

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of the MACOMB DAILY.

KEVIN E. STAFFORD,

Plaintiff-Appellee,

v

PAMELA STAFFORD, a/k/a PAMELA MCGEE,

Defendant-Appellee,

and

MACOMB DAILY,

Appellant.

UNPUBLISHED

November 23, 1999

No. 215744

Macomb Circuit Court

LC No. 95-004762 DM

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

PER CURIAM.

The Macomb Daily appeals by leave granted from an amended gag order issued in this child custody dispute. We affirm.

The Macomb Daily argues that the amended gag order which the trial court issued in this case violated its First Amendment right to gather information in order to report the news. We disagree. Constitutional questions are reviewed de novo on appeal. *Smith v Calvary Christian Church*, 233 Mich App 96, 100; 592 NW2d 713 (1998).

The Macomb Daily argues that the following order imposed by the trial court violates its First Amendment right to gather news:

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

IT IS HEREBY ORDERED that the Gag Order entered October 1, 1998, is amended as follows:

The Court Sua Sponte finds that the rights of the parties hereto for a fair hearing may be jeopardized and in consideration of the best interest of the minor child;

IT IS HEREBY ORDERED that the 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; and shall not comment upon the subject matter of this case, the evidence expected to be introduced, or the merits of this case; 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. This order shall remain in effect until further order of the court.

"Freedom of speech and of the press are guaranteed by federal and state constitutional provisions." US Const, Ams I, XIV; Const 1963, art 1, § 5; *In re Midland Publishing Co, Inc, v District Court Judge, 75th Judicial Circuit*, 420 Mich 148, 156; 362 NW2d 580 (1984). The United States Supreme Court has interpreted these guarantees to afford special protection against orders that impose a prior restraint on speech by prohibiting the publication or broadcast of particular information or commentary. *Nebraska Press Ass'n v Stuart*, 427 US 539, 556; 96 S Ct 2791, 2801; 49 L Ed 2d 683 (1976). Because prior restraints on publication constitute the least tolerable infringement of First Amendment rights, the party seeking to justify a prior restraint must overcome a heavy presumption of unconstitutionality. *Id.*

In *United States v Davis*, 902 F Supp 98, 102 (ED La, 1995), the court noted that "[n]o certain consensus exists as to whether an order that regulates trial participants' extrajudicial statements is a prior restraint." The court went on to state that a "consistent theme" which emerged from the case literature was that there was "a real difference between restraints imposed on trial participants and those that directly obstruct publication or dissemination." *Id.*, citing *In re Application of Dow Jones & Co*, 842 F2d 603, 608 (CA 2, 1988). The *Davis* court found that, because the newspapers themselves could not be "haled into court for violating its terms," an order aimed at trial participants is considerably less intrusive of First Amendment rights. *Davis, supra*. In *Nebraska Press Ass'n, supra*, the United States Supreme Court suggested that orders limiting what lawyers and witnesses may say to anyone outside of the proceedings are "measures short of prior restraints on publication." *Id.*, 564. See also, *Radio and Television News Ass'n of Southern California v United States District Court for the Central District of California*, 781 F2d 1443, 1446 (CA 9, 1986) (recognizing a fundamental difference between a restraining order against the press and a restraining order against the trial participants).

The amended gag order in this case does prohibit the Macomb Daily from taking “photographs, films or videotapes of the minor child.” However, the Macomb Daily does not challenge that provision of the order. The challenged provisions of the amended gag order do not prevent the Macomb Daily from accessing the trial court record, attending any proceedings, or publishing any information in its possession. See, *Radio and Television News, supra*, noting that the United States Supreme Court, in *Richmond Newspapers, Inc. v Virginia*, 448 US 555, 576; 100 S Ct 2814; 2827 L Ed 2d 570 (1978), while affirming the “right of access” or “right to gather information” granted to the press with respect to criminal trials, went on to describe that right only as a right to “sit, listen, watch and report.” Moreover, the trial court cannot impose sanctions against the Macomb Daily for publishing information regarding the case, no matter how it acquired the information. As a result, we conclude the amended gag order does not constitute a prior restraint, and we therefore are not required to consider whether it can withstand strict constitutional scrutiny. *Davis, supra*.

We are, however, required to determine whether the amended gag order was reasonable and served a legitimate purpose which overrides the limited incidental effects of the order on First Amendment rights. *Radio and Television News Ass’n, supra*, at 1448. In custody disputes, Michigan has an interest in protecting the best interests and welfare of children as evidenced by the Legislature’s enactment of the Child Custody Act. *Frame v Nehls*, 452 Mich 171, 176; 550 NW2d 739 (1996). In *Fisher v Fisher*, 118 Mich App 227, 232; 324 NW2d 582 (1982), this Court stated:

It is difficult to conceive of a more compelling or vital state interest than the welfare of minor children as it is affected by the dissolution of their parents' civil marriage union. The care and protection of children has long been a matter of utmost state concern. The state has declared that all disputes concerning custody of children shall have preference over other civil actions and that the controlling consideration in such disputes shall be the best interests of the children. MCL 722.25; MSA 25.312(5). That the best interests of children are potentially threatened in a divorce situation cannot be gainsaid. Those best interests include inherent rights to proper and necessary support and custody and general well-being, and are matters to which the court's protective function most vitally applies. See MCL 722.24; MSA 25.312(4).

Moreover, in addition to the State’s role as *parens patriae*, the minor child in this case has a constitutional privacy interest in avoiding disclosure of personal matters. *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 554; 475 NW2d 304 (1991). See also, *Mager v Dep’t of State Police*, 460 Mich 134; 595 NW2d 134 (1999). In *In re J S, a Minor*, 267 Ill App 3d 145, 150; 640 NE2d 1379 (1994), the Appellate Court of Illinois found that the minor’s right to privacy in a custody dispute outweighed a parent’s right to take the case to the press.

Accordingly, this Court cannot conclude that the trial court was unreasonable in its conclusion that statements made to the media regarding the custody dispute might impair the minor child’s best interests and general well-being. *Radio and Television News Ass’n, supra*; *Swickard, supra*; *Fisher, supra*. The amended gag order imposes reasonable restrictions on the persons involved, and Michigan’s interest in protecting the minor child’s best interests overrides the incidental effects of the gag order on the Macomb Daily’s First Amendment rights. *Radio and Television News Ass’n, supra*.

Moreover, the amended gag order does not serve, nor does the

Macomb Daily argue that it serves, an illegitimate purpose, such as concealment. *Radio and Television News Ass'n, supra*.

Affirmed.

/s/ Roman S. Gibbs

/s/ Joseph B. Sullivan