STATE OF MICHIGAN

COURT OF APPEALS

In re Matter of MACOMB DAILY.

KEVIN E. STAFFORD,

Plaintiff,

v

PAMELA D. STAFFORD, also known as PAMELA MCGEE,

Defendant,

and

MACOMB DAILY,

Appellant.

UNPUBLISHED
November 23, 1999

No. 215744
Macomb Circuit Court
LC No. 95-004762 DM

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 *Ireland v Smith* (Docket No. 215022). Thus, my analysis and recommendation mirror those found in *Ireland*. 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 lower court here explained that it "would serve no purpose" for either party to make statements to the press while the Friend of the Court conducted its custody investigation. This conclusory statement is the only evidence in the record of the court's analysis, with the exception of the gag order itself, concluding that "the rights of the parties hereto for a fair hearing may be jeopardized"

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

and that the order was "in consideration of the best interest of the minor child." No further explanation or analysis was provided by the court. The majority states that it is reasonable to conclude that "statements made to the media regarding the custody dispute might impair the child's best interests and general well-being," but does not provide any factual support for this conclusion. Certainly the right statement to the media concerning *any* custody dispute *might* impair the particular child's best interests, but courts cannot issue gag orders, particularly of the breadth issued in this case, in every custody dispute in an effort to prevent unspecified risks that *might* conceivably come to pass. The majority also concludes that the gag order imposes "reasonable restrictions on the persons involved," but does not discuss the effect of those restrictions and has not explained why they are reasonable. In my view, considerably more is needed to justify limiting the constitutional rights involved here. 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.

As an initial matter, I do not understand the amended gag order in this case to prohibit appellant from taking photographs, films, or videotapes of the minor child, as represented by the majority. However, it is unclear to me precisely what the order does accomplish. The first clause provides:

> [T]he plaintiff, plaintiff's counsel, defendant, defense counsel, the family members of the parties, all persons employed by the parties or their counsel, all parties with knowledge of the status and content of settlement negotiations, subpoenaed witnesses, clerks and officials in attendance to this Court, and any guardian ad litem appointed by the Court, shall not have *the following forms of contact* with agents and/or employees of the media including newspapers, magazines, television stations, and radio stations . . . . (emphasis added)

The court failed to explain what forms of contact were prohibited. Rather, the order simply proceeds to the second clause, "and shall not allow the minor child to be photographed, filmed or videotaped by the media or allow the media access to take photographs, films or videotapes of the minor child."

I see no material difference between allowing the child to be photographed by the media and allowing the media access to take photographs of the child. Similarly, the order appears to place no direct limitations on the media. Therefore, although I believe that the gag order requires further justification by the trial court, I disagree with the majority's conclusion that the gag order in this case "does prohibit the Macomb Daily from taking 'photographs, films or videotapes of the minor child.'"

I agree with the majority that the gag order here does not constitute a prior restraint on the appellant newspaper, but I do not agree that it should be affirmed without further inquiry. Both the federal and Michigan State constitutions guarantee freedom of speech and freedom of the press, US Const, Ams I, XIV; Const 1963, art 1, § 5, but 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 have been recognized as a less restrictive alternative to direct limitations on the press, *Nebraska Press Ass'n*

v Stuart, 427 US 539, 564; 96 S Ct 2791; 49 L Ed 2d 683 (1976), but they are recognized 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 *non-constitutional* interest-- the best interests of the child. At an absolute minimum, allowing a non-constitutional interest to limit a constitutional right should require the same careful weighing and balancing as required when analyzing two *constitutional* rights that are allegedly in tension. *Globe, supra*.

In my view, this Court requires additional information before we may adequately assess the constitutionality of the disputed gag order. 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. The First Amendment protects even speech "which lacks truth, social utility or popularity or which exaggerates or vilifies." *New York Times Co v Sullivan*, 376 US 254, 270-71; 84 S Ct 710; 11 LEd2d 686 (1964).

However, the First Amendment is 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, but we cannot merely presume that *non-constitutional* interests warrant imposing similar limitations in light of the values set forth explicitly by the Constitution. Media exposure 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 the gag order might prevent the predicted harm. Neither the trial court nor the majority have explained how the

child's best interests have been harmed or are 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. 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 the 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.

The majority cites *Swickard v Wayne Co Medical Examiner*, 438 Mich 536; 475 NW2d 304 (1991); and *Mager v Dep't of State Police*, 460 Mich 134; 595 NW2d 134 (1999), for its conclusion that "the minor child here has a *constitutional* privacy interest in avoiding disclosure of personal matters." [emphasis supplied]. In *Swickard*, the Supreme Court addressed a newspaper reporter's attempt, through a Freedom of Information Act (FOIA) request, MCL 14.231 *et seq*.; MSA 4.1801(1) *et seq*., to obtain an autopsy report and a toxicology test regarding a deceased district court judge-- a suicide victim. *Swickard*, *supra* at 541. That case involved neither a gag order nor a child's privacy interests. Indeed, the Court in *Swickard* declined to extend either a common-law or a constitutionally based right to privacy to the particular facts before the Court, concluding that the requested information did *not* fall within the FOIA's privacy exemption, which precludes disclosure of "[i]nformation of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." *Id*. at 554-56, analyzing MCL 15.243(1)(a); MSA 4.1801(13)(1)(a).

In *Mager*, another case involving an FOIA request, the Court examined a request for the names and addresses of registered-handgun owners, concluding that such information did fall within the FOIA's privacy exemption, MCL 15.243(1)(a); MSA 4.1801(13)(1)(a). *Mager, supra* at 135-36. But, while the Court agreed that the names and addresses of handgun owners fell within this exemption, it engaged in no constitutional analysis whatsoever, noting only in a final footnote that "we, like the U.S. Supreme Court, 'are reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions.'" *Id*. at 146 n 23, quoting *United States Dep't of Defense v Federal Labor Relations Authority*, 510 US 487, 501; 114 S Ct 1006; 127 L Ed 2d 325 (1994). Thus, not only does *Mager* not address a gag order or a child's privacy interests, it does not even provide an articulated constitutional basis for supporting the statutorily protected privacy interest under the narrow facts of that case.

The right to privacy is not expressly enunciated in the Constitution. Nevertheless, the United States Supreme Court has recognized the existence of a limited constitutional right of privacy, apparently under the Ninth Amendment, US Const, Am IX. See, e.g., *Griswold v Connecticut*, 381 US 479, 483-84; 85 SCt 1678; 14 L Ed 2d 510 (1965). However, in no case has the Supreme Court ever applied or even analyzed such constitutional right in the context of a child's (or for that matter, an adult's) interest in avoiding the disclosure of "personal matters," assuming for the moment that such a

disclosure is somehow at risk in the instant case. Similarly, the majority here has not even attempted to justify its conclusion that, because the U.S. Supreme Court and Michigan Supreme Court have recognized a limited constitutional privacy right, children therefore enjoy a constitutional protection from the "disclosure of personal matters." It is indeed remarkable that such a far-reaching proposition of constitutional law should be asserted in the context of an unpublished opinion of this Court. In any event, I cannot agree with the identification of such a right in the constitutions of either the United States or this State.

Regardless of my disagreement with the majority's attempt to expand a limited constitutional right of privacy to the instant context, I do agree that the potential effect of the disclosure of personal matters is a factor to consider when analyzing a particular child's best interest for purposes of weighing this with the First Amendment rights involved. In that context, I note the majority's reliance on *In re J S, a Minor*, 267 Ill App 3d 145, 150; 640 NW2d 1379 (1994), to support its conclusion that the minor's privacy interest here outweighs the effect of the gag order on the media. However, in *In re J S*, the court did engage in a careful weighing of the competing interests, as I advocate here. The minor child's mother in that case inflicted physical abuse on her daughter in an effort to prove the mother's fabricated claims that the child's father had sexually abused their child. Presumably, media exposure of that case would have created a far greater risk to the child's best interests than media exposure of the instant case, in which plaintiff merely planned to release "a series of written statements as the case develops." Thus, although I disagree with the Illinois court's characterization of the child's privacy interest as a constitutional right, I do agree that, under some circumstances, media exposure of the details of a child's personal life could well create a substantial enough risk to the child's best interests to warrant placing limited restrictions on the media's access to that information.

The trial court here also suggested that media exposure could interfere with an ongoing Friend of the Court investigation, but again, failed to articulate its concerns. While this is certainly a valid concern--one that the lower court can properly take into consideration--I believe the court must articulate precisely what risks to the investigation media exposure may present, including the likelihood and potential severity of those risks, and then the court must weigh and balance these risks against the important constitutional rights being restricted. This would necessarily include consideration of other, less restrictive, means of protecting against the identified risks.

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.[1] That court considered 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 in this case, requires 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 prohibit the following individuals from communicating with the press: the parties, the parties' families and employees, the parties' attorneys, the attorneys' employees, all parties with knowledge of the status and content of settlement negotiations,[2] 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 each of these individuals possesses knowledge, the dissemination of which would pose 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 over whom the court may properly exercise 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 is not only protected from unwanted media attention, 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 issue and continue the gag order beyond the stage of litigation at which it was entered. The lower court determined, sua sponte, and in conclusory fashion, that "the rights of the parties hereto for a fair hearing may be jeopardized." However, custody issues are determined by a judge, not by a jury. Presumably, the lower court judge would not permit the media to influence his decisions. As the majority recognizes, the lower court will likely retain jurisdiction over this child until she reaches the age of majority, *Brown v*

Brown, 192 Mich App 44; 480 NW2d (1992), long after the custody issues have been resolved. If the court deems it necessary to limit the press's access to information until the Friend of the Court investigation is complete or until the child reaches the age of eighteen, I believe the court must articulate precisely why this is necessary-- precisely what risk media exposure will have on any future proceedings.

In my judgment, remanding this case is necessary 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 important interests can work to define the boundaries of access on the part of the press. The "best interest of the child" may sometimes rise to this level; however, I do not believe this Court can make that determination without analysis and articulation on the part of the trial court. I therefore respectfully dissent.

/s/ Stephen J. Markman

[1] *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.

[2] Presumably, the court was using "parties" in the generic sense here, as opposed to the *legal* parties to this action, the latter having already been listed in the order.