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Divorcing Parents Have a Right to Post Their Stories Online, Court Says

A ruling in Massachusetts finds that involuntary nondisparagement orders, commonly used to keep spouses from discussing their cases on social media, are unconstitutional.

By Ellen Barry

May 9, 2020

The acrimonious split of Masha and Ronnie Shak ended up where many divorces do these days — on Facebook.

As the proceedings unfolded, Mr. Shak offered a running commentary on social media, shared with the couple's rabbi, assistant rabbi and members of their synagogue, court documents show.

He created a GoFundMe page entitled "Help me KEEP MY SON." He called his ex-wife an "evil liar." He illustrated the posts with a video of their one-year-old son, and told their friends to unfriend her.

That was until a probate court judge banned Mr. Shak from posting on social media about his divorce, a common practice known as a nondisparagement order.

A ruling this week by the Massachusetts Supreme Judicial Court, stemming from the Shaks' divorce, found such bans to be unconstitutional, a decision that could have broad implications in the state.

"As important as it is to protect a child from the emotional and psychological harm that might follow from one parent's use of vulgar or disparaging words about the other, merely reciting that interest is not enough to satisfy the heavy burden" of

restricting speech, Justice Kimberly S. Budd wrote in a 13-page ruling.

Jennifer M. Lamanna, a lawyer who represented Mr. Shak in the appeal, called the ruling a "game-changer" because family and probate judges in the state frequently give such orders, and treat violations as contempt of court, carrying severe penalties.

"There are thousands of these out there, which is why this is, for Massachusetts purposes, a landmark ruling," she said. "People ask for them routinely and they are just handed out."

She said the orders, used for decades to control disparaging speech, have been expanded in recent years to focus on social media.

Under such orders, she said, "my client could write a nasty letter to everyone he knows, but he's not allowed to put it up on social media. You can whisper in your synagogue, make nasty remarks about your ex-wife, but you can't put it up on Facebook."

Ms. Shak's attorney, Richard M. Novitch, said the ruling had an immediate, negative effect, prompting Mr. Shak to resume his postings on social media. "Within the last 24 hours of the Shak case being issued by the S.J.C., he's right back at it, blowing up on social media," he said. "There's nothing that stops him."

While Mr. Novitch called the decision "constitutionally sound," he said that "common sense would suggest that children should be insulated from the combat between parents."

"It will give license to a lot of bad actors to say what they want, regardless of where and when and the circumstances," he said.

The case underscored the role social media can play in modern divorce, as dueling parties try to win support from their circle of acquaintances.

Shortly after filing for divorce and seeking to remove Mr. Shak from their shared home, Ms. Shak filed a motion to prohibit him from posting disparaging remarks about her on social media. Two family court judges complied, with the second,

George F. Phelan, issuing an order preventing both Mr. and Ms. Shak from posting "any disparagement of the other party" on social media until their son reached the age of 14.

Judge Phelan's ruling prevented both spouses from using four specific expletives, as well as "other pejoratives involving any gender," noting that "the Court acknowledges the impossibility of listing herein all of the opprobrious vitriol and their permutations within the human lexicon."

It also banned the parents from posting photographs of their son in poses the judge considered inappropriate.

"The court finds that the 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 the father's maturity," the judge wrote.

But Judge Phelan also put the order on hold, to be reviewed on constitutional grounds by the Supreme Judicial Court. And this week, the court found it unconstitutional.

An order preventing someone from carrying out a certain kind of speech, known as "prior restraint," is legal in the United States when the threat of damage caused by that speech is compelling. But though the state does have an interest in protecting children from "being exposed to disparagement between their parents," it is not grave enough to justify restricting freedom of speech, the ruling said.

The ruling noted that one spouse, if offended by the other's speech, has the option of suing for defamation or seeking a harassment prevention order. It also noted that the judges' ruling does not apply to voluntary nondisparagement agreements.

"What are people with common sense going to do? They're going to go out in the hallway and reach an accord in which each agrees not to disparage the other," said Mr. Novitch, Ms. Shak's attorney. "It will be based on the agreement of the parties, not on judicial fiat."

Ruth A. Bourquin, a senior attorney from the American Civil Liberties Union, the co-author of an amicus brief supporting Mr. Shak, said she was relieved by the Massachusetts Supreme Judicial Court ruling. “We’re so grateful that the S.J.C. reiterated the first amendment principles, and recognized that they applied here,” she said, comparing social media to “the new town square.”

“That’s what it is,” she said. “Just because it’s bigger doesn’t mean we can say that the rights of free speech don’t apply. Having a government actor say you can say this, and not say that, is a somewhat scary alternative.”

Ellen Barry is The Times's New England bureau chief. She has previously served as The Times's Russia and South Asia bureau chief and was part of a team that won the 2011 Pulitzer Prize for International Reporting. More about Ellen Barry

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A version of this article appears in print on , Section A, Page 23 of the New York edition with the headline: Divorcing Parents Free To Post Personal Discord On the Web, Court Rules