STATE OF MICHIGAN

COURT OF APPEALS

In re Matter of the DETROIT FREE PRESS.

JENNIFER IRELAND,

Plaintiff,

v

STEVE SMITH,

Defendant,

and

DETROIT FREE PRESS,

Appellant.

UNPUBLISHED
November 23, 1999

No. 215022
Macomb Circuit Court
LC No. 93-000385 DS

Before: Gribbs, P.J., and Markman and Sullivan*, JJ.

MARKMAN, J. (dissenting).

I respectfully dissent. The facts in this case are similar to those in the related case of *Stafford v Stafford* (Docket No. 215744). Thus, my analysis and recommendation mirror those found in *Stafford*. While I agree with the majority that the gag order here does not constitute a prior restraint on the appellant, I do not agree that the order, which nevertheless affects the constitutional freedom of the press, should be affirmed without further inquiry.

The majority concludes that the state's interest in protecting the child's best interests "overrides the incidental effects of the gag order on the First Amendment rights of the Detroit Free Press," but provides no articulation of precisely why the constitutional impact is only incidental, precisely how the child's best interests are threatened here, or why this broad gag order is the least restrictive means of protecting those interests. Likewise, the only evidence of the trial court's reasoning in this case was the

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

following passage provided within the order itself:

> The parties agree that media exposure of the minor child is not in the child's best interest. In her response to this motion plaintiff stated that she shared defendant's concern that the child not be exploited or victimized by the media. The Court finds that the rights of a fair hearing of the parties and the minor child may be threatened, and in considering the best interest of the minor child, media exposure should be limited.

The parties may certainly agree, between themselves, to protect their child from media exposure. However, I do not believe that they may limit non-parties' constitutional rights by stipulation. Moreover, I do not believe this Court has sufficient information from which to merely conclude that this child's best interests outweigh the gag order's effect on First Amendment protections, even if that effect is, with adequate analysis, found to be incidental. I would, therefore, remand this case for further findings and a clear articulation by the trial court of precisely what considerations weigh in favor of limiting media access here.

While the majority is, of course, correct that both the federal and state constitutions guarantee freedom of speech and freedom of the press, US Const, Ams I, XIV; Const 1963, art 1, § 5, prior restraints are not the only method of infringing these rights. Freedom of the press includes not only a right to disseminate information, but a corresponding right of access to information-- the former being effectively meaningless without the latter. *Branzburg v Hayes*, 408 US 665, 681; 92 S Ct 2646; 33 L Ed 2d 626 (1972). Gag orders, such as that currently before this Court, have been recognized as a less restrictive alternative to direct limitations on the press, *Nebraska Press Ass'n v Stuar*t, 427 US 539, 564; 96 S Ct 2791; 49 L Ed 2d 683 (1976), but they are recognized as limitations nonetheless.

Challenges to gag orders have historically arisen in criminal cases, requiring a weighing of First Amendment protections against the Sixth Amendment guarantee to a fair trial. US Const, Am VI. Under these circumstances, they are sometimes the least restrictive means of ensuring that a criminal defendant will be tried in the courts, rather than in the media. See, e.g., *Globe Newspaper Co v Superior Court*, 457 US 596; 102 S Ct 2613; 73 L Ed 2d 248 (1982); *Sheppard v Maxwell*, 384 US 333, 361; 86 S Ct 1507; 16 L Ed 2d 600 (1966). In the instant case, however, restrictions on the media's ability to gather news were imposed to protect an important, but clearly a *non*-constitutional interest-- the best interests of the child. When courts limit the constitutional freedom of the press right in an effort to protect another *constitutional* right which is allegedly in tension, they are required to carefully weigh and balance the interests in question. *Globe*, *supra*. At a minimum, the same careful weighing and balancing must be employed when limiting freedom of the press in an effort to protect a *non-constitutional* right.

In my view, this Court requires additional information before we may adequately assess the constitutionality of the disputed gag order in the instant case. As the majority recognizes, the lower court record in this case is replete with examples of statements the parties and their attorneys have made to the press throughout this highly publicized custody dispute. Some of this evidence would likely

support the imposition of a gag order, provided such order was sufficiently limited in scope. However, I do not believe that the lower court may merely let the record speak for itself and issue a gag order of the breadth issued in this case, without engaging in any articulated analysis whatsoever. We cannot determine the constitutionality of the gag order until we can examine the reasoning and factual findings supporting its issuance. The only support for this order on the record is evidence that the case generated considerable media attention and that the parties stipulated that a gag order would be in their child's best interests. The lower court supported its decision to continue the order by stating, "the rights of a fair hearing of the parties and the minor child may be threatened, and in considering the best interest of the minor child, media exposure should be limited." In my view, this limited statement, without further clarification or factual support, does not sufficiently support the broad limitation the lower court imposed on the media in this case.

In its analysis of the constitutionality, the lower court should consider several questions. First, the lower court should consider, and fully articulate, precisely what impact its order will have on the access of the press. The purpose of the rights guaranteed by the First Amendment is to encourage open discussion of public issues and to encourage citizens to participate in self-government. *Globe, supra*. Consequently, the media has been deemed to have a constitutional right of access to newsworthy information, particularly that within the control of the government, including the judicial branch of the government. *Id.* When the courts limit such access, they limit the press's ability to disseminate information and the public's concomitant access to that information. Even speech "which lacks truth, social utility or popularity or which exaggerates or vilifies" commands constitutional protection. *New York Times Co v Sullivan*, 376 US 254, 270-71; 84 S Ct 710; 11 LEd2d 686 (1964).

Yet, the First Amendment is also not so broad as to allow plenary access to information without exception. *Globe*, *supra*, at 606; *Nebraska Press Ass'n*, *supra*, at 560-61. Where First Amendment rights have threatened other constitutional interests, definition of the breadth of the latter have helped to define the breadth of the former. However, we cannot merely presume that *non-constitutional* interests warrant imposing similar limitations in light of the values set forth explicitly by the Constitution. Media coverage of custody cases provides a variety of potential benefits; for example, educating the public with respect to child welfare concerns has often served as a catalyst for legislative and judicial reform in this area. The majority concludes that the gag order here has only an incidental effect on the press, but without clarification of precisely what effect this particular order has or may have in the future, I cannot agree that it is only incidental. In my view, a court may not limit a constitutional right without first recognizing the significance and scope of that right in the context of the case before the court.

Second, the lower court should explain precisely what harm media exposure may cause to the child or to other persons affected by this process, the likelihood of such harm, and how exactly a gag order might prevent the predicted harm. Stated another way, precisely what interests are being protected? Neither the trial court nor the majority have explained how the child's best interests have been harmed or have been threatened by media exposure. The "best interests of the child" is a well-understood standard in matters of child custody, for example, but has yet to be examined carefully in the context of the First Amendment. A particular child's best interests may be affected by a multitude of factors, including the child's age, psychological state, and maturity, as well as by the overall circumstances of the particular custody dispute.[1] The parties here expressed a desire that the gag order

remain in effect, agreeing that it was in the best interests of their child. While the lower court should certainly take this expression of parental concern into consideration, it is axiomatic that the parties may not, by mere stipulation, limit non-parties' constitutional rights. See, e.g., *Specialties Distributing Co v Whitehead*, 313 Mich 696, 700; 21 NW2d 926 (1946). It must also be recognized, of course, that the parties may be motivated by something other than concern for the "best interests of the child" in terms of their endorsement of a gag order. This must all be sifted through carefully by the trial court as a prelude to imposing a gag order upon the parties. Only after this has been done will this Court have sufficient information from which to review the trial court's decision.

In *In re TR*, 52 Ohio St 3d 6; 556 NE2d 439 (1990), the Ohio Supreme Court examined a gag order similar to the order at issue here.[2] The lower court in that case relied on expert testimony suggesting that media exposure could have a detrimental effect on the child but also acknowledging that the risk of harm was unpredictable and could vary widely depending on the child's age and the child's particular circumstances. On remand, both the majority and the dissent recognized that the lower court had failed to engage in the careful weighing and balancing I advocate here, disagreeing only with respect to the standard of review. The majority in that case instructed the lower court to determine: (1) whether a "reasonable and substantial basis" existed for believing that public access could harm the particular child or endanger the fairness of the proceeding; and (2) whether the potential for such harm outweighed the benefits of public access to the information, *id.* at 456, while the dissent advocated an even higher standard: (1) proof that there existed a "substantial probability" that a "higher value" than the First Amendment would suffer prejudice by the publicity that the gag order would prevent; and (2) a showing that no reasonable alternatives could adequately protect that higher value. *Id.*, citing *Press-Enterprise Co v Superior Court*, 478 US 1; 106 S Ct 2735; 92 L Ed 2d 1 (1986); *State, ex rel The Repository v Unger*, 280 Ohio St 3d 418; 504 NE2d 37 (1986). Under either of these standards, a gag order, particularly of the magnitude imposed here, would require more than mere conjecture that the parties' child might somehow be harmed by media exposure, or that media exposure might somehow interfere with an investigation.

Third, the lower court should examine alternative means of protecting the child's specific interests and adopt the least restrictive of those alternatives. The lower court here has attempted to limit the following individuals from communicating with the press: the parties, their families and employees, the parties' attorneys, the attorneys' employees, all parties with knowledge of the status and content of settlement negotiations,[3] subpoenaed witnesses, court clerks and officials, and any guardian ad litem appointed by the court. Even agreeing, for argument's sake, that the court's jurisdiction here extends to individuals who are not legal parties to the action, there is no evidence that every current and future employee and every family member poses a risk to the child's best interest. Indeed, if this were the case, the court could not accomplish its goal without extending the gag order to the entire community. Clearly, such order would fall outside the scope of the court's authority. Thus, on remand, I would ask the lower court to limit any gag order it deems necessary to only those individuals whose communications would pose a clear threat to the child's best interests, limited, of course, to those individuals over whom the court may properly exercise its jurisdiction or administrative authority.

The risk of overbreadth in this case is evident not only with respect to the individuals restricted from communicating with the press, but with respect to the scope of the restrictions themselves. For example, the child here is not only protected from unwanted media attention, but she is also "protected"

from being photographed or filmed for academic, sports-related or artistic accomplishments, or for her community service efforts. Again, if the risk of harm is so significant that photographs, films, and videotapes must be completely avoided to adequately protect the child's best interests, then the individuals charged with protecting the child from such exposure cannot accomplish the court's goal without isolating the child completely from public places. Certainly this cannot be what the lower court intended. Consequently, I cannot agree with the majority that the order here is reasonable, for it is difficult to imagine how these broad provisions, if enforced as written, protect the child's best interests. Thus, on remand, I would require the lower court to narrow its order to the least restrictive means of protecting the specific interests.

Finally, the lower court should articulate precisely why it is necessary to continue the gag order beyond the stage of litigation at which it was entered. The lower court determined, in conclusory fashion, that "the rights of a fair hearing . . . may be threatened." However, the risk of unfair proceedings appears minimal here: the underlying issues have been resolved and a custody order has been entered. Although, as the majority recognizes, the lower court will likely retain jurisdiction over the child until she reaches the age of majority, *Brown v Brown*, 192 Mich App 44; 480 NW2d (1992), there are no pending proceedings to be compromised by any media attention.[4] If the court deems it necessary to limit the press's access to information for the next decade or beyond, I believe it must articulate precisely why this is necessary.

In my judgment, we should remand this case in order to protect the interests of all involved. If the constitutional rights of the press are to be protected, the courts must acknowledge that there is a significant burden to be overcome whenever the media's access to information is restricted. Yet, it is also important to acknowledge that other interests can sometimes work to define the boundaries of access on the part of the press. The "best interests of the child" may rise to this level in a given case; however, I do not believe this Court can make this determination without more analysis and articulation on the part of the trial court. I therefore respectfully dissent.

/s/ Stephen J. Markman

[1.] It is conceivable that, under some circumstances, media access may actually contribute to the best interests of the child. Certainly exposure of abuses in various institutional settings, for example, has benefitted children subjected to those abuses. I note here that in the related case of *Stafford v Stafford* (Docket No. 215744), the majority suggests that the minor child's interest includes a "constitutional right to privacy." Because the majority has not referenced a right to privacy in this case, I do not address it here.

[2.] *In re TR* involved a complicated custody and adoption proceeding in the context of a disputed surrogate parenting arrangement. The proceedings were held in a juvenile court rather than in a circuit court as here.

[3.] Presumably, the court used "parties" in this portion of the gag order in its generic sense, rather than referring to the legal parties to the action.

[4.] Also significant is that custody issues are determined by a judge, not by a jury. Presumably, the lower court judge would not permit the media to influence future decisions.