

## Comment, THE USE OF NON-DISPARAGEMENT CLAUSES IN FAMILY LAW CASES

The enforcement of non-disparagement clauses in divorce and custody cases is a challenge that all parties involved share. A seemingly simple clause that asks divorcing parties to act like adults is surprisingly the center of great controversy. Judges and lawyers alike must use all of their legal knowledge to draft enforceable non-disparagement clauses, because they must consider the parties' First Amendment right to freedom of speech.<sup>1</sup>

This comment will address the challenges that judges and lawyers face when drafting non-disparagement clauses. It is limited to a discussion of non-disparagement clauses, and does not address similar clauses such as non-disclosure agreements in business contracts.<sup>2</sup> Part I will provide a description of non-disparagement clauses to offer a basic understanding of the clause. Part II will discuss court imposed non-disparagement clauses and First Amendment issues. Part II will be further separated into two sections, the first addressing speech related to communication with the children, and the second with third-party communications. Part III will explore non-disparagement clauses that parties have agreed to, and will similarly be divided into speech relating to communication with the children and speech directed to third parties.

### **I. What Is a Non-Disparagement Clause**

To understand the complexity of non-disparagement clauses, one must first understand what they are. A non-disparagement clause in a parenting plan is a clause that requires each parent in a dissolution or custody case to refrain from disparaging the

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<sup>1</sup> U.S. CONST. Amend. I.

<sup>2</sup> Jonathan Lurie, *Party Unity: Understanding Non-Disclosure and Non-Disparagement Clauses*, LEGAL MATCH: EMPLOYMENT LAW (July 26, 2016), <https://legalmatch.typepad.com/employmentlaw/2016/07/party-unity-understanding-non-disclosure-and-non-disparagement-clauses.html>.

other.<sup>3</sup> Non-disparagement clauses are helpful in custody situations because they try to prevent a parent from making disparaging comments about the other parent in front of the children and third parties.<sup>4</sup> Non-disparagement clauses are not boilerplate clauses; they must be unique in order to work. A crafty ex-spouse would be able to evade the intended restrictions, and lawyers and judges must be careful to draft air-tight clauses. What is unique about non-disparagement clauses is the way they are enforced. To enforce the non-disparagement clause a party generally has three options.<sup>5</sup> A party can ask the court to modify the parenting plan, and reference to the court the change of circumstances that occurred since the last hearing.<sup>6</sup> Alternatively, a motion to modify can be filed, asking the court to change certain terms in the non-disparagement clause.<sup>7</sup> Finally, one has the option of filing a motion for contempt in which the injured party asks the court to punish the other party for not abiding by the non-disparagement clause and to compel future good behavior.<sup>8</sup>

## **II. Court Imposed Non-Disparagement Clauses and First Amendment Issues**

Courts throughout the country adopt various approaches when including non-disparagement clauses in their orders. Generally, a distinction can be seen between those clauses that address speech related to children, and those directed to third-party communications.

### *A. Speech Relating to Communication with the Children*

Non-disparagement clauses are sometimes written to protect the bond between a parent and child. The court in writing such clauses must be mindful of all the interests involved. These interests are the child's best interest standard, the state's duty to pro-

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<sup>3</sup> Kelly Kanavy, *The State and the "Psycho Ex-Wife": Parents' Rights, Children's Interests, and the First Amendment*, 161 U. PENN. L. REV. 1081, 1087 (2013).

<sup>4</sup> *Id.* at 1091.

<sup>5</sup> *Id.* at 1089, 1090.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

tect the child also known as “*parens patriae*,”<sup>9</sup> and both parents’ separate constitutional interests.<sup>10</sup> The balancing of these interests can be seen in the following cases.

An early case exploring this issue is *Schutz v. Schutz*.<sup>11</sup> This thirty year-old Florida Supreme Court decision is a landmark decision that many courts have cited when addressing non-disparagement clauses.<sup>12</sup> The case involved a six-year marriage, and at the time of the divorce the mother was given sole custody of the children.<sup>13</sup> Several years later the father alleged, and the trial court agreed, that the children had come to hate their father. The court found that the mother was “the cause of the blind, brain-washed, bigoted belligerence of the children toward the father which grew from the soil nurtured, watered and tilled by the mother.”<sup>14</sup> The trial court found that the, “mother breached every duty she owed as the custodial parent to the noncustodial parent of instilling love, respect and feeling in the children for their father,”<sup>15</sup> and with these findings the court drafted a non-disparagement clause in the visitation, custody, and support order.<sup>16</sup> These findings then created a potential First Amendment challenge. The Florida Supreme Court held that the mother’s First Amendment challenge was “merely incidental,”<sup>17</sup> and in doing so, upheld the order.

The court reasoned that the non-disparagement clause “furthered an important or substantial governmental interest,” and it weighed the mother’s First Amendment interest as inferior to the government’s *parens patriae* interest.<sup>18</sup> In reaching its conclusion, the court also considered the children’s and father’s inter-

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<sup>9</sup> *Id.*, at 1092.

<sup>10</sup> Janet Weinstein, *And Never the Twain Shall Meet: The Best Interest of Children and the Adversary System*, 52 U. MIAMI L. REV. 79 (1997).

<sup>11</sup> *Schutz v. Schutz*, 581 So. 2d 1290 (Fla. 1991).

<sup>12</sup> Kanavy, *supra* note 3, at 1098.

<sup>13</sup> *Schutz*, 581 So. 2d at 1291.

<sup>14</sup> *Id.* at 1292.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* The non-disparagement clause stated that the mother will have “to do everything in her power to create in the minds of the children a loving, caring feeling towards the father, and to convince the children that it is the mother’s desire that they see their father and love their father.”

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1293.

ests.<sup>19</sup> The *parens patriae* interest was identified as the importance of the state's influence in assisting the creation of a father-child relationship, and the father had a constitutional right to that relationship.<sup>20</sup> The court found that the actions of the mother created an environment that would never allow such a relationship to occur. The court further explained how in promoting the state's interest, it would also be promoting the best interest of the children by having a father in their lives.<sup>21</sup> The Florida Supreme Court ruled that the burden placed on restricting the mother's right to free expression was essential and necessary to promote the father's and the state's interests.<sup>22</sup> What makes this case interesting is the court's seeming disregard for the mother's First Amendment right to freedom of expression. Throughout the decision the court only briefly mentioned the mother's right, and instead focused heavily on the competing rights. This approach has led other courts to distinguish the *Schutz* case.

In Missouri, the court decided in *Kessinger v. Kessinger* that the *Schutz* court's rationale was not applicable in Missouri.<sup>23</sup> In a fact situation similar to that in the *Schutz* case, the court ordered the mother in *Kessinger* to tell her children that all of the problems that they were facing were her fault and not their father's.<sup>24</sup> As in *Schutz* the court faced the delicate task of balancing every party's interest.<sup>25</sup> However, even after balancing the interests of all the parties, the court found that there was no authority in Missouri by which to make such an order enforceable.<sup>26</sup> The reasoning is that these specific statements in the non-disparagement clause go beyond what the state legislature intended when it drafted the statute, and it was beyond the scope of the court's power to enforce such a clause.<sup>27</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Kessinger v. Kessinger*, 829 S.W.2d 658, 663 (Mo. Ct. App. 1992).

<sup>24</sup> *Id.* The court ordered that the mother was to tell the children that the financial deprivation they suffered resulted from the mother's actions, that the father was not responsible for the mortgage payments on their house, and that the father did not harass, intimidate or coerce the mother.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

In Massachusetts, the court in *Shak v. Shak* decided that a non-disparagement clause was an unconstitutional prior restraint under the First Amendment.<sup>28</sup> This case differs from *Schutz* and *Kessinger* in that it uses a more in-depth First Amendment analysis. The Shaks were married a little over a year and had one young child together.<sup>29</sup> During one of the hearings the mother asked the court to order a non-disparagement clause.<sup>30</sup> At a different hearing the mother filed a civil complaint against her ex-husband, because he violated the first non-disparagement clause.<sup>31</sup> The trial court denied the mother's motion after finding that the non-disparagement clause was a prior restraint on the father's speech. However, the judge concluded that the clause would be constitutional if it was narrowly construed and supported by a compelling state interest and therefore crafted a new clause.<sup>32</sup>

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<sup>28</sup> *Shak v. Shak*, 144 N.E.3d 274 (Mass. 2020).

<sup>29</sup> *Id.* at 276. This little background is important later in the court's final decision.

<sup>30</sup> *Id.* The non-disparagement clause read:

1. Neither party shall disparage the other— nor permit any third party to do so — especially when within hearing range of the child.
2. Neither party shall post any comments, solicitations, references or other information regarding this litigation on social media.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 277. The new non-disparagement clause read:

1. Until the parties have no common children under the age of fourteen 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 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 one hundred feet of the communicating party or within any other farther distance where the children may be in a position to hear, read or see the disparagement.

The appellate court in its review addressed the constitutionality of the court-created second non-disparagement clause. The appellate court approached this issue beginning with a thorough First Amendment review. It first looked at what the First Amendment protects and concluded that the First Amendment prevents the government from limiting one's speech unless a narrow exception applies.<sup>33</sup> The court then reviewed the prior restraint standard. The court defined prior restraint as a court order that forbids certain speech in the future before that speech has even occurred.<sup>34</sup> The court viewed prior restraint as the "most serious and the least tolerable infringement on First Amendment rights."<sup>35</sup> The court did, however, mention exceptions where prior restraints might be permissible, but concluded that the standard for finding an exception is extremely high. The court concluded that it would allow such orders if the damage from the speech was "truly exceptional," or if the damage from the speech was certain and there were no less restrictive alternatives available.<sup>36</sup> The court would also allow prior restraint in a non-disparagement clause if it could be shown that there was a compelling state interest, and the prior restraint was protecting against a serious danger.<sup>37</sup> The appellate court acknowledged that the trial court was able to find that the state indeed had a compelling interest to protect the children, but went on to explain that the compelling state interest was not strong enough to overcome the high burden against courts allowing the enforcement of a prior restraint.<sup>38</sup> The court found that there was no imminent harm to the child, because the child was only a toddler, and therefore the child was unable to understand what was being mentioned in his presence or on social media.<sup>39</sup> The court therefore held that the non-disparagement clause was a prior restraint on the father's speech and unconstitutional.<sup>40</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 278.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 279.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 280.

<sup>40</sup> *Id.*

It is interesting to consider whether the court would have ruled the same way if the child were older? The manner in which the court decided this case involved a significant reliance on the fact that the child was too young to understand what was happening. It seems not to be a general holding on the constitutionality of non-disparagement clauses, but one that remains fact specific. As such, it illustrates the complexities of a First Amendment analysis, and the possible ways that similar non-disparagement clauses could be enforced.

In a different approach to the First Amendment analysis, the Supreme Court of New Hampshire engaged in a simple legal discussion in *In re Ramadan*.<sup>41</sup> The trial court ordered that the father “shall not speak about the petitioner as a Muslim/Muslim woman to the children or within hearing of the children.”<sup>42</sup> The Supreme Court in one line said that the court order was an “impermissible prior restraint on his freedom of speech.”<sup>43</sup> Unlike in *Shak*, the court here did not bother to go through a sophisticated legal analysis of the constitutionality of the non-disparagement clause. Instead, the court summarily concluded that the clause constituted an infringement of the father’s First Amendment rights.

In *In re Marriage of Hartman*, the court used the best interest of the child standard to limit the mother’s speech.<sup>44</sup> Unlike the *Shak* court’s opinion, the court here did not bother with an in depth First Amendment analysis. Instead the court simply said, “In family law cases, courts have the power to restrict speech to promote the welfare of the children. Thus courts routinely order the parties not to make disparaging comments about the other parent to their children or in their children’s presence.”<sup>45</sup> This case demonstrates again that every court’s jurisdiction may have a different way of approaching non-disparagement clauses.

The trial court in *In re Marriage of Black* was overturned by the Washington Supreme Court, because it wrongfully tried to use the best interest of the child standard simply because the

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<sup>41</sup> *In re Ramadan*, 153 N.H. 226 (N.H. 2006).

<sup>42</sup> *Id.* at 233.

<sup>43</sup> *Id.*

<sup>44</sup> *In re Marriage of Hartman*, 185 Cal. App. 4th 1247 (2010).

<sup>45</sup> *Id.* at 1251.

mother was a homosexual.<sup>46</sup> This case involved a conservative religious Christian household that believed that homosexuality was a sin.<sup>47</sup> During the parties' long marriage, the wife revealed her sexual orientation as a lesbian, which led the parties to divorce three years later.<sup>48</sup> The guardian ad litem for the children recommended to the court that the mother should be refrained from talking about anything relating to homosexuality with the children,<sup>49</sup> and the trial court adopted the guardian ad litem's suggestion in its court orders.<sup>50</sup> The trial court also further restricted the mother's conduct with her children by restricting her from talking about alternative lifestyles with them.<sup>51</sup> The Washington Supreme Court determined that the trial court based its order solely on the mother's sexual orientation, and used the guise of protecting the children as a rationale for making the order enforceable.<sup>52</sup> The court found that the order was also based on an unwarranted belief that the children would be bullied and harmed because of their mother's sexuality,<sup>53</sup> and strongly rejected such a rationale.<sup>54</sup> The Supreme Court found that the guardian ad litem's recommendations, ratified by the trial court, created an unconstitutional restriction on the mother's speech, and that the court failed to stay neutral to the parties regarding their sexual orientation.<sup>55</sup> What makes this case interesting is that the court here came to the same conclusion as *Shak*, but used a drastically different approach. Here the court found that

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<sup>46</sup> *In re Marriage of Black*, 188 Wash. 2d 114 (Wash. 2017).

<sup>47</sup> *Id.* at 118.

<sup>48</sup> *Id.* at 119.

<sup>49</sup> *Id.* at 124.

<sup>50</sup> *Id.* at 125.

<sup>51</sup> *Id.* at 132. The court order read:

[Rachelle] is ordered to refrain from having further conversations with the children regarding religion, homosexuality, or other alternatives lifestyle concepts and further that she be prohibited from exposing the children to literature or electronic media; taking them to movies or events; providing them with symbolic clothing or jewelry; or otherwise engaging in conduct that could reasonable be interpreted as being related to those topics unless the discussion, conduct or activity is specifically authorized and proved by Ms. Knight.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 133.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 137.

the best interests of the children were not being accomplished by maintaining such an order. When it comes to religion, courts must balance every parties' interest, but at the same time the court cannot uphold an order that is clearly designed to discriminate against a parent because of who they are.<sup>56</sup>

### B. *Third-Party Communication*

There are situations in which the courts will order parents to not disparage each other to third parties. This is different than writing a non-disparagement clause to protect the children from the parents' hateful comments. The courts here are trying to prevent parents from disparaging each other to friends, family, co-workers and others, and must do so without unnecessarily infringing upon the parties' First Amendment rights.

In *In re Marriage of Candiotti*, the trial court restrained the mother from talking to third parties about the background of her ex-husband's wife.<sup>57</sup> The trial court justified the order by explaining that it was trying to protect the children from hearing rumors about their step-mother, and from being bullied because of it.<sup>58</sup> The trial court felt that it had written the order narrowly enough to prevent any First Amendment challenge.<sup>59</sup> However, this was not the case. The appellate court explained that because family court judges often are tasked with dealing with hostile parents, they must balance all the parties' interests and any harm that might occur.<sup>60</sup> With that in mind, the appellate court indicated that while it may be proper to issue orders limiting parents' interactions with their children, here the the trial court went beyond the scope of that power by limiting the mother's right to speak to others.<sup>61</sup> The appellate court found that the order an undue prior restraint on mother's speech, because it would limit how the mother could talk to all third parties about the children's step-

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<sup>56</sup> Jeffrey Shulman, *What Yoder Wrought: Religious Disparagement, Parental Alienation and the Best Interest of the Child*, 53 VLL.L. REV. 173 (2008).

<sup>57</sup> *In re Marriage of Candiotti*, 34 Cal. App. 4th 718, 719 (1995).

The order stated: "Directing Debra not to disseminate information regarding Donna's past driving record and other defined personal history to anyone besides certain specified individuals."

<sup>58</sup> *Id.* at 721.

<sup>59</sup> *Id.* at 722.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 725.

mother.<sup>62</sup> The court agreed that it was in the best interest of the children for the mother to not speak ill about their step-mother, but here the court felt that the non-disparagement clause was too far-reaching to be constitutional.<sup>63</sup>

This case demonstrates that the best interest of the child standard has less weight in issues involving disparaging comments to third parties. While the California court in *In re Hartman* allowed the “best interest standard” to be used to enforce a non-disparagement clause when directed at inter-parental communication, here that standard was not enough to justify the infringement on the mother’s First Amendment right. However, in the next case the court in Kentucky demonstrated what requirements are needed in order to allow a non-disparagement clause to be upheld.

In *Wedding v. Harmon*, the appellate court in Kentucky upheld an order preventing a father from forwarding emails to third parties.<sup>64</sup> The father on multiple occasions sent emails to hundreds of individuals complaining about his divorce.<sup>65</sup> The mother filed a motion with the court to stop the father’s actions, and that motion was granted by the family court.<sup>66</sup> The father appealed, arguing that the order was an infringement on his First Amendment rights, but the appellate court after a thoughtful analysis denied the father’s claim.<sup>67</sup> The court first examined what is protected under the First Amendment and in doing so explained that the First Amendment is designed to promote “the free flow of ideas and opinions on matters of public interest and concern,” and that “very few restrictions upon the content of speech are permitted.”<sup>68</sup> However, the father’s emails were not designed to promote these lofty ideals; instead the emails were only designed to denigrate the mother to the parties’ acquaintances. The court explained that freedom of speech is not unlimited, and that others can be affected by actions.<sup>69</sup> This, the court, explained al-

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Wedding v. Harmon* 492 S.W.3d 150 (Ky. Ct. App. 2016).

<sup>65</sup> *Id.* at 152.

<sup>66</sup> *Id.* at 153.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 154.

<sup>69</sup> *Id.*

lows one's freedom of speech to be limited in order to protect others.<sup>70</sup> The father also argued that preventing his emails constituted a prior restraint on speech.<sup>71</sup> The court rejected the father's argument, finding that the ruling was not an abuse of discretion.<sup>72</sup> The court found that the father's actions were inimical to the children's interest, and the state has a compelling interest to protect the children.<sup>73</sup> In this case the father's First Amendment right was outweighed by the children's interests.<sup>74</sup> This case illustrates that the First Amendment will not protect purely disparaging remarks, particularly when they affect a central family figure in a child's life.

In contrast to the *Wedding* case, the Supreme Court of Washington in *In re Marriage of Suggs* held that an anti-harassment order (similar to a non-disparagement clause) was an unconstitutional prior restraint on the wife's speech.<sup>75</sup> The trial court noted eleven instances in which the wife sent harassing communications about her ex-husband to different third parties.<sup>76</sup> The court granted the husband's order of protection restraining his former wife from making allegations to third parties.<sup>77</sup> The Washington Supreme Court found that the order constituted a prior restraint.<sup>78</sup> The court explained that "the line between protected and unprotected speech is very fine,"<sup>79</sup> and such court orders must be "tailored as precisely as possible to the

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 155. The reasons for upholding the court order were: the injunction was narrowly tailored relating only to unprotected speech; there was a final hearing prior to the injunction; evidence supported the order; the harassing emails were not subject to heightened scrutiny; and the mother had a right to be free from harassment.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *In re Marriage of Suggs*, 152 Wash. 2d 74 (Wash. 2004).

<sup>76</sup> *Id.* at 78.

<sup>77</sup> *Id.* at 79. The protective order read: "Knowingly and willfully making invalid and unsubstantiated allegations or complaints to third parties which are designed for the purpose of annoying, harassing, vexing, or otherwise harming Andrew O. Hamilton and for no lawful purpose."

<sup>78</sup> *Id.* at 81. The court here used a similar prior restraint analysis found in previous cases that explored the topic.

<sup>79</sup> *Id.* at 83.

exact need of the case.”<sup>80</sup> The court then dissected the order into three parts to come to its conclusion.<sup>81</sup> It found that the order created confusion regarding what it was trying to prevent, and in doing so it

lacks the specificity demanded by the United States Supreme Court for prior restraint on unprotected speech. Indefinite wording is impermissible when the court has repeatedly stated that the line between protected and unprotected speech is very fine. Such wording leaves us unable to ascertain what speech the order actually prohibits.<sup>82</sup>

The court felt that upholding such an order was impermissible, because it would leave a “chilling effect” on any type of speech that would normally be protected.<sup>83</sup> The problem with chilling one’s First Amendment rights is that it could result in a person living in fear of being found in contempt of the court order for doing something that they have every right to do.

What makes this case interesting is that the Washington Supreme Court used an in-depth First Amendment analysis to find that the trial court order was unconstitutional. The distinguishing factor here is that the wife’s First Amendment right was never compared to the best interest of the child standard. By not including such a comparison, it is easier for courts to find prior restraint in such orders. A common theme with non-disparagement is that the clauses include many different competing constitutional interests that the courts must carefully balance to protect everyone involved. In looking at the caselaw, it is difficult to find a bright-line rule regarding whose constitutional rights reign supreme. However, a common theme is that the court will use the best interest of the child standard to tip the balance in favor of one party.

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* The first part of the order was designed to “restrain libelous speech”; the second part was designed to deal with “harassing speech”; the third part was designed to combine “harassing and libelous speech.”

<sup>82</sup> *Id.* at 84.

<sup>83</sup> *Id.*

### III. Non-Disparagement Clauses That Parties Have Agreed to and Their First Amendment Considerations

Another aspect of non-disparagement clauses is the complications that will arise when parties agreed to the terms. In this situation, parties were able to settle their divorce and had their attorneys draft the non-disparagement clause. A quick Google search for non-disparagement clauses will find news articles relating to famous ex-couples who have broken their divorce settlements regarding their non-disparagement clause.<sup>84</sup> What makes these types of clauses different than judicially imposed ones is that the parties agreed to the terms. In the area of agreed clauses, courts will use different metrics to determine whether the non-disparagement clauses are enforceable.

#### A. Speech Relating to Communication with the Children

These types of non-disparagement clauses are the newsworthy ones, as is seen in NBA player Steve Nash's divorce.<sup>85</sup> Steve Nash was married to his wife for five years before they divorced.<sup>86</sup> During the divorce, the parties created a joint custody agreement, which included a non-disparagement clause that

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<sup>84</sup> See, e.g., Kwame Anthony Appiah, *My Ex-Wife Bad-Mouths Me to Our Boys. Can I Tell Them the Truth About Her?*, N.Y. TIMES MAG. (Feb. 11, 2020), <https://www.nytimes.com/2020/02/11/magazine/my-ex-wife-bad-mouths-me-to-our-boys-can-i-tell-them-the-truth-about-her.html>; Louisa Chu, *42 Grams Chef Battered His Ex-Wife. Now He Has Filed a \$250,000 Defamation Lawsuit Against Her*, CHI. TRIB. (Nov. 18, 2019), <https://www.chicagotribune.com/dining/ct-42-grams-jake-bickelhaupt-alexa-welsh-lawsuit-stone-flower-20191108-wg6faiijvvd6blapkv5cfsv73e-story.html>; Shaune Flowers, *Dwyane Wade's Ex-Wife Siohvaughn Funches Wants a New Divorce Settlement*, INQUISITR (July 11, 2016), <https://www.inquisitr.com/3295964/dwyane-wades-ex-wife-siohvaughn-funches-wants-a-new-divorce-settlement/>; David L. Hudson Jr., *NBA Star's Divorce Becomes an Unexpected First Amendment Contest*, ABA J. (Dec. 1, 2013), [https://www.abajournal.com/magazine/article/nba\\_stars\\_divorce\\_becomes\\_an\\_unexpected\\_first\\_amendment\\_contest/](https://www.abajournal.com/magazine/article/nba_stars_divorce_becomes_an_unexpected_first_amendment_contest/).

<sup>85</sup> Greg Price, *Lakers News: Steve Nash Child Support Payments to Increase; Kobe Bryant's Auction a Boon for Mom*, INT'L BUS. TIMES (July 25, 2013), <https://www.ibtimes.com/lakers-news-steve-nash-child-support-payments-increase-kobe-bryants-auction-boon-mom-1359855>.

<sup>86</sup> Nash v. Nash 232 Ariz. 473, 475 (Ariz. Ct. App. 2013).

was approved by the family court.<sup>87</sup> The very day after the case was settled, the mother went on Twitter and disparaged Steve Nash.<sup>88</sup> The family court reprimanded the mother because the comments on social media were in violation of her agreed settlement. She then appealed the court's interpretation, arguing that the clause violated her First Amendment rights.<sup>89</sup> The Arizona appellate court used an in-depth First Amendment analysis similar to that used in the previously discussed cases.<sup>90</sup> The court held that the mother's argument that the non-disparagement clause was unconstitutional failed because she had agreed to put restrictions on her own First Amendment rights by signing the joint custody agreement.<sup>91</sup> The court then took judicial notice of the facts of the case.<sup>92</sup> The court explained that because the father was a famous athlete the mother's tweets would be highly visible, and the children could most likely see the mother's disparaging comments.<sup>93</sup>

This is an interesting interpretation of the the non-disparagement clause that the parties signed, because technically the comments were never made in the presence of the children. However, in today's modern age, social media comments can be treated as being made in-person. Even though this case involved a famous athlete, one can assume that a similar result would occur to the plebeians in this country as was seen in *Shak* regarding the use of social media.<sup>94</sup> What is also important to understand is that people are able to limit their constitutional rights. Just as an individual can waive his or her Fourth, Fifth, and Sixth Amend-

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<sup>87</sup> *Id.* at 481. The non-disparagement clause read:

All communications between the parties shall be respectful. The parents agree that neither parent shall disparage the other party to the children, and that each parent shall model respect for the other parent in their interactions with the children. Neither parent shall do or say anything to the children that would negatively impact the child's opinion or respect for the other parent.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 482. The appellate court here used similar federal case law that was seen throughout this comment, to figure out what constitutes a prior restraint of speech.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Shak*, 144 N.E.3d at 277.

ment rights in criminal cases<sup>95</sup> and accept the consequences, so too can one waive his or her First Amendment rights in a divorce settlement.<sup>96</sup>

### B. *Third-Party Communication*

A further issue to consider is whether the clause actually protects the speech intended. This is an important consideration when parties settle their divorce and agree to the terms. An example of the concern is seen in the Utah Court of Appeals case of *Robertson v. Stevens*.<sup>97</sup> The case involves the parties' agreed upon non-disparagement clause that Mr. Stevens felt needed to be amended to deal with a change of circumstances that occurred.<sup>98</sup> Ms. Robertson (the ex-wife) wrote a chapter in her book, as well as blog posts, that included private details about the parties' marriage, and she made potentially disparaging comments about her ex-husband.<sup>99</sup> What makes this case interesting is that Mr. Stevens did not argue that his ex-wife disparaged him, but instead argued that a change of circumstances occurred, and therefore the non-disparagement clause should be expanded. The appellate court had to answer the question of whether a family court has continuing jurisdiction to modify an agreed upon non-disparagement clause that did not involve children.<sup>100</sup> A court has limited jurisdiction to modify an order once a judgment has been entered, and this is designed to prevent angry parties from filing endless motions.<sup>101</sup> The court explained that when it lacks jurisdiction over an issue, the only available option is to dismiss

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<sup>95</sup> Scott Grabel, *Criminal Amendments in the Bill of Rights*, GRABEL & ASSOCIATES MICH. CRIM. LAW., <https://www.grabellaw.com/criminal-amendments-in-the-bill-of-rights.html#:~:text=these%20amendments%20include%20the%20fourth,suspected%20or%20arrested%20for%20crimes.&text=the%20Fourth%20Amendment%20protects%20people,and%20seizures%20without%20a%20warrant> (last visited Sept. 25, 2020).

<sup>96</sup> *Nash*, 32 Ariz. at 482.

<sup>97</sup> *Robertson v. Stevens*, 461 P.3d 323 (Utah Ct. App. 2020). The non-disparagement clause read: "Ms. Robertson shall not tell third parties that Mr. Stevens kicked her out of the house, or has stolen marital assets."

<sup>98</sup> *Id.* at 324.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 325.

<sup>101</sup> *Id.*

the case.<sup>102</sup> In Utah, a family court under limited circumstances can maintain jurisdiction if the statutes allow it.<sup>103</sup> However, in this case no statutes were available to allow the family court to exercise continuing jurisdiction over the non-disparagement clause.

Perhaps Mr. Stevens was arguing the wrong point to enforce his non-disparagement clause. He may have been more successful if he had argued that his wife violated the agreement. Ms. Robertson then would have to argue that her First Amendment rights were being infringed by the clause. In that situation, as in the *Nash* case, the court might have held that she had waived her First amendment right by agreeing to the non-disparagement clause.<sup>104</sup>

## Conclusion

Non-disparagement clause are often hidden away in divorce documents. These few sentences, however, raise complex constitutional debates throughout the country. Attorneys and judges must be cognizant of the issues involving non-disparagement clauses, and should never assume that the drafted clause will be enforceable. When these clauses are subject to review, courts will treat similar clauses differently suggesting that there is never a perfect non-disparagement clause, and in looking back to the caselaw mentioned throughout a bright-line rule is hard to discern. In drafting non-disparagement clauses it would be paramount to look at what one's own state's highest court has decided on the matter.

Jacob Eisenman

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.* The statutes allow courts to maintain jurisdiction in cases involving child custody, child support, alimony, property distributions, and debts.

<sup>104</sup> *Nash*, 232 Ariz. 482 (2013).