



Custody and Parenting Time  
5/16/22

In **Israel v. Israel**, 189 N.E.3d 170 (Ind. Ct. App. 2022), the Court affirmed the trial court’s holdings regarding the legal custody of Child and attorney’s fees but reversed the trial court’s implementation of the non-disparagement clause.

While filing for dissolution of their marriage, Mother requested provisional orders, as well as child custody and a psychological evaluation pursuant to Indiana Trial Rule 35. The court granted her request. Father filed a counter petition for provisional orders. The trial court granted the parties joint legal custody of Child. Upon the final dissolution hearing, the trial court made certain property awards, and awarded Mother sole legal custody of Child but required shared physical custody of Child on alternating weeks. The trial court noted Father’s repeated interference with Child’s health care, refusal to agree with the use of a parenting coordinator, and refusal to cooperate with a court order requiring him to allow the resumption of therapy for Child. Father created such conflict as to cause the therapist to terminate her relationship with Child after determining it was no longer in the best interests of Child to continue to meet. Finally, the Decree contained a non-disparagement clause which disallowed the parties from making disparaging remarks about the other in front of anyone, not only Child.

**The trial court did not err in granting sole legal custody of Child to Mother because of Father’s repeated inability to cooperate with Mother and creation of obstacles in connection to Child’s therapy. Id. at 178.** Courts consider multiple factors when considering an award of joint legal custody, including the best interest of the child and the willingness of individuals awarded joint custody to cooperate in support of the child’s welfare. Id. (citing Ind. Code §31-17-2-13 and -15). The Court noted Father’s unwillingness to cooperate with Mother and Child’s service providers, as well as his willingness to create obstacles in connection with Child’s mental health appointments, as reason to grant Mother sole legal custody of Child. Id.

**The trial court did err in implementing the non-disparagement clause, which was an unconstitutional, overbroad restraint of the parties’ speech. Id. at 180.** Prior restraints are not inherently unconstitutional; however, they do enter courts with a “heavy presumption against its constitutional validity.” Id. (quoting In re Paternity of K.D., 929 N.E. 2d 863, 868 (Ind. Ct. App. 2010)). To determine the constitutionality of a prior restraint, a court may consider the “nature and extent” of the speech, if other measures could “mitigate the effects of unrestrained speech,” and how effective a restraining order could be to prevent the potential issues. Id. (quoting Shak v. Shak, 144 N.E. 3d 274, 277 (Mass. 2020)). Additionally, the government has an interest in protecting children from disparagement between their parents. Id. (citing Shak, 144 N.E. 3d at 279). In this case, the non-disparagement clause exceeded furthering the permissible goal of the best interests of the child; the clause prevented the parents from making disparaging remarks about the other even when Child was not present. Id. Thus, the Court deemed the first sentence of the non-disparagement clause, which disallows the parties to disparage the other in front of anyone, unconstitutional. Id.