn,

RA 327, concluded there was "no factual dispute," and found that Mother had clearly and convincingly evidenced the Father's postings, commentary, and discussions of the divorce litigation "on Facebook, a forum of Internet social media." RA 326. The trial court also found that "disparagement" -- as used in paragraph 6 of the Order -- is "capable of common understanding and is not vague or overly broad despite the innumerable words and phrases in which it may be expressed." RA 334. Nevertheless, because it concluded that both paragraph 6 and paragraph 7 of the May 24 Order "constitute[d] an impermissible [and "classic form of"] restraint on free speech protected by the United States Constitution First Amendment as well as Article 16 of the Massachusetts Declaration of

Rights," RA 334, Father was found *not* in contempt as to either "disparagement of Mother,"[11] or his postings.[12] RA 334.

In support of its decision, the trial court reasoned:

> in their current form, the rest of paragraph 6 ("Neither party shall disparage the other -- nor permit any third party to do so...") and the entirety of paragraph 7 ("Neither party shall post any comments, solicitations, references, or other information regarding this litigation on social media") are problematic when scrutinized in light of the free speech case law.
>
> The first and most obvious is the prohibition that each party shall not permit third parties to disparage the other party.[13] There is a question of the ability of a party to control speech and conduct of third parties, and, to the extent it were possible, whether the third parties may also

[11] Additionally, the trial court found Father not in contempt [1] "as to disparagement of Mother within hearing of the child, given the child's age and level of cognition," and [2] "as to the order portion 'nor permit any third party to do so' because it presents an impossibility and is beyond father's ability to control." RA 334. These two conclusions were puzzling since Mother did not allege violations of either provision of the May 24 order.

[12] The trial court then ordered limitations on both parties' social media postings and imposed its own "non-disparagement" instructions tied to the age of their son. Though these Orders were stayed pending appellate review. RA 335.

[13] This reference is puzzling since Mother did not allege a violation of that provision of the May 24, 2018 order.

> have free speech interests. The better order would prohibit either party from permitting the minor child to be within hearing of third parties who are in the midst of verbally disparaging one of the parents or an order which prohibits either party from showing to or permitting a minor child to access such video, audio or written disparagement.
>
> The balance of paragraph 6...and all of paragraph 7...run afoul of the overbroad prohibition and are classic examples of free speech which are neither 'fighting words' nor 'true threats.'
>
> . . .
>
> Father's **social media** postings on Facebook as to his opinions and assessments of mother and the divorce litigation may or may not constitute defamation but the First Amendment and Article 16 dictate that he is free to speak/write/post them and Probate and Family Court orders to restrain these are constitutionally impermissible **no matter how narrowly crafted**, except as below and only when children are in the government interest equation.
>
> Such free speech which identifies or implicates minor children of a party should compel heightened scrutiny, especially when the speech are posted to social media platforms to be viewable in perpetuity.

RA 331-333 (emphasis added).

The Court then issued the following Orders on Future Disparagement:

> **1)** Until the parties have no common children under the age of 14 years old, neither party shall post on any social media or other Internet medium any disparagement of the other party when such disparagement consists of comments about the party's

morality, parenting of or ability to parent any minor children. Such disparagement specifically includes but is not limited to the following expressions: "cunt," "bitch," "whore," "motherfucker," and other pejoratives involving any gender. The Court acknowledges the impossibility of listing herein all of the opprobrious vitriol and their permutations within the human lexicon.

2) While the parties have any children in common between ages of three and fourteen years old, neither party shall communicate, by verbal speech, written speech, or gestures any disparagement to the other party if said children are within 100 feet of the communicating party or within any other farther distance where the children may be in position to hear, read or see the disparagement.

3) With respect to any child they have in common, neither party shall post on any social media or other Internet medium any photos of said child or children with a cigarette, cigar, or any other smoking device in the child's mouth or otherwise pose the child in a manner which would cause the Court, upon proof furnished, to doubt the party's maturity to parent the minor child.

4) Neither party shall post on any social media or other Internet medium, specifically including but not limited to dating websites or other sites for the purpose of meeting other persons for relationships, romance, or sexual relations any photos of or videos of any minor child the parties have in common. Either party shall be permitted to post photos or video of the minor child on social media but only if posted in such a way as to control access to a group consisting solely of family members of either party related by blood or marriage.

These Orders were stayed. RA 336.[14]

STANDARD OF REVIEW

Mass. R. Dom. Rel. P. 64(a) provides two avenues to report a case or an issue to the Appeals Court. *First*, a trial court may report the *entire case* for determination "after verdict or after a finding of facts under Rule 52." Or, if the trial court "is of opinion that an *interlocutory* finding or order made by it so affects the merits of the controversy that the matter ought to be determined by the appeals court before any further proceedings in the trial court, it may report such matter, and may stay all further proceedings except such as are necessary to preserve the rights of the parties." Mass. R. Dom. Rel. P. 64.[15] "Interlocutory matters should be reported only where it appears that they present serious questions likely to be material in the ultimate decision, and that subsequent proceedings in the trial court will be substantially facilitated by so doing." Shea v.

[14] With respect to its use of age 14, the Court explained that that age "is purposeful and guided by the Massachusetts Uniform Probate Code which permits children who have reached the age of fourteen to self-petition for guardianship; further, that age has been recognized by the courts as conferring upon those children a voice in custody and parenting time disputes. RA 335

[15] See also G.L. c. 215, § 13.

Cameron, 92 Mass. App. Ct. 731, 733–34 (citations omitted), review den. 479 Mass. 1105 (2018).[16]

SUMMARY OF ARGUMENT

The trial court's report here was proper and satisfied its obligations under Rule 64. pp.16-17. The Non-disparagement Orders at issue here are also constitutionally permissible, and judicially enforceable prior restraints of speech that advance a compelling state interest and are narrowly tailored, pp.17-28, and are justified by the *parens patriae* doctrine. pp.28-33

ARGUMENT

1. The Report is Proper.

The trial court here made extensive findings of fact under Rule 52, and issued Further Orders. The specific questions he then reported, which bear on the enforceability of the trial court's Further (stayed)

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[16] "Although a judge may report specific questions of law in connection with an interlocutory finding or order, the basic issue to be reported is the correctness of his finding or order. Reported questions need not be answered in this circumstance except to the extent that it is necessary to do so in resolving the basic issue." Lyons v. Globe Newspaper Co., 415 Mass. 258, 261 n.4 (1993) (quoting McStowe v. Bornstein, 377 Mass. 804, 805 n. 2 (1979)).

interlocutory orders, are not just "likely" but are certain "to be material in the ultimate decision," and subsequent proceedings in the trial court "will be substantially facilitated" by resolution of the reported questions. Compare Dorfman v. Allen, 386 Mass. 136, 138 (1982)(discharging two reported questions of law where trial court did not report the entire case), with Adoption of Thomas, 408 Mass. 446, 448 (1990) (trial judge reported issues but did not make an interlocutory order)(SJC transferred case and answered questions posed as public interest best served by doing so). Cf. Commonwealth v. Yacobian, 393 Mass. 1005, 1005 (1984) (declining to rule on reported questions "because of the inadequacy of the record" and the absence of factual findings).

2. The Orders at issue here, while prior restraints of speech, are not impermissible.

A. First Amendment Protections are not Absolute.

Generally. "As a general matter, the First Amendment forbids the government, including the Judicial Branch, 'from dictating what we see or read or speak or hear.'" Sindi v. El-Moslimany, 896 F.3d 1, 31 (2018). The freedom of speech, including that made

online, is among the most fundamental personal rights and liberties "protected [by the First Amendment] from invasion by state action."[17] Lovell v. Griffin, 303 U.S. 444, 540 (1938); Reno v. American Civil Liberties Union, 521 U.S. 844, 870 (1997). But, the right to free speech is not absolute. Near v. Minnesota, 283 U.S. 697, 708 (1931). Restrictions on such rights properly may be based on the privacy interests of others. Rowan v. United States Post Office Dept., 397 U.S. 728, 737-738 (1970) ("the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate"). Libelous utterances and defamatory remarks also are not "within the area of constitutionally protected speech." Beauharnais v. Illinois, 343 U.S. 250, 255-257 (1952)("resorts to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution;" *affirming* validity of state statute over freedom of speech

[17] The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." U.S. Constitution, Amend. I. There is similar language in Article 16 of the Massachusetts Declaration of Rights ("the right of free speech shall not be abridged"). In 1A Auto Inc. v. Director of Campaign and Political Finance, 480 Mass. 423, (2018), this Court concluded that art. 16 provides no greater rights than the First Amendment. The analysis is thus the same under each.

claim). See O'Brien v. Borowski, 461 Mass. 415 (2012), in which the SJC observed:

> While most speech is protected from government regulation by the First Amendment to the United States Constitution and art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments to the Massachusetts Constitution, there are certain well-defined and narrowly limited classes of speech that are not protected because they are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that whatever meager benefit that may be derived from them is clearly outweighed by the dangers they pose.

Id. at 422. See also Commonwealth v. Johnson, 470 Mass. 300 (2016) (rejecting free speech claim, *affirming* harassment conviction); Commonwealth v. Walters 472 Mass. 680, 691-692 (2015)(addressing First Amendment under stalking statute and concluding defendant's placement of sign on lawn *not* protected by First Amendment as purpose could be found to harass the victim); Ferrari v. Commonwealth, 448 Mass. 163 (2007) (videotapes *not* protected by First Amendment; content lacked literary value and were harmful to minor); A.S.R. v. A.K.A., 92 Mass. App. Ct. 270, 279-280 (2017)(rejecting First Amendment and art. 16 claims and concluding communications and conduct not protected speech); Commonwealth v. Bell, 83 Mass. App.

Ct. 61, 63-64 (2013)("I'll see you on the street" constituted witness intimidation and *not* protected free speech).

In sum, as the above cases make clear, the First Amendment is not a talisman that protects all speech.

B. Non-disparagement Orders are not *per se* impermissible prior restraints of free speech.

Prior Restraints. Prior restraints of speech,[18] however, stand on a different footing. "[C]ourt orders that actually forbid speech activities are classic examples of prior restraints." Id.[19] Though a prior restraint "bear[s] a heavy presumption against its constitutional validity," Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963), not all prior restraints are invalid so long as there is found to be both: **[a]** a **compelling state interest** to justify the prior restraint, and **[b]** the order is **narrowly tailored** to serve that interest. Globe Newspaper Co. v

[18] "The term 'prior restraint' is used 'to describe... judicial orders forbidding certain communications when issued *in advance* of the time that such communications are to occur.'" Commonwealth v. Barnes, 461 Mass. 644, 651 (2012).

[19] Mother concedes that the orders issued here, viz.¶s 6 and 7 of the May 24, 2018 Order and ¶s 1-4 of the Further Order on Disparagement, dated October 24, 2018, are prior restraints.

Superior Court, 457 U.S. at 607. See also Care and Protection of Edith, 421 Mass. 703 (1996).

> A child's best interests is a compelling state interest that justifies the imposition of a prior restraint of speech.

Though there are no reported appellate decisions in Massachusetts addressing whether a child's best interests constitutes a sufficiently **compelling state interest** to justify a judicially-imposed prior restraint of speech, the U.S. Supreme Court has held that "safeguarding the physical and psychological well-being of a minor may be a **compelling interest**," see Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607-608 (1982 (though a compelling interest was shown, statute mandating closure to the press of criminal proceedings during testimony of minor victim of sex abuse not constitutionally justified; infringement of First Amendment freedom of press instead must be determined on case-by-case basis after weighing myriad factors); Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 126 (1989), and myriad decisions from around the country highlight that the best interests of the children has been considered an important and **compelling state interest** that *can* justify limitations on speech. See e.g., Schutz v.

Schutz, 581 So.2d 1290, 1292-93 (Fla. 1991)(order requiring mother to say positive things about father was in the best interests of children and, at very least, in furtherance of "substantial" state interest and *not* a violation of mother's First Amendment right to free speech); Geske v. Marcolina, 642 N.W.2d 62, 64 (Minn.Ct.App. 2002)(*affirming* injunction over prior restraint argument and holding best interests of child serve as compelling state interest justifying a prior restraint of parent's speech); Hartman v. Hartman, 185 Cal.App.4th 1247 (2010)(*rejecting* wife's free speech claim, and upholding an order restraining wife from interfering with husband's custodial time); Borra v. Borra, 756 A.2d 647, 650 (N.J.Super. 2000)(trial court enjoined a father from contesting ex-wife's application for membership in a country club where the parties were members prior to divorce; although father had a First Amendment right to speak his mind freely, "New Jersey courts have consistently recognized that the 'best interests' of the children can be made paramount to other fundamental rights"); Stafford v. Stafford, No. 215744, 1999 WL 33429988, at *2 (Mich.Ct.App. November 23, 1999), *cert. denied*, 620 N.W.2d 10 (2000)("[i]t is difficult to conceive of a

more compelling or vital state interest than the welfare of minor children as it is affected by the dissolution of their parents'... marriage. The care and protection of children has long been a matter of utmost state concern.").

In Dickson v. Dickson, 529 P.2d 476 (Wash. App. 1974), *cert. denied*, 423 U.S. 832 (1975), a Washington court enjoined a father from making defamatory comments about the mother of his children due to a present threat of emotional harm to mother, and the clear threat of emotional effect on the children. Rejecting father's free speech claims, the appellate court reiterated that the First Amendment is "not absolute," and concluded that the prior restraint was necessary to protect both mother and children, reasoning:

> [father's] statements have been recurrent, there is the threat of emotional harm and it would be difficult to evaluate the injury in monetary terms...The thrust of the injunction is the protection of [the] minor children. It is clear that a court in a divorce action retains jurisdiction over children...in order to assure that their best interests are furthered. This is not a hollow duty. This position [rejecting father's free speech claim]...stems from the well-founded conclusion that there is often no adequate remedy at law where minors are concerned ... There was sufficient evidence that [father's] conduct interfered with the

> welfare of his minor children...[his] statements were made to several persons including [mother's employer]...On one occasion, [father] passed out literature at their church, at which several persons laughed...The disparaging remarks about or reflecting on [the children] could very well make them think badly of themselves and their family.

529 P.2d at 479-480 (emphasis added). The Court further explained:

> In addition to the indirect effect [father's statements] will have on the children because their mother will be upset, there will be a direct effect on them through damage to the reputation of their family and to their feelings about their mother...[A]pplying the balancing test...interference with [ex-wife's] privacy and the children's well being overweighs [ex-husband's] rights of free speech.
>
> Similarly, in Nash v. Nash, 307 P.2d 40 (Ariz. 2013), after mother "tweeted" negative remarks about father, an Arizona trial court prohibited the parents from posting disparaging remarks about each other on social media, reasoning:
>
> The life span of social media is indefinite. Distribution of social media postings cannot be effectively controlled or contained. Disparaging comments made by either party regarding the other party...is likely, over time, to be viewed by the minor children.

Id. at 48. *Rejecting* mother's free speech challenge, and affirming the trial court's prior restraint, the

appellate court concluded that the risk the children might view the negative social media posts in the future was not in their best interests and outweighed mother's constitutional claim. The appellate court reasoned:

> We take judicial notice...of the fact that depending on the circumstances, comments Mother posts on social media about Father may not remain private but may make their way to the children, perhaps in very short order.

Id. at 49.

Other courts, presented with similar first amendment concerns, have held court orders prohibiting parties from disclosing confidential information from juvenile proceedings permissible when not overbroad. See In re Tiffany G., 29 Cal.App.4th 443, 451–52 (1994) (holding nondisclosure order against mother, stepfather did not violate first amendment rights); In re Minor, 595 N.E.2d 1052 (Ill. 1992)(juvenile's interest in privacy during abuse proceeding sufficient predicate for finding court order did not violate free speech rights).[20]

[20] Cf. In re Marriage of Candiotti, 40 Cal.Rptr.2d 299 (1st Dist. 1995)(order prohibiting dissemination to third parties outside presence of children overbroad and constituted impermissible prior restraint); Adams v. Tersillo, 666 N.Y.S.2d 203 (2d Dept 1997)(order

Application. In a vacuum, the cases cited above recognize that a child's best interests is a compelling state interest that, in certain circumstances such as those present here, justifies the prior restraint of a parent's speech. The trial court here correctly agreed, echoing the observations in both Dickson and Nash:

> Such free speech which identifies or implicates minor children of a party should compel heightened scrutiny [with the trial court], especially when the speech are posted to social media platforms to be viewable in perpetuity.
>
> In circumscribing such speech, there is a **compelling government interest**: **to protect minor children from the threat of harm and repercussions of unbridled commentary about family dirty laundry aired in a public and infinite domain: the Internet and social media**....

RA 331-333 (emphasis added).

Under the facts of this case, and in light of the ubiquitous nature of the internet and social media posts,[21] paragraphs 1-4 of the trial court's

---

prohibiting parents from making derogatory statements to any other person was unconstitutionally overbroad prior restraint); In re Marriage of Newell, 192 P.3d 529, 535-536 (Colo.Ct.App. 2008)(order prohibiting father from voicing concerns about child's care or education not least restrictive means of promoting compelling state interest).

[21] More than 20 years ago, the U.S. Supreme Court observed:

interlocutory Further Order on Disparagement were narrowly tailored in both scope and content,[22] not overbroad as to audience, strike an appropriate balance between the child's long-term interests to be free from "the disharmonious disparagement exchanged between [his] parents" and Father's freedom of speech, and, Mother submits, were constitutionally permissible and "correct." See Lyons v. Globe Newspaper Co., supra at 261 n.4. More specifically, the restrictions were limited to derogatory internet and social media

---

> the Internet can hardly be considered a scarce expressive commodity. It provides relatively unlimited...capacity for communication of all kinds. The Government estimates that [a]s many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999. This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, the content on the Internet is as diverse as human thought.

Reno v. Am. Civil Liberties Union, 521 U.S. at 870 (quotation marks omitted).

[22] The trial court's age limitation and explanation related thereto, however, appears inexplicable, and arbitrary.

"posts" about the other, and disparaging communications between the parties and only if their child also is "within 100 feet" or "within any other father distance where the child[] may be in a position to hear, read or see the disparagement."[23] There also is no other practical way, or available remedy at law, to protect the child from hearing [and/or being adversely impacted by] pejorative remarks about his mother than by restricting what his Father says about her in his presence, or curtailing Father's vitriolic posts that the child may subsequently see.

Given the context and history of this case that preceded the Order,[24] it also can be inferred that the restrictions on Father's speech are incidental at most, and instead appear principally designed to curb

[23] Presumably, this expansion was designed to prohibit either party from "giving the other the middle finger" when their child was in a position to see it.

[24] The context and history includes: an order requiring Father to vacate the marital home, the Father's very limited parenting time of 7 hours per *week*, the need for supervision of Father's parenting time, questions concerning Father's mental health that justified the production of his psychiatric records for *in camera* review, allegations surrounding Father's impulsivity and explosive temper, and the "judicially noticed" fact "based on the hundreds if not more cases [the court] has heard... which have demonstrated the pernicious effects on minor children, of all ages beyond infant cognition, of parental disparagement to which the children were exposed, whether in person or through internet or social media postings."

Father's conduct that could negatively impact the child's psychological well-being and emotional development. Globe Newspaper Co. v. Superior Court, 457 U.S. at 607-608. At a minimum, the "speech" here -- if it could be considered "speech" -- was "of such slight social value as a step to the truth that whatever meager benefit that may be derived from them is clearly outweighed by" the harm to Mother and child. O'Brien v. Borowski, 461 Mass. at 422.

Since shielding the child from "parental combat" is not a hollow duty, the trial court should not have been required to "wait for [an] inevitable disaster to happen" before stepping in to protect him by issuing the orders at play here. See Adoption of Katherine, 42 Mass. App. Ct. 25, 32 (1997).

C. Non-Disparagement orders can and should be enforceable to protect children. The State, as *Parens Patriae*, may properly interfere with a parent's First Amendment Rights to protect a child from present or anticipated future harm.

In Prince v. Massachusetts, 321 U.S. 158, 166 (1944), the United States Supreme Court noted that while parents have a fundamental constitutional right to direct the upbringing of their children, that right *also* is not absolute and does not include as a

necessary adjunct the right to jeopardize their children's health or safety. See also Opinion of Justices, 427 Mss. 1201, 1203 (1998). Toward that end, a judge unequivocally is authorized to impose such conditions and restrictions on parenting when necessary to advance a child's best interests. Schechter v. Schechter, 88 Mass. App. Ct. 239, 247-248 (2015) (*affirming* 1-year suspension of parenting where, *inter alia*, court found father made "disparaging references to mother in child's presence"). Permissible, judicially imposed restrictions include curtailing a parent's First Amendment freedom of religious expression, see Felton v. Felton, 383 Mass. at 232 (1981) ("best interests of the child are to be promoted, and when the parents are at odds, the attainment of that purpose **may involve some limitation** of the liberties of one or other of the parents"); Guardianship of Yushiko, 50 Mass. App. Ct. 157, 159-160 (2000)(state may act to protect child from *emotional* harm), mandating "school attendance, regulating or prohibiting child labor, and in many other ways." Prince v. Massachusetts, 321 U.S. at 166. To be sure, "there is a strong expression of public policy in our Legislature that a child's welfare must

be the paramount concern." Schechter v. Schechter, 88 Mass. App. Ct. at 248 (referencing G.L. c. 208, §§ 31 and 31A).

What these cases and statutes highlight is that when a child's best interests and a parent's fundamental, constitutionally protected rights are in conflict, the child's best interests must come first.

Here, the trial court recognized as much and took judicial notice of the present and future **harm** to the parties' child caused by unabated exposure to his father's disparagement of Mother -- both in person and that which is posted online by Father to be viewed in the future by the child:

> ...Notwithstanding the lack of research or other evidence provided by the litigants to the Court in the Shak case,[25] the Court takes **judicial notice** based on the hundreds if not more cases it has heard in the Probate and Family Court which have demonstrated **the pernicious effects on minor children, of all ages beyond infant cognition, of parental disparagement to which the children were exposed, whether in person or through internet or social media postings**. Even those minor children unable to comprehend such disparagement in the here and now will become **able to later discover**

[25] Note: the prior restraint order had already entered by a prior judge at the time the parties appeared to argue on Mother's Complaint for Contempt. There was neither a request for, nor opportunity to present, information of this sort before the Court issued its Judgment and Further Orders.

> such upsetting postings which are preserved in **perpetuity by the internet**, to be culled, savored, and disseminated by family, gossipers, antagonists and the general public in and beyond the community of the parties...
>
> There is an **unassailable public policy interest** in **protecting children from potential harm in having peers hear and see parental disparagement posted by one parent or another** re-posted, shared, 'liked' or disseminated by family members who have decided to join the fray. Once posted on social media and re-posted, **there are no means to permanently delete and ensure future non-sharing or dissemination of disparaging materials**. . . .
>
> . . . The Court [also] takes **judicial notice** of the real possibility that once posted on whatever platform of social media, disparagement has left the control of the poster and subsequent destinations remain free to re-post, share, 'like' or transform into other mediums for public viewing by present and future generations not only of family members but others important to the well-being and nurturing of the children: peers, teachers, religious and social communities, extended and remote family members.

RA 332-333.

Furthermore, the trial court made findings that the father was distributing and posting information to a targeted audience on social media that he knew was disparaging, and implicitly found that the threat of emotional harm to the parties' son, if he heard or read such online statements, would be contrary to his

best interests. The trial court's efforts to protect the child were well-intentioned and are justified here. "As *parens patriae*, the state may limit the power of the parent if it appears that parental decisions will jeopardize the health or safety of the child..." In re: F.L.D., 464 A.2d 419, 421 (Pa. Super. 1983), citing Wisconsin v. Yoder, 406 U.S. 205 (1972).

In short, if Father's fundamental right *to see* his son may be suspended due, in part, to "disparaging references to the mother in the child's presence," see Schechter v. Schechter, supra, and if Father's constitutional freedom of religion may be judicially altered to protect the best interests of his son, see Felton v. Felton, supra, then Father's freedom of speech can and should properly be curtailed for the same reasons.

The parties' son here deserved to be protected; his best interests justified the trial court's orders designed to insulate him from Father's incendiary remarks. As the trial court reasoned:

> Given the special case of minor children and their need to be protected from the disharmonious disparagement exchanged by their parents, given the potentially infinite dissemination of such disparagement over the internet and social media to third persons and strangers, the Court issue[d]

> the [above] orders with the intention that they constitute the least restrictive alternative but foster the compelling public interest in protecting minor children from being exposed to disparagement between their parents and from being exposed on Internet and social media to third persons who may be able to identify and locate the children for nefarious or other purposes harmful to the child.

RA 335.

CONCLUSIONS

For these reasons, the Court should answer the reported questions, and conclude that a child's best interest is a sufficiently compelling state interest to justify a trial court's narrowly tailored prior restraint of a parent's freedom of speech. The trial court's interlocutory orders issued here are constitutionally permissible and thus enforceable.

Respectfully submitted,

Masha Shak
By her attorneys,

April 24, 2019

/s/ Richard M. Novitch
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COMMONWEALTH MASSACHUSETTS

APPEALS COURT

APPEALS COURT NO. 2018-P-1700

MASHA M. SHAK.
Plaintiff/Appellant

vs.

RONNIE SHAK,
Defendant/Appellee

ON RESERVATION AND REPORT FROM
THE NORFOLK PROBATE & FAMILY COURT

Certificate of Compliance
Pursuant to Rule 16(k) of the
Massachusetts Rules of Appellate Procedure

I, Richard M. Novitch, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New at size 12, less than 10.5 characters per inch, and contains 34, total non-excluded pages.

/s/ Richard M. Novitch
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COMMONWEALTH MASSACHUSETTS

APPEALS COURT

APPEALS COURT NO. 2018-P-1700

MASHA M. SHAK.
Plaintiff/Appellant

vs.

RONNIE SHAK,
Defendant/Appellee

ON RESERVATION AND REPORT FROM
THE NORFOLK PROBATE & FAMILY COURT

CERTIFICATE OF SERVICE

Pursuant to Mass. R.A.P. 13(e) and 16(a)(15), I hereby certify, under the penalties of perjury that on April 24, 2019, I have made service of Appellant's Brief and Record Appendix upon Ronnie Shak, by serving same upon his attorney of record, via the Electronic Filing System, to:

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Addendum Table of Contents

THE COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

PROBATE AND FAMILY COURT

NORFOLK DIVISION

I, Patrick W. McDermott, Register of the Probate and Family Court for said County of Norfolk, having, by law, custody of the seal and all the records, books, documents and papers of or appertaining to said Court, hereby certify the paper hereunto annexed to be a true copy of a paper appertaining to said court, and on file and of record in the office of said Court, to wit:

IN THE MATTER OF Masha Marnina Shak v. Ronnie Shak

RE: 18D0158 Docket Report

IN WITNESS WHEREOF,
I have hereunto set my hand and
affixed the seal of said Court,
this 4th day of January
In the year of our Lord two thousand and nineteen

Register

CRTR2709-CR

MASSACHUSETTS
NORFOLK PROBATE AND FAMILY COURT
Public Docket Report

NO18D0158DR Shak, Masha Marnina vs. Shak, Ronnie

CASE TYPE:	Domestic Relations	**FILE DATE:**	02/05/2018
ACTION CODE:	DB	**CASE TRACK:**	
DESCRIPTION:	Divorce 1B		
CASE DISPOSITION DATE		**CASE STATUS:**	Active
CASE DISPOSITION:	Active	**STATUS DATE:**	02/05/2018
CASE JUDGE:	Phelan, George	**CASE SESSION:**	

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MASSACHUSETTS
NORFOLK PROBATE AND FAMILY COURT
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FINANCIAL DETAILS

Date	Fees/Fines/Costs/Charge	Assessed	Paid	Dismissed	Balance
02/08/2018	FEE Complaint/Petition for Divorce, MGL 262 s.40 Receipt: 126401 Date: 02/09/2018	200.00	200.00	0.00	0.00
02/08/2018	Civil Filing Fee Surcharge due. Receipt: 126401 Date: 02/09/2018	15.00	15.00	0.00	0.00
02/08/2018	Blank Summons (except in matters relating to Contempt or Paternity) MGL 262 section 4b Receipt: 126401 Date: 02/09/2018	5.00	5.00	0.00	0.00
06/08/2018	For the issuance of a Contempt Summons MGL 262 s.40 Receipt: 131281 Date: 06/11/2018	5.00	5.00	0.00	0.00
09/24/2018	Tape Cassette Recordings of Proceedings plus postage per ninety minutes MGL 262 section 4b CD of hearing held May 24, 2018 before Judge Ward. Attorney Gary Todd, ordering party. Receipt: 135066 Date: 09/25/2018	50.50	50.50	0.00	0.00
09/24/2018	Postage for recording proceedings from hearing held 5/24/18 before VMW, J. Receipt: 135066 Date: 09/25/2018	4.00	4.00	0.00	0.00
	Total	**279.50**	**279.50**	**0.00**	**0.00**

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MASSACHUSETTS
NORFOLK PROBATE AND FAMILY COURT
Public Docket Report

INFORMATIONAL DOCKET ENTRIES

Date	Ref	Description	Judge
02/08/2018	1	Complaint for Divorce - Irretrievable Breakdown 1B Judge: Ward, Hon.Virginia M Judge: Ward, Hon.Virginia M	Ward
02/08/2018	2	Uniform Counsel Certification Form Filed by Applies To: Saunders, Esq., Amy Louise (Attorney) on behalf of Shak, Masha Marnina (Plaintiff)	
02/08/2018	3	Mass. Statistical R408 Form	
02/08/2018	4	Certificate of Marriage	
02/08/2018	5	Affidavit Disclosing Care and Custody	
02/08/2018		Summons issued on complaint for Divorce.	
02/08/2018		Track assignment notice issued. A NOTICE: Track Assignment Notice 14 Month Track was generated and sent to: Plaintiff: Amy Louise Saunders, Esq.	
02/21/2018	6	Motion For Short Order of Notice Applies To: Todd, Esq., Gary O (Attorney) on behalf of Shak, Masha Marnina (Plaintiff); Zitz, Esq., Julianna (Attorney) on behalf of Shak, Masha Marnina (Plaintiff)	
02/21/2018	7	Motion For Order to Vacate Martial Home Applies To: Todd, Esq., Gary O (Attorney) on behalf of Shak, Masha Marnina (Plaintiff); Zitz, Esq., Julianna (Attorney) on behalf of Shak, Masha Marnina (Plaintiff)	
02/21/2018	8	Affidavit Of Masha M. Shak in Support of Motion for Order to Vacate Marital Home	
02/21/2018	9	Motion For Short Order of Notice ALLOWED on 02/21/2018 File Reference # 6 Judge: Ward, Hon.Virginia M	Ward
02/21/2018	10	Order on Emergency Motion for Short Order of Notice Judge: Ward, Hon.Virginia M	Ward
02/21/2018	12	Appearance by Attorney, Gary O Todd, Esq.,Party Name Masha Marnina Shak Applies To: Todd, Esq., Gary O (Attorney) on behalf of Shak, Masha Marnina (Plaintiff); Zitz, Esq., Julianna (Attorney) on behalf of Shak, Masha Marnina (Plaintiff)	
02/22/2018	11	Notice of Withdrawal Applies To: Saunders, Esq., Amy Louise (Attorney) on behalf of Shak, Masha Marnina (Plaintiff)	

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02/22/2018	15	Summons Filed, Date of Service 02/21/2018	
03/21/2018	13	Affidavit Of Confirming Registration at Parent Education Program - Dated 03/16/2018 Applies To: Zitz, Esq., Julianna (Attorney) on behalf of Shak, Masha Marnina (Plaintiff)	
03/27/2018	14	Summons Filed, Date of Service 02/21/2018	
04/05/2018	16	Order on plaintiff's ex-parte emergency motion for order to vacate marital home. Dated 2/22/18. Judge: Ward, Hon.Virginia M	Ward
04/05/2018	17	Order to vacate marital home. Dated 2/22/18.w Judge: Ward, Hon.Virginia M	Ward
04/10/2018	18	Appearance by Attorney, Andrew R Stacey, Esq.,Party Name Ronnie Shak - Dated 04/05/2018	
05/07/2018	19	Appearance by Attorney, Jennifer M Lamanna, Esq.,Party Name Ronnie Shak - Dated 05/04/2018	
05/24/2018	20	Motion For Temporary Orders - Dated 05/18/2018 Applies To: Todd, Esq., Gary O (Attorney) on behalf of Shak, Masha Marnina (Plaintiff); Zitz, Esq., Julianna (Attorney) on behalf of Shak, Masha Marnina (Plaintiff)	
05/24/2018	21	Affidavit Of Masha M. Shak in Support of Motion for Temporary Orders - Dated 05/18/2018	
05/24/2018	22	Motion For Impoundment and Affidavit - Dated 05/18/2018 Judge: Ward, Hon.Virginia M Applies To: Zitz, Esq., Julianna (Attorney) on behalf of Shak, Masha Marnina (Plaintiff)	Ward
05/24/2018	23	Motion For Order requiring compliance with her Subpoena of Defendant's Mental Health/Counseling Records - Dated 05/18/2018 Applies To: Zitz, Esq., Julianna (Attorney) on behalf of Shak, Masha Marnina (Plaintiff)	
05/24/2018	24	Motion To Withdraw - Dated 05/18/2018 Applies To: Stacey, Esq., Andrew R (Attorney) on behalf of Shak, Ronnie (Defendant)	
05/24/2018	25	Masha Marnina Shak's Certificate of Completion of Parent Education Program	
06/08/2018	26	Subsequent Action Contempt Filed	

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06/08/2018	27	Motion For Impoundment & Affidavit DENIED on 05/24/2018 File Reference # 22 Judge: Ward, Hon.Virginia M	Ward
06/08/2018	28	Financial Statement--Signed 5/24/18 Applies To: Shak, Ronnie (Defendant)	
06/08/2018	29	Financial Statement--Signed 5/24/18 Applies To: Shak, Masha Marnina (Plaintiff)	
06/08/2018	30	Child Support Guidelines Worksheet--Date Prepared 5/23/18	
06/08/2018	31	Child Support Guidelines Worksheet--Date Prepared 5/23/18	
06/08/2018	32	Motion To Withdraw ALLOWED on 05/24/2018 File Reference # 24 Judge: Ward, Hon.Virginia M	Ward
06/08/2018	33	Stipulation For Temporary Orders #1--Dated 5/24/18	
06/08/2018	34	Stipulation/Agreement of the Parties--#2-Dated 5/24/18	
06/08/2018	35	Plaintiff's Motion Motion For Order requiring Compliance With Her Subpoena Of Defendant's Mental Health/Counseling Records	
06/08/2018	36	Mother's Opposition And Reply to Father's Motion For Temporary Orders	
06/08/2018	37	Defendant Ronnie Shak's Motion For Temporary Orders	
06/08/2018	38	Orders (Complaint for DIVORCE docketed on February 8, 2018 (#01). The parties shall be bound by the terms of their stipulation dated May 24, 2018. Judge: Ward, Hon.Virginia M	Ward
06/27/2018	39	Affidavit Of Masha Shak	
07/06/2018	40	joint Motion To Continue/Reschedule 7/12/18 status hearing	
07/12/2018	41	Orders Concerning Medical Records (Complaint for Divorce docketed on 02/08/2018 (#01) - Dated 06/26/2018 Judge: Ward, Hon.Virginia M	Ward
07/13/2018	42	Orders Concerning Medical Records (on Complaint for Divorce docketed on 02/08/2018 (#01) - Dated 06/25/2018 Judge: Ward, Hon.Virginia M	Ward
07/18/2018	43	Summons Filed, Date of Service 07/05/2018	
07/24/2018	44	Motion To Continue/Reschedule Joint ALLOWED on 07/12/2018 File Reference # 40 *Continued to 08/16/18 Judge: Phelan, Hon. George	Phelan
08/02/2018	45	Order and memorandum of Decision and Order on Request to Review Defendant's Medical Records (on Complaint for Divorce filed on or about 02/08/2018) - Dated 07/30/2018 Judge: Phelan, Hon. George	Phelan

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08/09/2018	46	Answer to Complaint for Contempt filed on 06/08/2018 Applies To: Lamanna, Esq., Jennifer M (Attorney) on behalf of Shak, Ronnie (Defendant)	
12/04/2018	47	Action on Appeal as follows: Notice of Appeal by Masha M. Shak filed October 24,2018 on Report Pusuant to Mass. R. Dom. Rel.P.64(a)	
12/04/2018	48	Judgment/Decree on Complaint for Contempt and further orders entered on 10/24/2018 Related to File Reference #	
12/04/2018	49	Action on Appeal as follows: Notified date Of Receipt And Filinf Of A Notice Of Appeal, by Masha M. Shak Dated October 24,2018 Applies To: Shak, Masha Marnina (Plaintiff); Shak, Ronnie (Defendant); Todd, Esq., Gary O (Attorney) on behalf of Shak, Masha Marnina (Plaintiff); Lamanna, Esq., Jennifer M (Attorney) on behalf of Shak, Ronnie (Defendant)	
12/11/2018	50	Action on Appeal as follows: Notice of Assembly of Record Dated December 11,2018	
12/17/2018	51	Motion For Speedy Hearing on Plaintiff's Complaint for Contempt dated 06/01/2018 - Dated 06/01/2018	
12/17/2018	52	Status Memorandum - Dated 08/16/2018 Applies To: Shak, Ronnie (Defendant)	
12/17/2018	53	Status Memorandum of Masha M. Shak - Dated 08/16/2018	
12/17/2018	54	Order on REPORT PURSUANT TO MASS. R. DOM. REL. P. 64(A) - Dated 10/24/2018 Judge: Phelan, Hon. George	Phelan
12/17/2018	55	Judgment/Decree on Complaint for Contempt FINDINGS and Judgment on Complaint for Contempt entered on 10/24/2018 Related to File Reference # 26	Phelan
12/18/2018	56	Motion For Short Order of Notice - Dated 12/11/2018 Applies To: Zitz, Esq., Julianna (Attorney) on behalf of Shak, Masha Marnina (Plaintiff)	
12/18/2018	57	Motion To Compel Mental Evaluation of Defendant (Memorandum Incorporated) PLAINTIFF'S EMERGENCY RULE 35 - Dated 12/11/2018 Applies To: Zitz, Esq., Julianna (Attorney) on behalf of Shak, Masha Marnina (Plaintiff)	
12/18/2018	58	Memorandum in Support of Rule 35 Motion to Compel Mental Evaluation of Defendant (Plaintiff's) - Dated 12/11/2018 Applies To: Todd, Esq., Gary O (Attorney) on behalf of Shak, Masha Marnina (Plaintiff); Novitch, Esq., Richard M (Attorney) on behalf of Shak, Masha Marnina (Plaintiff); Zitz, Esq., Julianna (Attorney) on behalf of Shak, Masha Marnina (Plaintiff)	

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12/18/2018	59	Motion For Short Order of Notice ALLOWED on 12/11/2018 File Reference # 56 Matter to be heard on 12/20/2018 @ 9:00 a.m. - Father's parenting time to be suspended until further Order of the Court . Counsel to refrain from adding pictures to pleadings.	Gorman
12/24/2018	60	Pre-Trial Notice and Order Sent Judge: Phelan, Hon. George Event: Pretrial Conference Domestic and Equity Date: 03/06/2019 Time: 10:00 AM	Phelan

COMMONWEALTH OF MASSACHUSETTS

TRIAL COURT

PROBATE AND FAMILY COURT DEPARTMENT

Norfolk County Case number 18D0158

Masha M. Shak, Plaintiff ("Mother")

v.

Ronnie Shak, Defendant ("Father")

On August 16, 2018 appeared both parties, with counsel, for hearing of mother's complaint for contempt filed June 4, 2018. The hearing proceeded by way of representations of counsel plus mother's affidavit to which was attached Facebook postings. Under oath, mother adopted representations of her counsel as her testimony and evidence. There was little in factual dispute. Father's defense was free speech and lack of knowledge of the orders at date of alleged non-compliance.

FINDINGS:

After a marriage of about 15 months, the parties are in midst of divorce.

Their marriage produced one child, a son Ezra now about 1.5 years old.

Mother is 33 years old and father is 32 years old.

On February 5, 2018 mother filed a complaint for divorce, alleging irretrievable breakdown of marriage.

On Thursday May 24, 2018, after a hearing at which both parties were present, the Court issued temporary orders, of which paragraphs 6 and 7 contain the orders mother alleges father failed to comply with and of which father argues amount to impermissible restraints on constitutional free speech.

Paragraph 6 states: "Neither party shall disparage the other – nor permit any third party to do so – especially when within hearing range of the child".

Paragraph 7 states: "Neither party shall post any comments, solicitations, references, or other information regarding this litigation on social media."

Mother's allegations and father's defense invoke paragraphs 6 and 7;

During a Court hearing on May 24, 2018, father's social media postings were pointed out by mother's counsel who argued, albeit briefly, for restriction on such postings. After listening to the audio recording of that hearing, the Court notes that the length of time devoted to that issue was brief in relation to other matters (drug testing, parenting time supervision). It was unclear if the defense of free speech was in play, and the Court's verbal directive was also brief and not entirely clear on the issue of future postings.

There is no factual dispute and the Court finds clear and convincing evidence as to father posting commentary, discussing the parties' divorce litigation, and inviting comments to his postings on Facebook, a forum of Internet social media.

Father's postings may be re-posted by his friends group members.

Father posted such both before and after the Court issued its May 24, 2018 temporary orders.

On Sunday May 27, 2018 father posted and made available via "friends" sharing to thirty (30) members of a Facebook group that mother was trying to deny him access to the minor child "for three years" as well as a video of the minor child and a photo of the child (at age less than six months old) with a cigarette in his mouth, posing and posting to which father admits.

Members of father's Facebook "friends" viewed and responded to father's postings. Mother learned of the May 27, 2018 post but the date she did so was unclear from the evidence.

On Sunday, May 27, 2018 at 2:32 PM mother's counsel e-mailed father's counsel informing father's counsel that father had published another Facebook post which disparaged mother and described the divorce litigation. Father shared that post to over 30 Facebook members profiles including family members, rabbi, assistant rabbi and members of mother's religious community. The e-mail request from mother's counsel to father's counsel also directed father to remove the Facebook post as follows: "forthwith (published at approximately 8 AM this morning) and refrain from publishing additional posts in the future...". Also included in the e-mail from mother's counsel was that "during the hearing on Thursday, Judge ..... commented that Ronnie should refrain from posting details of this case on social media platforms."

Father removed that post but the date he did so was not clarified by any email evidence nor was it clear when and how mother learned of the removal. This is significant given that father at some point in the divorce litigation had changed legal counsel and given that father claims he was unaware as of Sunday May 27, 2018 of the Court's Thursday May 24, 2018 orders paragraph 6 and 7.

In a posting on Sunday May 27, 2018, father evidenced awareness of the Court's Thursday May 24, 2018 temporary orders: "(I have proof of about half the claims being false, documented and unarguable)(I hope it's enough to not have the judge err on her side of caution again)".

The Court finds that father learned on the same day May 27, 2018 from his attorney about mother's May 27, 2018 discovery of his postings and that father was aware at some point during May 27, 2018 of the Court's May 24, 2018 orders as to social media posts.

One day later, on Monday May 28, 2018 father again posted to Facebook about "false testimony", "blind and evil", and "evil lier (sic)", all in reference to mother. He made those postings available to three (3) persons and asked those persons to "de-friending" the "evil liar", in reference to mother.

On Tuesday May 29, 2018 father again posted to Facebook in a manner to permit a group containing 776 "members" to potentially view his post of father's opinions regarding the ongoing court proceeding and that mother did "horrible things". On that same date, father "shared" that post with nine (9) members of the parties' synagogue.

On Wednesday May 30, 2018 father shared his May 29, 2018 post with four more members of the synagogue, writing that he was defending himself, disgusted with himself and embarrassed but hopeful he will get the son back.

In that May 30, 2018 posting, father acknowledged the inappropriateness of his postings: "If I saw someone post like I have been recently, I'd be like :k man stop throwing your shit on the feed, and it's not right, and no matter whose wrong don't make it public.....I agree to all But I'm desperate I got nothing else I want to defend myself I actually am disgusted with myself and so embarassed, I'll never be the same. But being under the microscope and defending all the allegations, I feel that creating public awareness might have a tiny chance of helping me and I'll take it. I want people to know what's going on because this can't happen this easily. People shouldn't be able to just do this to someone. I m disgusted with myself and totally embarrassed but maybe ill (sic) get my son back. "

Although mother is not explicitly mentioned by name (and is referred to as "mother" just once) in the postings, viewers of the posts who were in the synagogue could reasonably conclude that father was referring to mother and the parties' ongoing divorce.

Mother received contacts from friends and acquaintances regarding father's postings.

Mother is a licensed social worker who is employed by a therapy practice and also sees private practice clients.

The Court credits mother's concerns that the postings by father will become known in her professional community and might adversely impact her employment and self-employment.

The Court credits mother's concerns that the postings by father will damage her reputation in the parties' religious community and subject her to gossip and scorn.

The Court finds that father's posing, taking and posting of the photo of the parties' child (then less than one year old) with a cigarette in his mouth was in poor taste, even if intended as a joke, and causes the Court to question father's maturity.

The issue of free speech versus the May 24, 2018 orders was argued to some degree at the contempt hearing. Father first raised this defense in his answer to the contempt complaint yet the issue merited but a portion of a single sentence: "the Husband denies that the Court has the authority to issue the prior restraint on speech contained in the May 24, 2018 Temporary Order". Neither party submitted memoranda of law to the Court before, during or after the contempt hearing on this issue, significant given the common placement of such non-disparagement orders in Probate and Family Court orders. Non-disparagement provisions are also frequently contained within documents such as divorce separation agreements and contempt complaints deriving therefrom. Counsel for the parties agreed that there seemed not to be any case law on point in the context of domestic relations matters. Consequently, the trial court reviewed the law on free speech and its permitted constraints.

CASE LAW:

Tiberius Quinn v Gioni, 89 Mass. App. Ct. 408 (2016), involved extension and vacate of a District Court 209A abuse prevention order which included a provision restricting defendant's ability to post information about plaintiff online. Plaintiff claimed the defendant was inciting others through his online postings to threaten and harass her. The district court ordered defendant "not to post any further

information about her or her personal life online or to encourage the mobs". Defendant argued that the provision impermissibly interfered with his First Amendment rights and was also "overly broad". The Appeals Court declined to reach the free speech argument, but only for reason of mootness and also said that defendant had not briefed the First Amendment issues at all.

In Care and Protection of Edith & others, 421 Mass. 703 (1996), a district court judge ordered that the father of children not "discuss any aspect of the ongoing proceedings with any member of the media... If it is reasonable to believe that the information communicated will lead to the identity of the subject children." Other specific court orders were : "No party.... shall directly or indirectly release to any member of the media, any photograph or likeness of the children while the subject of this petition." ; "No party shall directly or indirectly release to any member of the media any information pertaining to the children's past or present psychological and/or physical condition if said information could reasonably be associated with the children by one not a party to this proceeding."; "No party to this action shall discuss any aspect of the ongoing proceedings with any member of the media or permit anyone else to discuss such proceedings on his or her behalf and direction if it is reasonable to believe that the information communicated will lead to the identity of the subject children." The defendant objected to any limitations on his right to criticize the way that the government agency (then known as Massachusetts Department of Social Services) handled his children's care and protection proceeding and handled such cases in general. Citing Alexander v. United States, 509 U.S. 544 (1993), the First Amendment of the Constitution of the United States and Article 16 of the Massachusetts Declaration of Rights, the Supreme Judicial Court described such orders as a "classic" example of a prior restraint and declared that the constitutional principles that govern our consideration of the challenged order are well established and are not significantly different between federal and state protections as to free speech. The Court also criticized the lack of hearing and factual findings before these orders were issued.

In Commonwealth v. Norman Barnes, et al, 461 Mass. 644 (2012) were raised the issues of free speech of the press to report and the broad availability to the public via Internet "livestreaming" in a criminal dangerousness hearing during which a minor sex assault victim's name was disclosed in open court. The district court judge ordered the redaction of the name of the alleged victim from an audio and video recording and ordered a temporary stay of public access to an archive of that recording. That case is not directly on point with our Shak case, given that the balance of interests and public policy concerns centered around the defendant's ability to receive a fair trial in future proceedings against him, the press freedom to report, and the public interest in transparency of court proceedings. But Barnes did address what was central to the resolution of the Shak case: freedom of speech guaranteed by the First Amendment as well as Massachusetts Article 16. The issues in Barnes are center stage in our Shak case: Probate and Family Court orders not to speak or write, issued in a domestic relations case in pursuit of circumscribing conduct vexing to a spouse and which, presently or in the future, may also affect child best interests. The Internet platform exponentially and in perpetuity magnifies the availability of that potentially harmful speech, no matter how free. In Barnes, the SJC decided that the "prior restraint" doctrine applies to administrative and judicial orders forbidding certain communications when the orders are issued in advance of the time that such communications are to occur.

Court orders such as temporary restraining orders and permanent injunctions that actually forbid speech activities are classic examples of prior restraints. In Barnes, there was the additional public policy

ingredient: protecting from public consumption the identify of a 15-year-old minor female alleged to be the victim of forced prostitution. The SJC recognized sensitivities of adolescents to "invasions of privacy" and was also mindful of "at least a reasonable likelihood that the recording and public archiving of the dangerousness proceedings would cause emotional distress and related harm to the minor if she were to be accidentally identified". Referring to Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), Barnes recognized that "safeguarding the physical and psychological well-being of a minor" may be a compelling interest, but a determination of the measures necessary to protect that interest must occur on a case-by-case basis considering factors such as the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives." Barnes criticized the Commonwealth's argument about psychological or physical harm resulting from broad publicity about the charges and the minor female's connection to them because the Commonwealth failed to provide affidavits or other evidence that would enable the judge to verify these contentions; nor did the Commonwealth present evidence relating to the particular minor's psychological state or the extent to which she or her family had sought privacy. Barnes found that it was at least a reasonable likelihood that the recording and archiving of the proceedings would cause emotional distress and related harm to the minor if she were to be accidentally identified. Barnes also discussed the issue whether forbidding the posting of the archived recording on a website was a less (but not necessarily the least) restrictive reasonable alternative available. The government failed to show that forbidding the "posting" of the archived recording on the Internet was the least restrictive reasonable alternative. The ordered restraint (name redaction) lacked detailed findings of fact necessary to demonstrate that no reasonable less restrictive alternative to the order would protect the minor's privacy interest.

Globe Newspaper Co. v. Superior Court, 457 U.S.596, 607-608 (1982) held that safeguarding the physical and psychological well-being of a minor may be a compelling interest but the determination of the measures necessary to protect that interest must occur on a case-by-case basis, considering factors such as the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives. Such evidence must be produced such as affidavits or some sort of expert testimony.

Commonwealth v Johnson, 470 Mass. 300 (2014) recognized a "hybrid" of conduct and speech where the speech was integral to establishing the commission of the crime of criminal harassment under M.G.L. ch. 265 sec. 43A. This case involved neighbors with adjoining properties and the constitutionality of the criminal harassment statute and its application to acts of cyber harassment. The Court considered whether a pattern of harassing conduct that includes both communications made directly to the targets of the harassment and false communications made to third parties through Internet postings solely for the purpose of encouraging those parties also to engage in harassing conduct toward the targets can be constitutionally proscribed by the statute. They also considered whether, to the extent that this pattern of conduct includes speech, that speech is protected by the First Amendment or is unprotected speech integral to the commission of the crime. The goal of the defendants' online postings was to encourage unwitting third parties to repeatedly contact and harass the victims at their home or by telephone. The defendant's conduct included speech that was not protected by the First Amendment but was rather integral to criminal conduct. The Court may also consider whether the pattern of conduct would cause a reasonable person to suffer substantial emotional distress. Where the sole purpose of the defendant's speech was to further his endeavor to intentionally harass the victims, such speech is not protected by

the First Amendment and does not provide a defense to criminal charge simply because the actor uses words to carry out his illegal purpose. Speech or writing used as an integral part of conduct in violation of a valid criminal statute is not protected by the First Amendment. These were not "fighting words" which are a well defined and limited category of speech that is not protected because it does not represent an essential part of any exposition of ideas or are of such slight social value as a step to truth that whatever meager benefit that may be derived from them is clearly outweighed by the dangers they pose. Speech and conduct frequently overlap and may be incapable of precise differentiation. It is apparent that cyber harassment will consistently involve a hybrid of speech and conduct. There is content within the communications but the very act of using the Internet as a medium through which to communicate implicates conduct. The victims' fear and anxiety were real and actual, not hypothetical. The fear was not the uneasiness associated with day-to-day living but rather the outcome of the ominous and hostile acts perpetrated by the defendants which continued to escalate and the totality of the situation evoked the type of serious negative emotional experience required under the statute. The Johnson court noted that there is no criminal invasion of privacy statute in Massachusetts.

O'Brien v Borowski, 461 Mass. 415 (2012) involved a police officer who had charged a party with a crime and the party later gave the officer the "middle finger". The SJC found the civil harassment law, Chapter 258E, effectuated legislative intent and the definition of harassment did not include constitutionally protected speech, confining the meaning of harassment to either "fighting words' or "true threats". The SJC decided that Chapter 258E is not constitutionally overbroad because it limits the scope of prohibited speech to constitutionally unprotected true threats and fighting words. There may be types of threats that contain ideas or advocacy such as a threat to picket an organization if it does not yield to a demand to take some social or political action. Such a threat may cause a fear of economic loss of unfavorable publicity or defeat at the ballot box but such fears cannot be enough to make the threat a "true threat" that may be prohibited as civil harassment. Because the trial court order lacked any findings, the SJC did not decide the issue whether the "middle finger" was protected free speech. Instead the Court was confined to a general analysis of the civil harassment statute and concluded that the statute's requirements ("three or more acts of willful and malicious conduct and that a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property") applied only to speech that was "fighting words" or "true threats" and thus did not constitutionally infringe free speech. There is no "reasonable person" requirement in the statute to muddy the free speech issue. The SJC repeated the Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) analysis that there are certain well-defined and narrowly limited classes of speech that are not protected because they are no essential part of any exposition of ideas and are of such slight social value is clearly outweighed by the dangers they pose. The "middle finger" without accompanying conduct of a threat nature did not fall into the definition of abuse, were not a true threat or fighting words because abuse as defined in Chapter 258E includes the act of attempting to cause or causing physical harm to another while placing another in fear of imminent serious physical harm.

Thus the SJC's balancing test roadmap as applied to Probate and Family Court non-disparagement orders is:

(1) is the speech free;

(2) is the order a restraint;

(3) what harm does the Probate and Family Court seek to restrain;

(4) what is the governmental public interest to be served by the ordered restraint;

(5) is that public interest compelling;

(6) is the ordered restraint the least restrictive reasonable alternative.

RATIONALE:

Given the findings of fact, and applying the relevant constitutional guidelines, the required analysis for the Probate and Family Court as to non-disparagement orders in domestic relations cases (but excluding 209A restraining orders) is:

Both paragraphs 6 and 7 of the May 24, 2018 temporary orders are a classic form of speech restraint.

A portion of paragraph 6 implicates a different government interest : "Neither party shall disparage the other – nor permit any third party to do so – **especially when within hearing range of the child**" (emphasis added). Although "within the hearing range of the child" may not constitute a clear and unequivocal order to sustain a complaint for contempt, it is sufficiently clear from a due process notice standpoint to inform father of what he is not to do. But as to the free speech issue, notwithstanding the young age of the child and the cognitive limitations inherent with that age, the Court credits that portion of the order because it serves to protect the best interest of the child not to be exposed to the rancor between parents and that interest will continue to be served as the child matures. That is a compelling government interest which justifies limiting specific disparaging speech uttered within hearing of the child. Although no arithmetic limits are contained within the order, "within hearing" is susceptible to common interpretation and sufficiently describes the proscription.

But In their current form, the rest of paragraph 6 ("Neither party shall disparage the other – nor permit any third party to do so ....") and the entirety of paragraph 7 ("Neither party shall post any comments, solicitations, references, or other information regarding this litigation on social media") are problematic when scrutinized in the light of the free speech case law.

The first and most obvious is the prohibition that each party shall not permit third parties to disparage the other party. There is a question of the ability of a party to control speech and conduct of third parties and, to the extent that it were possible, whether the third parties may also have free speech interests. The better order would prohibit either party from permitting the minor child to be within hearing of third parties who are in the midst of verbally disparaging one of the parents or an order which prohibits either party from showing to or permitting a minor child to access such video, audio or written disparagement.

The balance of paragraph 6 ("Neither party shall disparage the other.....") and all of paragraph 7 ("Neither party shall post any comments, solicitations, references, or other information regarding this litigation on social media") run afoul of the overbroad prohibition and are classic examples of free speech which are neither "fighting words" nor "true threats".

Paragraph 7 would, for example, prohibit both parties from merely posting the date of an upcoming hearing, what may be an innocuous piece of information bereft of any negative connotation.

Father's social media postings on Facebook as to his opinions and assessments of mother and the divorce litigation may or may not constitute defamation but the First Amendment and Article 16 dictate that he is free to speak/write/post them and Probate and Family Court orders to restrain these are constitutionally impermissible no matter how narrowly crafted, except as below and only when children are in the government interest equation.

Such free speech which identifies or implicates minor children of a party should compel heightened scrutiny, especially when the speech are posted to social media platforms to be viewable in perpetuity.

In circumscribing such speech, there is a compelling governmental interest: to protect minor children from the threat of harm and repercussions of unbridled commentary about family dirty laundry aired in a public and infinite domain: the Internet and social media. That portion of paragraph 6 as to the child is sufficiently narrow and necessary to protect against the harm; there is no reasonable available less restrictive alternative to the order. Here, the father was distributing/posting information on social media in a manner that he knew would have a certain effect; he specifically targeted an audience that knew both he and mother: members of their social and religious communities. The nature of the information was derogatory to mother and might harm her public or professional business reputation. But the free speech case law is clear that such public or professional business harm does not supersede father's right to utter or post such disparagement even if it did result in such harm and even if mother could establish harm to her reputation in the religious community and a decrease in the demand for her professional services and thus reduced income.

Not reached in the Shak case but nevertheless capable of repetitive litigation in the thousands of domestic relations cases that flood our courts each year are cases of restraining order and domestic relations protective orders which serve the important public policy interests of protecting victims or potential victims of violence due to gender, marital or parental relationships. To this compelling interest, our Probate and Family Court judges have issued orders prohibiting 209A defendants from any means of "contact" with plaintiffs including posting on the Internet or through third parties. Even if there were no disparagement element to such speech, should judges be prohibited from these types of orders by free speech guarantees or is the public policy interest (protecting victim from further fear or intimidation or harassment) more compelling and trump the constitutional guarantee.?

There is a separate scrutiny of what otherwise may be protected free speech; the long recognized public policy interest in the Commonwealth of preserving a child's best interest which necessarily includes being shielded from parental combat, with the analysis distinguished by age of the affected child. Notwithstanding the lack of research or other evidence provided by the litigants to the Court in the Shak case, the Court takes judicial notice based on the hundreds if not more cases it has heard in the Probate and Family Court which have demonstrated the pernicious effects on minor children, of all ages beyond infant cognition, of parental disparagement to which the children were exposed, whether in person or through internet or social media postings. Even those minor children unable to comprehend such disparagement in the here and now will become able to later discover such upsetting postings which are preserved in perpetuity by the internet, to be culled, savored, and disseminated by family, gossipers, antagonists and the general public in and beyond the community of the parties. That harm is not merely confined to the child's knowledge.

There is an unassailable public policy interest in protecting children from potential harm in having peers hear and see parental disparagement posted by one parent or another or re-posted, shared, "liked" or

disseminated by family members who have decided to join the fray. Once posted on social media and re-posted, there are no means to permanently delete and ensure future non-sharing or dissemination of disparaging materials such as naked photos, so-called "revenge porn", compromising text messages, or less provocative yet still hurtful disparagement.

Without some narrowly crafted and least restrictive orders, speech and writing no matter how profane, provocative or untrue about the other half on social media seems protected unless "fighting words" and "true threats" which apply to parties of all stripes not just duelists in domestic relations litigation. Even speech which demonstrably and statistically affects the other parent's economic bottom line, professional or social reputation seems protected.

The notion of what constitutes "disparagement" is also fluid and may in some cases be in the eyes of the offended. Other forms of disparagement can readily be identified by their connection to gender or genitalia: the "C" word, "B" word, and others in the same rhetorical specie. According to free speech, these comments uttered or written in the context of a heated divorce or custody battle (where there are no children involved) have no more protection than a plumber who is maligned by a poor review posted on the Internet or a business site dedicated to rating professional or commercial expertise and customer satisfaction. In the Court's view, the existence of children heightens the compelling interest and demand for scrutiny against those free speech.

The Court takes judicial notice of the real possibility that once posted on whatever platform of social media, disparagement has left the control of the poster and subsequent destinations remain free to re-post, share, "like", or transform into other mediums for public viewing by present and future generations not only of family members but others important to the well-being and nurturing of children: peers, teachers, religious and social communities, extended and remote family members. More sinister, such information is ultimately available for trolling by persons with bad intent.

While recognizing the compelling governmental interest in restraining speech disparaging to a parent in a way that a child might now or in the future be adversely affected, such restraint orders must be narrowly tailored and child- centric. Such limitation serves as a less restrictive alternative to shutting down all disparagement which free speech protects against.

A special carve-out is already in place to protect proven victims of gender-based violence such as plaintiffs in Chapter 209A restraining orders (no "contact" even by otherwise protected free speech); domestic relations protective orders pursuant to Chapter 208 section 34B; and Chapter 208 section 18 orders prohibiting restraint of personal liberty which arguably cover disparaging language (" the probate court in which the action for divorce is pending may..... prohibit..... from imposing any restraint upon his or her personal liberty during the pendency of the action for divorce..... The court may make such further order as it deems necessary to protect either party or their children, to preserve the peace or to carry out the purposes of this section relative to restraint on personal liberty.") Section 18 has come to serve somewhat different purposes. The statute allows a judge to respond with some immediacy and flexibility to harassing behaviors that may be temporarily exhibited by parties during divorce proceedings but which do not rise to the level of abuse justifying intervention under chapter 209A (quoting from Hennessey v. Sarkis, 54 Mass. App. Ct. 152 (2002). These statutes also come under free

speech scrutiny when only disparaging language is complained of and when the free speech is uttered, written or posted in furtherance of or accompanied by criminal conduct in such a way as to strip the free speech protection (see Johnson, above, where the defendant's conduct included speech that was not protected by the First Amendment because it was integral to criminal conduct).

Chapter 208 sections 28 and 28A permit the Probate and Family Court to enter permanent and temporary orders regarding the care of children. "Upon a judgment of divorce, the court may make such judgment as it considers expedient relative to the care, custody and maintenance of the minor children of the parties and may determine with which of the parents the children or any of them shall remain... for the benefit of the children. " Section 28A states "(d)uring the pendency of an action seeking a modification of the judgment for divorce .... the court may make temporary orders relative to the care, custody maintenance of such children. Every order entered relative to care and custody shall include specific findings of fact made by the court which clearly demonstrate the injury, harm or damage that might reasonably be expected to occur if relief pending a judgment of modification is not granted." The Court has similar authority to issue orders for the best interests of children born to parents who are not married to each other. See chapter 209C section 15 ("....the court may..... issue a temporary order or final judgment including a vacate, restraining or no – contact order to protect a party or child"). Violations of such orders may be prosecuted criminally.

JUDGMENT ON COMPLAINT FOR CONTEMPT:

In order to find a defendant in civil contempt there must be a clear and unequivocal order (see Larson v. Larson, 28 Mass. App. Ct. 338 (1990) and the defendant must have willfully violated the order as determined by clear and convincing evidence. (See Richard G. Birchall, 454 Mass. 837 (2009).

As to Paragraph 6 of the Court's May 24, 2018 temporary orders ("Neither party shall disparage the other – nor permit any third party to do so – especially when within hearing range of the child"): the order constitutes an impermissible restraint on free speech protected by the United States Constitution First Amendment as well as Article 16 of the Massachusetts Declaration of Rights.

Father is not in contempt as to disparagement of mother.

Father is not in contempt as to disparagement of mother within the hearing of the child, given the child's age and level of cognition.

Father is not in contempt as to the order portion "nor permit any third party to do so" because it presents an impossibility and is beyond father's ability to control.

As to Paragraph 7 of the Court's May 24, 2018 temporary orders ("Neither party shall post any comments, solicitations, references, or other information regarding this litigation on social media."): the order constitutes an impermissible restraint on free speech protected by the United States Constitution First Amendment as well as article 16 of the Massachusetts declaration of rights. Father is not in contempt.

The Court does find that "disparagement" is capable of common understanding and is not vague or overly broad despite the innumerable words and phrases in which it may be expressed.

FURTHER ORDERS ON FUTURE DISPARAGEMENT:

Given the special case of minor children and their need to be protected from the disharmonious disparagement exchanged by their parents, given the potentially infinite dissemination of such disparagement over the Internet and social media to third persons and strangers, the Court issues the following orders with the intention that they constitute the least restrictive alternative but foster the compelling public interest in protecting minor children which must supersede constitutionally protected speech. The State has a compelling interest in protecting children from being exposed to disparagement between their parents and from being exposed on Internet and social media to third persons who may be able to identify and locate the children for nefarious or other purposes harmful to the child. The Court's use of the age of fourteen as the cut-off is purposeful and guided by the Massachusetts Uniform Probate Code which permits children who have reached the age of fourteen to self- petition for guardianship; further, that age has been recognized by the courts as conferring upon those children a voice in custody and parenting time disputes.

1) Until the parties have no common children under the age of 14 years old, neither party shall post on any social media or other Internet medium any disparagement of the other party when such disparagement consists of comments about the party's morality, parenting of or ability to parent any minor children. Such disparagement specifically includes but is not limited to the following expressions: "cunt", "bitch", "whore", "motherfucker", and other pejoratives involving any gender. The Court acknowledges the impossibility of listing herein all of the opprobrious vitriol and their permutations within the human lexicon.
2) While the parties have any children in common between the ages of three and fourteen years old, neither party shall communicate, by verbal speech, written speech, or gestures any disparagement to the other party if said children are within 100 feet of the communicating party or within any other farther distance where the children may be in position to hear, read or see the disparagement.
3) With respect to any child they have in common, neither party shall post on any social media or other Internet medium any photos of said child or children with a cigarette, cigar, or any other smoking device in the child's mouth or otherwise pose the child in a manner which would cause the Court, upon proof furnished, to doubt the party's maturity to parent the minor child.
4) Neither party shall post on any social media or other Internet medium, specifically including but not limited to dating websites or other sites for the purpose of meeting other persons for relationships, romance, or sexual relations any photos of or videos of any minor child the parties have in common. Either party shall be permitted to post photos or video of the minor child on social media but only if posted in such a way as to control access to a group consisting solely of family members of either party related by blood or marriage.

Date: OCTOBER 24, 2018

George F. Phelan, Judge

Probate and Family Court

COMMONWEALTH OF MASSACHUSETTS

TRIAL COURT

PROBATE AND FAMILY COURT DEPARTMENT

Norfolk County Case Number 18D0158DR

Masha M. Shak, Plaintiff ("Mother")

v.

Ronnie Shak, Defendant ("Father")

The Trial Court hereby reports this case because it involves novel, systemic and important matters which appear in many if not most temporary orders and divorce agreements in the Probate and Family Court: "Non-Disparagement" orders, their enforceability via contempt complaint, and constitutionally protected speech. After hearing on a contempt complaint in an ongoing divorce complaint, this Court on October 24, 2018 issued a finding of no contempt but issued further temporary orders of non-disparagement in the ongoing divorce. The trial Court hereby **STAYS** the ORDERS issued on October 24, 2018.

REPORT PURSUANT TO Mass. R. Dom. Rel. P. 64(a)

Question: Are "Non-Disparagement' orders an impermissible restraint on constitutionally protected free speech.

Question: Are "Non-Disparagement" orders enforceable and not an impermissible restraint on free speech when there is a compelling public interest in protecting the best interests of minor children.

Designation of Appellant: The Trial Court hereby designates as aggrieved party the Plaintiff ("Mother") Masha M. Shak.

Date OCTOBER 24, 2018

George F. Phelan, Judge

Probate and Family Court

United States Code Annotated
Constitution of the United States
Annotated
Amendment I. Religion; Speech and the Press; Assembly; Petition

U.S.C.A. Const. Amend. I-Full text

Amendment I. Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances

Currentness

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const Amend. I--Establishment clause; Free Exercise clause>

<USCA Const Amend. I--Free Speech clause; Free Press clause>

<USCA Const Amend. I--Assembly clause; Petition clause>

U.S.C.A. Const. Amend. I-Full text, USCA CONST Amend. I-Full text
Current through P.L. 116-5. Also includes P.L. 116-8. Title 26 current through 116-12.

End of Document

Massachusetts General Laws Annotated
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Part the First a Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts

M.G.L.A. Const. Pt. 1, Art. 16

Art. XVI. Liberty of the press; free speech

Currentness

ART. XVI. The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged.

Notes of Decisions (727)

M.G.L.A. Const. Pt. 1, Art. 16, MA CONST Pt. 1, Art. 16
Current through amendments approved February 1, 2019

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Massachusetts General Laws Annotated
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Articles of Amendment

M.G.L.A. Const. Amend. Art. 77

Art. LXXVII. Annulment of Pt. 1, Art. 16, and adoption of new Article relating to liberty of the press and free speech

Currentness

ART. LXXVII. Article XVI of Part the First is hereby annulled and the following is adopted in place thereof:

[See Pt. 1, Art. 16, for text]

Notes of Decisions (1)

M.G.L.A. Const. Amend. Art. 77, MA CONST Amend. Art. 77
Current through amendments approved February 1, 2019

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Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title I. Courts and Judicial Officers (Ch. 211-222)
Chapter 215. Probate Courts (Refs & Annos)

M.G.L.A. 215 § 13

§ 13. Reservation and report of case to appeals court

Currentness

A judge of the probate court by whom a case or matter is heard for final determination may reserve and report the evidence and all questions of law therein for consideration of the appeals court, and thereupon like proceedings shall be had as upon appeal. And if, upon making an interlocutory judgment, decree or order, he is of opinion that it so affects the merits of the controversy that the matter ought, before further proceedings, to be determined by the appeals court, he may report the question for that purpose, and stay all further proceedings except such as are necessary to preserve the rights of the parties.

Credits
Amended by St.1973, c. 1114, § 68; St.1975, c. 400, § 59.

Notes of Decisions (42)

M.G.L.A. 215 § 13, MA ST 215 § 13
Current through Chapter 9 of the 2019 1st Annual Session

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Massachusetts General Laws Annotated
Massachusetts Rules of Domestic Relations Procedure (Refs & Annos)
VIII. Provisional and Final Remedies and Special Procedures (Refs & Annos)

Massachusetts Rules of Domestic Relations Procedure(Mass.R.Dom.Rel.P.), Rule 64

Rule 64. Report of Case

Currentness

(a) Courts Other Than District Court. The court, after verdict or after a finding of facts under Rule 52, may report the case for determination by the appeals court. If the trial court is of opinion that an interlocutory finding or order made by it so affects the merits of the controversy that the matter ought to be determined by the appeals court before any further proceedings in the trial court, it may report such matter, and may stay all further proceedings except such as are necessary to preserve the rights of the parties. The court, upon request of the parties, in any case where the parties agree in writing as to all the material facts, may report the case to the appeals court for determination without making any decision thereon. In an action commenced before a single justice of the supreme judicial court, the court may report the case in the circumstances above described to either the appeals court or the full supreme judicial court; provided further that a single justice of the supreme judicial court may at any time reserve any question of law for consideration by the full court, and shall report so much of the case as is necessary for understanding the question reserved.

(b) District Court. Report of a case or a ruling by the court to the Appellate Division shall be governed by District/ Municipal Courts Rules for Appellate Division Appeal 5.

Massachusetts Rules of Domestic Relations Procedure (Mass. R. Dom. Rel. P.), Rule 64, MA ST DOM REL P Rule 64
Current with amendments received through February 15, 2019.

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