IN THE UTAH COURT OF APPEALS

MARY ELLEN ROBERTSON

Petitioner/Appellee,

v.

MICHAEL STEVENS

Respondent/Appellant.

SUPPLEMENTAL BRIEF OF APPELLANT

Appeal No.: 20170415

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INTRODUCTION

The instant request for supplemental briefing presents a very narrow issue of first impression: How does a state's continuing jurisdiction in a divorce case mesh with a stipulated, non-child-related non-disparagement clause contained in a final, but non-adjudicated decree of divorce. First, principles of *res judicata* are inapplicable regarding the instant issue because of a trial court's very broad discretionary powers as clearly established by this Court and because the nature of disparagement in a divorce action is likely to require post-decree adjudication.

No party should lose their right to modify a disparagement clause set forth in a decree of divorce due to the nature of what a disparagement clause seeks to address. In light of technological advances, more and more divorcing litigants agree to non-disparagement clauses. Finally, in light of statute, case law, and sound public policy, district courts should have continuing jurisdiction on matters such as the narrow issue set forth in this Court's *Supplemental Briefing Order* in this matter.

ARGUMENTS

I. *RES JUDICATA* IS RENDERED INAPPLICABLE UNDER THE FACTS OF THIS CASE DUE TO A TRIAL COURTS BROAD DISCRETIONARY POWERS, ONLY TO BE DISTURBED IN THE PRESENCE OF CLEAR ABUSE

In 1978, this Court held in *Kessimakis v. Kessimakis,* 580 P.2d 1090, 1091 (Utah 1978) that, pursuant to the operative section 30-3-5, a showing of substantial post-decree change in circumstances makes the doctrine of res judicata inapplicable. In the instant matter, as shown herein, the trial court has continuing jurisdiction because of its broad discretionary powers. Utah Courts have long upheld the arguments in support of continuing jurisdiction over divorce matters when public policy suggests parties may need the court's assistance. An example of the broad discretionary powers of the district court, this Court has held that merely because the

divorce judgment is silent on alimony, does not mean a final order cannot be modified with respect to alimony. See *Kinsman v. Kinsman*, 748 P.2d 210, 213-16 (Utah Ct. App. 1988) (Jackson, J., concurring) (construing Utah's divorce modification statutes to allow alimony to be awarded at modification because court has continuing jurisdiction over divorce decree and that decree is only res judicata as to circumstances as they exist at the time of divorce, not as to changed circumstances requiring further adjudication). The instant case highlights the need of a district court to maintain continuing jurisdiction over the non-disparagement clause at issue. Continuing jurisdiction over a non-disparagement clause in a decree of divorce in the age of the internet will likely require further adjudication.

District courts in Utah should continue to have the broad discretionary powers this Court has upheld. See *Despain v. Despain*, 610 P.2d 1303, 1305-06 (Utah 1980) ("Under Utah law, a divorce court sits as a court in equity so far as child custody, support payments, and the like are concerned. It likewise retains continuing jurisdiction over the parties, and *power to make equitable redistribution or other modification of the original decree as equity might dictate.* In both the formulation of the original decree and any modifications thereof, *the trial court is vested with broad discretionary powers*, which may be disturbed by an appellate court only in the presence of clear abuse thereof.").

II. THE COURT HAS CONTINUING JURISDICTION TO MODIFY OR EXPAND A STIPULATED, NON-CHILD-RELATED NON-DISPARAGEMENT CLAUSE CONTAINED IN A NON-ADJUDICATED DECREE OF DIVORCE

a. Although the issue for which this court seeks supplemental briefing is an issue of first impression in Utah, strong legal basis in the form of statutes and case law lend support to district courts retaining continuing jurisdiction regarding a non-disparagement clause between the divorcing parties and not related to minor children. Today's social and technological changes pose yet another serious question for this Court. In this case, the Court should lead the nation on this issue and thereby keep up with social and technological changes that can so widely impact a divorcing party's life. As in this case, a former spouse can broadcast with the internet disparaging comments about their ex-spouse as far as Europe and China.

If this Court decides a trial court does not have continuing jurisdiction over the subject matter in dispute, it means the parties reached an agreement that is now henceforth eternally etched in stone; rather, a trial court should have continuing jurisdiction, once the requisite material changes are pled, weigh the changes in light of the disparagement clause to determine if expansion or restriction is needed. As in this case, spousal disparagement can have far-reaching consequences that may impact another party financially; ex-spouse hold a special position of trust to learn intimate details about their ex-spouse that can be exploited or used to embarrass widely.

b. District Court's in Utah have continuing jurisdiction over personal property. In Utah, personal property includes non-tangible property such as copyrights, patents, or trademarks. One's reputation is tantamount to personal property and one must literally be more vigilant in the age of the Internet to protect one's image. The operative section of the Utah Code allows for this reading: "The court has continuing jurisdiction to make subsequent changes or new orders . . . for distribution of the property . . . as is reasonable and necessary. Utah Code 30-3-5(3)

CONCLUSION AND RELIEF SOUGHT

The Court should find there is continuing jurisdiction over the subject matter at issue.

Respectfully submitted this 8th day of November, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of November, 2019, I caused to be delivered two true and correct copies of the foregoing SUPPLEMENTAL BRIEF OF THE APPELLANT pursuant to statute to the following by email:

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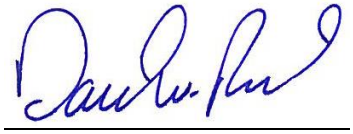

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