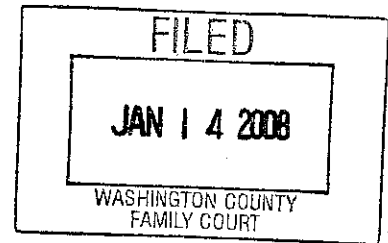


STATE OF VERMONT
WASHINGTON COUNTY, SS.



MARIA U. GARRIDO,
Plaintiff,

WASHINGTON FAMILY COURT
DOCKET No. F 466-12-06 WnDmd

v.

WILLIAM C. KRASNANSKY
Defendant

Notice of Decision Re: Defendant's Motions to Dismiss Plaintiff's
Motion for Temporary Relief and Motion to Vacate Temporary Order

This decision issues in connection with Defendant's Motion to Dismiss Plaintiff's Motion for Temporary Relief and Defendant's Motion to Vacate Temporary Order. For the reasons set forth below, the Motion to Dismiss is denied; the Motion to Vacate Temporary Order is granted.

I.

The parties are husband and wife. They separated after nine years of marriage. The marriage produced no children.

Two prior actions for divorce were brought and dismissed. This third complaint has been pending since December, 2006.

Wife kept a diary during the marriage, in the form of several journals. During the marriage she did not share the content of her diary with her husband. It seems husband was unaware of the journals until discovering them after his wife's departure.

In November, 2007, wife learned that husband had, in the preceding weeks, been publishing certain blog entries on the internet. These entries chronicle what defendant's counsel concedes is a "thinly-disguised, fictional account" of the end of the marriage from defendant's perspective. Defendant's counsel has submitted by stipulation what is believed to be a complete copy of all the blog entries as of December 24, 2007.

However, in addition to stating his perception wife is at fault for the end of the marriage, husband has also posted portions of wife's diary on the blog site. The diary excerpts are set off in plaintiff's distinctive handwritten script. Husband scanned portions of wife's diary into his computer before posting them on the internet. Husband posted portions of the wife's diary without her knowledge or consent.

On December 7, 2007, Plaintiff filed what she captioned a "Motion for Immediate Relief" in the divorce case. Plaintiff averred that certain of Defendant's blog posts constituted

harassment. She argued, "It is standard for temporary and final divorce orders to include a provision that prohibits parties from harassing one another." Plaintiff specifically requested an order:

which prohibits the Defendant from making online statements about the Plaintiff, prohibits him from posting her old journals, or excerpts thereof online, or in any way harassing her and/or interfering with the Plaintiff's personal liberty. She further requests that the Court's Order include a provision whereby the Defendant will not attempt to initiate any personal contact with the Plaintiff until further order of this court.

The court responded on the same day by issuing the following entry order:

We do not have the ability to set this motion as an emergency matter. Pending hearing, the Court orders defendant to remove any and all internet postings about plaintiff and issues in the parties' marriage.

Defendant on December 24, 2007 moved to dismiss Plaintiff's motion and to vacate the temporary order of December 7, on the grounds that the blog is a form of speech protected from the court's interference by the First Amendment. Although Defendant raised an objection to entry of the order without a hearing, as that problem relates to V.R.C.P. 65, the parties are now agreed that the matter should be decided on the papers. In view of the credible First-Amendment and Due-Process issues raised by Defendant's filings, as well as the relative novelty of internet-publication issues, we now attempt to bring the Constitutional dispute to a fast and thorough resolution so that it may be rendered susceptible to review.

II.

Husband sees this matter as being solely a case about speech. Wife sees it as being about conduct, or more precisely, *mis-conduct*. Neither party is completely correct, as it has elements of both.

This is far from the first case in which a litigant has endeavored to find extrajudicial outlets for his or her frustration with the litigated subject matter, or with the opponent. Nor is this the first time a spouse in a pending divorce has taken unilateral action with respect to marital property. So common is the problem that Vermont's Rules for Family Proceedings, at V.R.F.P. 4(c), anticipate it and provide for interim domestic orders, provisions for temporary relief, and restraining orders as to property. Rule 4 orders are specifically exempted from the stricter guidelines articulated at V.R.C.P. 65, which would apply were a temporary restraining order sought in an action before the Superior Court. V.R.F.P. 4(c)(4).

Rule 4 provides the general framework from which Family Courts approach orders seeking to restrain one party to a divorce from harassing the other. The Family Court may

prohibit “each party’s interference with the personal liberty of the other”; may prohibit “the selling, concealing, or otherwise disposing of . . . personal property of the parties after the commencement of the proceeding”; and may enjoin a party from “conveying, concealing, or interfering with the property or clothing of [the other] party . . . or “interfering with the possession, use, and control of any property in the possession of either party and claimed by the other.” See V.R.F.P. 4(c)(1)(B-C) and (C)(3).

It is through the Rule 4 framework that the court first approaches the problem here. That is to say, the court looks first to the use and interference with personal property, as well as to the accused litigant’s interference, *vel non*, with the personal liberties of the movant.

Defendant’s blog, though technically accessible to any internet user, is in its opening text a communication directly to Plaintiff. In a post dated November 24, 2007, Defendant makes plain in his own words one end to which a blog can be put: “The better with which to spread the most Intimate & Personal Details of their Private Lives from One End of the Planet To the Other And Back Again,” reads his headline. With the very same post, Defendant gives an obtuse parable involving the Civil-War-era theft of a stove. To whom was this a communication? Its significance, a review of the file reveals, would be lost on anyone not intimately familiar with disputed items related to the parties’ marital estate; in particular, a very expensive kitchen stove. The stranger, the casual reader, and perhaps the parties’ own family members would scarcely understand the meaning the post conveyed to Defendant: that she was the thief of the marital stove. Arguably, the post could be cast as setting up context for broader communication of Defendant’s grievances regarding the stove, but on the date of the post, it conveyed a message comprehensible exclusively to Plaintiff, alone among the infinite potential readers of the blog. However strange, the parable and Defendant’s own text seem outside Rule 4.

The post’s next content – or more specifically, what that content indicates about Defendant’s conduct and intentions – brings Rule 4 more sharply into view. When Plaintiff departed the marital residence, she left behind personal journals she had not shared with Defendant. This we know because he says as much in his subsequent blog posts, entered into the record by Defendant’s attorney. The blog entry of November 24 continues, “the Truth shall, eventually and regardless of any and all other considerations, be spoken, and ever so very publicly at that, in the dime stores and bus stations, and everywhere else where it needs to be spoken as well ... Each and every word of it ... For failure’s no success at all.” (Ellipses in original.) Beneath that text appears an enlarged, scanned image of two hand-written words – “hello again” – in Plaintiff’s distinctive handwriting. The scanned, hand-written words bear no textual connection with the preceding entry. They would appear to anyone a complete *non sequitur*, perhaps an odd piece of visual design. But not to Plaintiff, because only Plaintiff could know their source. To Plaintiff, and to Plaintiff only, the two scanned words would very clearly convey an unpleasant surprise, which might be paraphrased: “I found your diary, and I’m about to put it on the internet.”

Following that coded announcement, Defendant appropriated other of Plaintiff’s journal

entries, scanned them, and included them among derisive commentary concerning her sexual practices, her use of psychiatric medication, and the perceived paucity of her contributions to the marital estate. Those blog entries in the record generally maintain the thin veneer of pseudonymity; however, Defendant periodically lapses; for example, by giving the actual address of the marital home, 1080 Country Road; Plaintiff's Attorney's actual name, Ms. Ellwood (in Place of Defendant's preferred pseudonym for the attorney, "Ms. Incompetent"); and the names of Plaintiff's culinary school and a bar she visits in Montpelier.

Defendant's self-generated prose is of little moment to a Rule 4 analysis; as is the intermittent leakage to the internet of real-world names and locations, which are cognizable as "interference with the personal liberty of the other" only in the most strained sense. Defendant makes no direct or indirect threats of serious, imminent physical harm to plaintiff. However, Defendant's appropriation and unauthorized reproduction of Plaintiff's diary, accomplished for the announced purpose of publicizing her theretofore-private writings, is something distinct from an act of speech. It is conduct, pure and simple.

At any time after commencement of the proceeding, on motion of either party the court may enjoin the other party . . . from interfering with the possession, use, and control of property in the possession of either party and claimed by the other."

V.R.F.P. 4(c)(3).

Plaintiff has asserted – and Defendant has not only not contested, but also confirmed by his publications – that Defendant asserted control over a piece of her personal property, her theretofore private and confidential journal, and used it directly as fodder with which to harangue her in the most public way he could conceive. We emphasize that this is not the court's characterization, but a restatement of Defendant's own published announcement of November 26, 2007, entered into the record by his attorney.

It has long been held that the act of putting one's own thoughts to writing, even if not in contemplation of sale, creates a property right, a copyright, in the work, encompassing the right to control the disposition and publication or non-publication of that work. See, for example, *Hemingway's Estate v. Random House, Inc.*, 23 N.Y.2d 341, 244 N.E.2d 250 (N.Y. 1968). "Common-law copyright is the term applied to an author's proprietary interest in his literary or artistic creations before they have been made generally available to the public. It enables the author to exercise control over the first publication of his work or to prevent publication entirely—hence, its other name, the 'right of first publication.'" *Id* at 345-46 (citing *Chamberlain v. Feldman*, 300 N.Y. 135, 139, 89 N.E.2d 863, 864).

Common law copyright was first explicitly recognized in Vermont by *O'Bryan Const. Co., Inc. v. Boise Cascade Corp.*, 139 Vt. 81, 86 (1980), by which time, the *O'Bryan* Court noted, the doctrine had been substantially preempted by federal copyright law. Today's federal copyright statutes govern "original works of authorship fixed in any tangible medium of

expression,” 17 U.S.C. 102(a), which the subject journal entries certainly are. The court will not reach the preemption question, because adjudication of any copyright issue is very plainly beyond the Family Court’s jurisdiction in any event – what matters is not where the property may be fought over if it is conceived as intellectual property, but that it can be conceived as intellectual property at all. It can.

Thus, there are two forms of property at issue: the physical pages belonging to Plaintiff, upon which she wrote her journal, and Plaintiff’s intellectual property interest in controlling first publication, whether by photo-image or quotation. For purposes of orders prior to judgment in a divorce, Rule 4 identifies quite adequate authority to restrain the improper or unauthorized use of property in the possession of one party and claimed by the other.

Wife has a proprietary and possessory interest in her books and papers as both tangible property and intellectual property. She also has a First Amendment right to express herself, or not if she should choose. In seizing her writings and placing them on the blog, husband has crossed the line from speech into conduct. In doing so, he becomes subject to the family court’s jurisdiction.

The court finds authority to control the use of Plaintiff’s journal and its contents in V.R.F.P. 4(c), at least for the limited purposes of controlling the use of property disputed in the Family Court litigation. Thus to the extent defendant’s motion to dismiss asserts that as a matter of law, husband’s activities are not subject to the oversight of the family court, the motion fails.

Two questions remain: (1) whether the particular order issued by this court on December 7 cast so wide a net, on the way to restraining the Defendant’s use of Plaintiff’s journal, as to ensnare speech protected by the First Amendment, and (2) whether the remedies sought in Plaintiff’s request for immediate relief lie within the jurisdiction of the Family Court.

Plaintiff describes husband’s blog as “inaccurate, defamatory, derogatory and inappropriate.” The Vermont Supreme Court has recognized there is “no First Amendment right to inflict unwanted and harassing contact on another person.” *State v. Mott*, 166 Vt. 188, 194 (1997).

However, with the exception of defamatory language (as discussed further below), the fact speech is offensive, profane, irritating or even vexatious does not remove it from First Amendment protection. *State v. Allcock*, 177 Vt. 467, 469 (2004). Rather, the test is whether the language falls within the “certain well-defined and narrowly limited classes of speech to, the prevention of which has never been thought to raise any Constitutional problem.” *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571-72 (1942).

Chaplinsky identifies four categories of speech which lack Constitutional protection. These are: “the lewd and obscene, the profane, the libelous and the insulting or ‘fighting words’ – those which by their very utterance inflict injury or tend to incite an immediate breach of the

peace." *Chaplinsky*, 315 U.S. at 571-72.

Defendant's blog is not obscene or lewd. Although there are sexual references from time to time, the work as a whole is not focused on sex, nor it does not proceed to deal "with sex in a manner appealing to prurient interest." *Roth v. U.S.*, 354 U.S. 476, 487 (1957).

Likewise, it is not profane, although it contains occasional expletives. *Long v. L'Esperance*, 166 Vt. 566, 573 (1997) (Motorist's utterance of an expletive at officer was protected speech.).

Nor does the language used by husband tend to incite immediate breach of the peace. The fighting words doctrine proscribes use of "those personally abusive epithets which, when addressed to the ordinary citizen, are as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20 (1971). Fighting words focuses on face-to-face communication or at least communication within a close enough area where an immediate and uncontrollable physical reaction from the listener could reasonably be expected to result. In internet communication there is distance between speaker and recipient, with significant time likely to lapse before the recipient of the message, however upset, could confront the speaker. There is in short, no immediacy.

This leaves us with defamation. Libelous statements are not afforded absolute protection under the First Amendment. *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952). Defendant argues his use of a disclaimer and pseudonym shields him here, and posits the elements of a defamation claim cannot be met in any event.¹

However, the merits of any future defamation or other tort claim arising from defendant's conduct must be determined in Superior Court. Family Court jurisdiction is limited. 4 V.S.A. § 454. It does not include ancillary jurisdiction to determine tort or other claims between divorcing spouses. See, e.g. *Ward v. Ward*, 155 Vt. 242, 246-48 (1992); *Allen v. Allen*, 161 Vt. 526, 531 (1994) (Dooley, J., concurring in part).

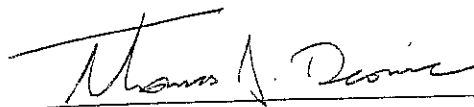
This brings us back full circle to Rule 4 and where to draw the proper dividing line between speech and conduct. To the extent the *Temporary Order* restricts speech-based activities, it is over broad and constitutes an impermissible burden on defendant's freedom of expression under the First Amendment. Yet the First Amendment does not operate to shield defendant from any misappropriation of wife's property, nor does it authorize conduct which would otherwise run afoul of V.R.F.P. 4.

¹The elements of defamation are (1) a false and defamatory statement concerning another; (2) some negligence, or greater fault in publishing the statement; (3) publication to at least one third person; (4) lack of privilege in the publication; (5) special damages, unless actionable per se; and (6) actual harm. *Ryan v. Herald Ass'n, Inc.* 152 Vt. 275, 278 (1989).

After careful consideration of the competing concerns, the Court denies defendant's motion to dismiss, grants defendant's motion to vacate the temporary order and sets plaintiff's motion for immediate relief for hearing.

Dated at Barre, Vermont, this 14th day of January, 2008.

SO ORDERED.

A handwritten signature in cursive script, reading "Thomas J. Devine", written over a horizontal line.

Hon. Thomas J. Devine
Presiding Judge