Legal Lines

A Publication of the Worcester County Bar Association

October 2020 Issue Volume 21, Number 2

PRESIDENT'S MESSAGE
by Terry J. McLaughlin

Let me begin by sending my best wishes that everyone and their families are healthy and safe, and remain that way. I also want to thank everyone that has suggested, planned, presented or participated in one of our virtual events so far. They have been a great success and very well attended.

The Committee for Anti-Racism and Equality (CARE) Co-Chairs, Adrian Angus and Courtney Mayo, have chosen their subgroups and subgroup leadership teams. I am happy to announce that the subgroups will be Community Outreach and Education and Awareness. The leaders of the Community Outreach subgroup will be Jonathan Mannina and Dolores Thibault-Munoz, and the leaders of the Education and Awareness subgroup will be Weayonnoh Nelson-Davies, Areille Sharma and Rubby Wuabu.

The CARE Committee subgroup on Education and Awareness is already off to a great start, inviting all of our members to take part in a "21-Day Racial Equity Habit-Building Challenge" which will begin in November. There is more detailed information attached to this issue of Legal Lines, including the start date and materials. I encourage all of you to review the materials and consider joining us in this important activity.

We have been and will continue to provide regular updates from the Courts. Thank you to the Probate Court co-chairs Kathryn Calo and Kathleen Brown, and the Housing Court co-chairs Monica Passeno and John Goggins, for multiple updates from Probate Court and Housing Court. Thank you to Kanchana Fernando and Maryanne Reynolds for a recent Juvenile Court update.

On November 5th, there will be a Superior Court Best Practices seminar. My thanks to Ryan Avery, Catherine Brennan and Cheryl Riddle for planning that event. The Honorable Judge Daniel Wrenn and the Honorable Judge William Ritter will be the panelists, and Attorneys Kathryn O'Leary and Anthony Salerno will moderate.

Thanks to Judge Timothy Hillman and Attorney Leonardo Angiulo, co-chairs of the Federal District Court Committee, our First Monday series returned in October. The next First Monday series topic will be Closing Arguments, on November 2nd from 1 to 2 pm. There will be a very experienced group of judges and practitioners presenting, including Judge David Hennessey, Judge Daniel Wrenn, and Attorneys Michael Angelini, John Martin and Jeffrey Raphaelson. The event will be hosted by Jared Fiore and Courtney Mayo. Please participate if you have the chance. These are meaningful programs that pack a lot of useful information into a short period of time.

Our Young Lawyers Section, led by Paige Barton and Liz Halloran, planned and held our first Young Lawyers event of the year, musical bingo. It was well attended and very successful. They will be planning more events for the fall.

Our new website is expected to be ready soon and should launch in November. Please be patient during the first weeks of the launch. Unless you enjoy being yelled at, I would also advise not calling the main office for a few days after the launch, since Sandra and Candice will be the ones working through the glitches! Seriously though, I thank you in advance for your patience while we navigate this change.

We are still operating very much as a virtual association at this time and will continue to do so until it is safe. That being said, we have started to plan next year's legislative breakfast, Law Day and annual dinner. We hope that those events, and so many others that we have all been missing, will be held in person.

As I have asked before and will continue to ask, please reach out, please be active and please get involved. I believe that the progress we have already made shows that as predicted, we will weather the current crisis together, and emerge a stronger association and Bar.

Worcester County Bar Association – Family Law Section
Case Summary: Shak v. Shak, 484 Mass. 658 (2020)
By Kevin J. Powers[1]

I. Issue

Is a recital of need to protect a child from emotional and psychological harm that might follow from a parent's use of vulgar or disparaging words about another sufficient to justify a prior restraint?

II. Procedural History

In a pending divorce involving a child of about one year old, the trial judge issued orders prohibiting future disparagement, including that:

(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: [whereupon the court listed four particularly colorful obscenities], 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 [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 judge reported questions to the Appeals Court. The Supreme Judicial Court granted direct appellate review.

III. Rule of Law and Policy

Non-disparagement orders are, by definition, a prior restraint on speech. A prior restraint is permissible only where the harm expected from the unrestrained speech is grave, the likelihood of the harm occurring without the prior restraint in place is all but certain, and there are no alternative, less restrictive means to mitigate the harm.

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 justifying a prior restraint.

IV. Reasoning

Justice Budd, writing for the Court and answering the legal question presented by the nondisparagement orders, observed that no showing was made linking communications by either parent to any grave, imminent harm to the child. The Mother presented no evidence that the (then approximately one-year-old) child had been exposed to, or would even understand, the speech that gave rise to the underlying motion. As a toddler, the child is too young to be able to either read or to access social media. The concern about potential harm that could occur if the child were to discover the speech in the future is speculative and cannot justify a prior restraint. There has been no showing of anything in this particular child's physical, mental, or emotional state that would make him especially vulnerable to experiencing the type of direct and substantial harm that might require a prior restraint if at any point he were exposed to one parent's disparaging words toward the other. Therefore, there has been no showing that any harm from the disparaging speech is either grave or certain.

V. Holding

Because there was no showing of an exceptional circumstance that would justify the imposition of a prior restraint, the non-disparagement orders issued here are unconstitutional.

VI. Disposition

The SJC vacated paragraphs 1 and 2 of the judge's further orders on future disparagement.

VII. Practitioner Guidance

The SJC noted that there are measures short of prior restraint available to litigants and judges in circumstances in which disparaging speech is a concern. For example:

- Parties may enter into voluntary nondisparagement agreements.
- Parties may seek a G.L. c. 258E harassment prevention order.
- Parties may file an action for damages for intentional infliction of emotional distress or defamation.
- Judges may make clear to the parties that their behavior, including any disparaging language, will be factored into the best interests of the child calculus in any subsequent custody determinations.
- Of course, the best solution would be for parties in divorce and child custody matters to rise above acrimony and, with the children's well-being paramount in their minds, simply refrain from making disparaging remarks about one another.

VIII. Of Note

The trial judge and the SJC did not shirk from listing four particularly colorful obscenities in the text of the non-disparagement orders at issue in this opinion. Comedian George Carlin included two of those obscenities in his original 1972 "Seven Words You Can Never Say on Television" routine.

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[1] The author handles appeals and complex trial motions for busy trial lawyers who love going into court but who lack the time to decamp to a law library. He can be reached at kpowers@kevinpowerslaw.com.