

STATE OF MICHIGAN
COURT OF APPEALS

In the 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UNPUBLISHED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 J.B.Sullivan*, JJ.

PER CURIAM.

The Detroit Free Press appeals by leave granted from an order denying its motion to lift the amended gag order in this case. We affirm.

The Detroit Free Press argues that the amended gag order is a prior restraint on its First Amendment right to gather information for purposes of reporting 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).

“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*

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

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).

In the instant case, the amended gag order provides:

IT IS HEREBY ORDERED that 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, be forbidden from having the following forms of contact with agents and employees of the media including newspapers, magazines, television stations, and radio stations: commenting upon the subject matter of this case, the evidence expected to be introduced, the merits of the case, or personal matters regarding the parties or the minor child; and, allowing the minor child to be photographed, filmed or videotaped by the media or allowing the media access to photographs, films, or videotapes of the minor child. This order shall remain in effect until further order of the Court.

This order does not prevent the Detroit Free Press from accessing the trial court record, attending any further 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 Free Press 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). The legislative purpose behind the Child Custody Act is to promote the best interests and welfare of children. *Id.* In furtherance of that interest, once a custody action commences, the circuit court retains jurisdiction for purposes of enforcement or modification of the judgment until the child reaches the age of majority. *Brown v Brown*, 192 Mich App 44; 480 NW2d (1992).

In the instant case, the parties' custody dispute generated considerable media attention in Michigan and around the country. *Ireland v Edwards*, 230 Mich App 607, 610; 585 NW2d 632 (1998) ("This case represents we hope, the dying embers of a highly publicized battle between plaintiff and Steven Smith for the custody of their daughter, Maranda"); *Ireland v Smith*, 214 Mich App 235, 250; 542 NW2d 344 (1995), modified 451 Mich 457; 547 NW2d 686 (1996) ("In this case, the media frenzy generated by the trial court's decision reached national proportions. Numerous newspaper and magazine articles, as well as radio and television references, appeared throughout Michigan and elsewhere.") When plaintiff sued defendant's trial counsel for defamation, false light invasion of privacy and intentional infliction of emotional distress, her claims were based on twenty of counsel's statements, some of which counsel made at a press conference which she called, some she made during the taping of various television programs and one which she made to a newspaper reporter. *Ireland, supra*, 230 Mich App 611.

The amended gag order stated:

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. . . .

When the parties placed their settlement agreement on the record, they indicated that they would like to have the gag order remain in effect. As a result, the consent order stated that the July 31, 1996, amended gag order was to remain in full force and effect. At the hearing on the Free Press motion, the guardian ad litem for the child requested that the order remain in full force and effect, and also stated that Ms. Ireland concurred.

We conclude that the amended gag order is reasonable and serves a legitimate purpose. Michigan's interest in protecting Maranda's best interest overrides the incidental effects of the gag order

on the First Amendment rights of the Detroit Free Press. Moreover, the order does not, serve nor does the Free Press argue that it serves an illegitimate purpose such as concealment. *Radio and Television News Ass'n of Southern California, supra*.

Affirmed.

/s/ Roman S. Gibbs

/s/ Joseph B. Sullivan