

## **When It's Not Just Gossip:**

### **Non-Disparagement Clauses Are Serious in Divorce Settlement Agreements**

By Charles M. Medlin

When a married couple with children gets divorced, it is typically in the best interests of the children that their parents do not speak out against one another. A common way to help ensure this is by including a non-disparagement provision into the couple's divorce settlement agreement. Such a provision states, in essence, that the parents are not to make disparaging remarks about one another, and the specific terms of the parties' agreement will determine to whom disparaging remarks cannot be made. Commonly the provision restricts the parties from making disparaging remarks made about the other parent to or in front of the children. But, in some cases, the provision prohibits the parent from making disparaging remarks about the other parent to *anyone*. While including a non-disparagement provision in a divorce settlement agreement is fairly simple, enforcing a non-disparagement provision is not.

Enforcement of a non-disparagement provision requires some proof that the opposing party actually made the alleged disparaging remarks. If the remarks were in writing, such as an email or a text message, obtaining proof of the disparaging remarks can be as easy as printing the email or taking a picture of the text message. However, if the remarks were made orally, and a credible witness who heard the remarks is not available to testify, contempt from oral statements is much more difficult to prove. The remedies available when a party breaks such a provision depend on whether the divorce settlement agreement containing the non-disparagement provision has been incorporated into the divorce decree.

If the non-disparagement provision has not been incorporated into the divorce decree, the only remedies available if either party violates the provision are those for breach of contract. To

be successful in a breach of contract claim, the claimant must show that he or she suffered some sort of damages as a result of the breach. *See, e.g., Norton v. Budget Rent A Car System, Inc.*, 307 Ga. App. 501, 705 S.E.2d 305 (2010). Proving that any damages were suffered as a result of a disparaging remark can be very difficult unless the remark had a true financial impact, such as making it so that the harmed party is unable to find a job.

If the divorce settlement agreement is incorporated into the divorce decree, the agreement becomes an order of the court. As with other orders, any party who does not comply with an order of the court can be found in contempt. O.C.G.A. § 15-1-4. To file a contempt action for making disparaging remarks in violation of a court order, “the law requires that a rule nisi issue and be served upon the accused, giving him notice of the charges against him, and that he be given an opportunity to be heard.” *Crocker v. Crocker*, 132 Ga. App. 587, 589, 208 S.E.2d 602, 604 (1974) (describing constructive contempt of court). “The notice given by the rule nisi is to afford the accused a reasonable time in which to prepare his defense to the charge that he had violated the court's order.” *Id.*

The judge will decide based on the evidence before it whether or not the party willfully violated the non-disparagement provision in the divorce decree. Possible defenses to contempt are that “the order was not sufficiently definite and certain, was not violated, or that the violation was not willful.” *Schiselman v. Trust Co. Bank*, 246 Ga. 274, 277, 271 S.E.2d 183, 186 (1980). Truth, on the other hand, is not a defense to an action for contempt. Even if the disparaging remark about the opposing party is a true statement, such as an ex-husband saying something negative to his children about his ex-wife having a new boyfriend, the disparaging party can still be found in contempt.

One of the major barriers to the enforcement of a non-disparagement clause through contempt is the relative imbalance of the cost to bring the contempt charges compared to the sanctions the court will impose on the disparaging party. Filing for contempt normally involves hiring an attorney and paying the associated fees while the punishment to the disparaging party will often be a warning or equivalent other slap on the wrist. If the cost of bringing the contempt action is not an issue and the main goal is for the disparaging remarks to cease, having to appear before a judge may be enough to shame the party making such remarks into thinking twice before making such negative remarks again. Preventing future conduct can be especially important to keep children from developing any long-term resentment against either parent. On the other hand, many people get frustrated spending time and money to bring a contempt action only to see the disparaging party walk away seemingly without punishment.

Another, more preferable, outcome is for the judge to order the disparaging party to pay attorney's fees. An award of attorney's fees sends a different message than imposition of a fine, imprisonment, or other remedy as found in most of other types of contempt, but it at least means that the disparaged party does not have to absorb the costs of trying to stop the disparaging comments. Having to pay for the other party's attorney's fees will also discourage the disparaging party from making disparaging remarks in the future. If there is an ongoing history of disparaging remarks, the judge may impose a fine or imprisonment in rare cases. This is more likely to be true if the party has previously been in contempt for such remarks.

Disparaging comments are an unfortunate, but all too common, consequence of a divorce. While non-disparagement provisions can deter parties from making disparaging remarks, these provisions do not wholly prevent them from being made. Disparaging comments negatively affect all parties involved, but are especially harmful to children. While the costs of enforcing a

non-disparagement provision through litigation may outweigh any potential benefit, it is often the only way to deter the disparaging party. The party wishing to bring the contempt action must decide whether the cost of litigation outweighs the possibility that the disparaging party will receive only a slap on the wrist from a judge. In cases where children are truly being negatively affected, stopping the disparaging party and deterring him or her from making disparaging comments in the future is well worth the price.