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# *Attorney Kimberley Keyes reviews an SJC decision placing limits on orders that restrict parents from disparaging each other in divorce and child custody cases.*

What do court orders forbidding publication of 1) classified government secrets, 2) a confession by an accused mass-murderer and 3) nasty comments about your soon-to-be-ex-spouse on Facebook, have in common? They are all unconstitutional "prior restraints" on free speech, according to a recent decision of the Massachusetts Supreme Judicial Court.

In Shak v. Shak (2020), the SJC struck down a Probate and Family Court judge's order prohibiting the parties in a pending divorce case from posting derogatory comments about each other's morality or parenting on social media, and from disparaging each other within earshot of their young child. In so doing, the state's highest court has forbidden family-court judges from issuing non-disparagement orders – which are *de rigeur* in many child custody and divorce cases involving children – in many cases, unless the parties agree in advance to such restrictions.

In reality, disparagement clauses are often difficult to enforce unless you have irrefutable proof of the disparagement (such as a printout from social media) – and even then, clear violations often only result in a slap on the wrist in contempt proceedings. Nevertheless, divorce lawyers routinely include such terms in divorce and custody agreements to remind parents that it is detrimental to their children when parents bad-mouth one another.

The SJC's decision may now empower litigants to simply refuse to agree not to disparage the other parent, knowing the court most likely cannot force them to do so. However, the SJC's decision may have little impact

in modification cases, which is the context most major child custody related decisions are made.

## Divorce judge enters temporary orders banning disparagement by either party

The parties in *Shak* were married for some 15 months and had a child who was a year old when the wife filed for divorce in February 2018. After a hearing, a Norfolk Probate and Family Court judge issued temporary orders that included the following terms: "6. Neither party shall disparage the other – nor permit any third party to do so – especially when within hearing range of the child. 7. Neither party shall post any comments, solicitations, references or other information regarding this litigation on social media." Variations on the first sentence, which applies to oral disparagement in front of the children, is routinely included in temporary orders where the parties have minor children. The second sentence, which applies to posting on social media, is somewhat less common, but by no means unusual in Probate & Family Court orders.

Following the order, the husband allegedly posted derogatory comments about the wife, and details about the divorce, on social media, prompting the wife to file a Complaint for Contempt for violating custody and parenting orders, including the disparagement clause. In his answer to the Complaint, the husband questioned the court's authority "to issue [a] prior restraint on speech." Judge George F. Phelan, who had not issued the original temporary order, presided over the contempt hearing.

Recognizing the fee-speech interests at stake, Judge Phelan declined to find the husband in contempt, and attempted to craft a new, narrowly tailored order that would pass constitutional muster. The new order prohibited the parties, until their child turned 14, from posting online any disparaging comments about the other's morality or parenting ability, and included an explicit (though not exclusive) list of pejorative terms that were forbidden (and that one rarely, if ever, sees in a court order, never mind an SJC opinion!) It also prohibited the parties from saying, writing or gesturing any disparagement to each other if the child was within 100 feet of the communicating party or was otherwise able to hear, read or see the disparagement.

Judge Phelan then stayed the order and asked the state's intermediate appellate court, the Appeals Court, to weigh in on the issue. The SJC stepped in at the wife's request to review the "correctness" of the new order. (It is

worth noting that the practice of Probate & Family Court judges arbitrarily referring cases for further appellate review – instead of allowing one party to appeal a decision – is not without controversy. Some practitioners feel that such referrals create unnecessary burdens, including stress and costs, for ordinary parents who do not necessary want or need to litigate an appeal. Arguably, if Judge Phelan felt the order could be unconstitutional, he should have found that the father was not in contempt on constitutional grounds and given the mother the option of filing an appeal. Instead, Phelan entered a new order that he immediately stayed before sending the case to the SJC for a lengthy and costly appeal process.)

# Prior Restraints are Presumed Unconstitutional

In the world of First Amendment law, orders requiring "prior restraint" – which is a court order forbidding certain communication before the communication is even made – are a big no-no. One of the most famous "prior restraint" cases is New York Times Co. United States, 403 U.S. 713 (1971), also known as "the Pentagon Papers case." There, the U.S. Supreme Court held that, despite the potential threat to national security, a federal judge could not stop the New York Times and Washington Post from publishing the contents of a classified study entitled "History of U. S. Decision-Making Process on Viet Nam Policy." The opinion was a resounding victory for freedom of the press.

Five years later, in Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), SCOTUS deemed prior restraints "the most serious and least tolerable infringement on First Amendment rights." In that case, a trial-court judge barred the media from publishing or broadcasting accounts of confessions made by a man who was facing the death penalty for allegedly killing six members of a Nebraska family. The gag order was necessary, the judge reasoned, to preserve the defendant's right to a fair trial. The U.S. Supreme Court disagreed, noting that the judge could have taken other, less restrictive steps to ensure a fair trial, such as changing the venue, thoroughly questioning potential jurors as to their impartiality, and sequestering the jury during the trial. The high court invalidated the order.

Although not unconstitutional *per se*, prior restraints are heavily disfavored, and permissible "only where the harm expected from the unrestrained speech is grave, the likelihood of harm occurring without the prior restraint in place is all but certain, and there are no alternative, less restrictive means to mitigate the harm." *Shak*, citing *Nebraska Press Ass'n*, supra. It is worth pointing out that many "prior restraint" cases involve orders preventing the press from

reporting on matters of public interest. First Amendment rights are particularly important in criminal cases because media coverage subjects police, prosecutors and courts to extensive public scrutiny and criticism and therefore enhances the likelihood of a fair trial, where the outcome can literally mean the difference between life and death.

## Applying free speech principles to non-disparagement orders

In analyzing the constitutionality of the family-court's order in the *Shak* case, the SJC looked not only to federal precedent but also studied Massachusetts case law, including Care and Protection of Edith, 421 Mass. 703 (1996). There, the SJC vacated a court order prohibiting the father in a care-and-protection proceeding – during which he was deemed unfit and the Department of Social Services (now the Department of Children and Families) took custody of his children – from talking to the press about his case. Such an order, the SJC determined, was "an unlawful prior restraint on the right of the children's father to comment on the judicial proceedings and on the conduct of the department." This logic aligns with the unfettered right of the media to cover criminal cases: Shining a light on government action helps ensure that citizens are treated fairly.

In *Shak*, the SJC applied the three-pronged *Nebraska Press Ass'n* test to the non-disparagement order issued by the Probate and Family Court. It found that Judge Phelan "properly noted" the state "has a compelling interest in protecting children from being exposed to disparagement between their parents." However, in the circumstances here, "[n]o showing was made linking communications by either parent to any grave, imminent harm to the child." The court noted there was "no evidence" that the child (a toddler) heard or understood the father's allegedly disparaging speech or was able to read or access social media. There was also no evidence that the child had any particular physical, mental or emotional condition that would make him "especially vulnerable" to harm caused by exposure to the father's alleged disparagement of the mother. The court dismissed the mother's concern that the child could be damaged if he read the derogatory posts in the future as "speculative." Concluding that there was no showing of "grave or certain" harm to the child as a result of the disparaging speech, the SJC held that the order was unconstitutional.

The Court did cite other remedies short of a prior restraint that are available in cases where disparaging speech by one parent about the other are at issue. First, the parties can voluntarily agree not to disparage each other; such a written agreement can then be entered as a temporary order or judgment that is enforceable by the court. Second, parents who are the victims of disparagement by their ex may also seek a harassment protection order under G.L. c. 258E. (The Court failed to note that such parent must prove three or more instances that meet the constitutional definition of harassment, making that option less likely to be successful.) They can also, according to the SJC, sue their ex for intentional infliction of emotional distress, or defamation (again problematic, since an expression of "opinion" usually cannot support a defamation claim).

## SJC Decisions Does not Protect Disparaging Parents from Changes in Custody

The SJC decision included commentary that is critically important for family law attorneys and litigants, inasmuch as the Court noted that disparaging the other parent can be "factored into any subsequent custody determinations." The key word here is "subsequent," meaning the disparaged parent would have to file a complaint for modification in order to possibly get relief (unless the disparagement occurred after a temporary order but still during the pendency of the divorce or paternity matter, in which case the court could take it into account in the final judgment).

This observation is crucial because it means that a parent who disparages the other in the presence of the child (or on social media) is not immune from consequences. The SJC decision only applies to orders preventing *future* speech. Evidence that one parent disparaged the other in the presence of the child can continue to be used in cases in which a parent seeks a change in custody due to the other's bad behavior. In this way, the opinion is perhaps not as earth-shattering for family law practitioners as it might appear. Although *Shak* may offer some protection in contempt actions, the real action in child custody contexts is often in modification cases, which deal with a parent's past behavior. To the extent that a parent's past behavior includes disparagement, the *Shak* case offers little protection to that parent in the modification context, where disparagement is a form of "bad parenting" that judges will continue to take into account.


# Freedom of Speech vs. the Protection of Children

The SJC ended its opinion by stating, “Of course, the best solution would be for parties in divorce and child custody matters to rise above any acrimonious feelings they may have, and, with the well-being of their children in their minds, simply refrain from making disparaging remarks about one another.” Which, to family-law practitioners, frankly sounds at best naïve and at worst, completely out of touch with reality. If most parents were able to do that, non-disparagement clauses would be a rarity instead of the norm.

As a former journalist and media lawyer who now practices family law, this opinion leaves me feeling conflicted. Of course, I support freedom of speech and of the press, and agree that prior restraints must be reviewed with a heavy presumption against their constitutionality. But I can’t help noticing that most of the cases the SJC relied on to support its holding in *Shak* involved gag orders that prevented the public from scrutinizing governmental action. Are those crucial public interests really equal to the interest one disgruntled parent has in denigrating the other in front of their children? Is it fair that the object of their ex’s hateful speech must prove their child is particularly vulnerable to harm if exposed to such vitriol? Isn’t there already broad agreement that *all* children are damaged by one parent’s disparagement of the other? On the other hand, perhaps most litigants will agree voluntarily not to disparage one another, if only for the sake of optics (if not the sake of their children).

**About the Author:** Before law school, Attorney Keyes worked as a newspaper reporter and editor in several South Shore communities, including Kingston. After becoming an attorney, she served as Distinguished Fellow for the Reporters Committee for Freedom of the Press outside Washington, D.C.

**Schedule a free consultation with Kimberley Keyes today at (781) 253-2049 or send her an email.**