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NO. 69222-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Adoption of M.S.M.-P., a Minor

A.K., and S.K.,

Respondent,

v.

N.P.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael J. Trickey, Judge

BRIEF OF RESPONDENT

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FILED
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE
FEB 14 4:30 PM '11

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A. ISSUE PRESENTED FOR REVIEW

Did the trial court violate appellant's right to a public trial in light of RCW 26.33.060, where the appellant did not avail himself of the right to open the courtroom to the public?

B. STATEMENT OF THE CASE

Respondent step-parent AK petitioned the court to terminate the parental rights of NP as a part of an adoption proceeding wherein AK was attempting to adopt MSM-P, the child of his wife, SK. CP 292-294. A hearing on AK's petition was held before the Honorable Judge Trickey on June 18, 2012. NP was not present at the hearing. Nothing in the record indicates any effort on the part of NP to attend the trial or to be in attendance telephonically during the entire proceeding, other than his testifying by telephone from Coyote Ridge Prison. RP6, RP42. All parties were represented by counsel. RP4.

Before taking evidence in the case, there was the following exchange between the trial court and the parties:

THE COURT: I read the materials which were submitted, including the various trial briefs. I looked at the statute on proceedings, 26.33.060. It does say, in part: "The general public shall be excluded and only

those persons shall be admitted whose presence is requested by any person entitled to notice under this chapter, or whom the judge finds to have a direct interest in the case or in the work of the Court.”

So I was proposing to put a sign on the courtroom door, indicating that the hearing was closed by law. And is there – anybody have any input or any thoughts about that at all?

MR. LIRHUS: I think that would be fine. What we generally do in these proceedings is when someone walks in, we all look and see who it is.

THE COURT: Okay. All right.

MR. ROBERTS: No objection.

THE COURT: Okay. All right.

RP5-6.

Though asked by the court for thoughts and input, at no time during the hearing did the appellant NP request the presence of anyone.

Testimony was taken and exhibits were admitted into evidence. Subsequently, the court gave its oral ruling and later entered findings of fact and conclusions of law and an order terminating the parental rights of NP with regard to MSM-P.

At no time after the court started to receive evidence did anyone make any remark, comment or objection regarding the fact that the courtroom was closed.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ERR BY CLOSING THE COURTROOM

The trial court did not err when it followed the statutory mandate set forth in RCW 26.33.060, which reads, in pertinent part: "The general public shall be excluded and only those persons shall be admitted whose presence is requested by any person entitled to notice under this chapter, or whom the judge finds to have a direct interest in the case or in the work of the Court."

Judge Trickey read from the applicable statute to the parties and counsel present, inviting comment from those present. RP5-6. No one objected to the closing of the courtroom or requested the admission of anyone else, although, as Judge Trickey read the statute, that was the right of any party. The hearing is closed only if no party opens it.

Statutes are presumed to be constitutional. It is the burden of the appellant challenging the constitutionality of the statute to demonstrate that it runs counter to the state's constitution. The burden of establishing the unconstitutionality of legislation is

beyond a reasonable doubt which must begin with the assumption that the legislature has considered the constitutionality of its enactments. *State vs. McCuiston*, 174 Wn.2d 369, 275 P.3d 1092 (2012); *In the Matter of the Dependency of M.S.R.*, 174 Wn.2d 1, 271 P.3d 234 (2012); *Bird vs Best Plumbing Group LLC*, 161 Wn.App. 510, 260 P.3d 209 (2011); *In re the Dependency of I.J.S.* 128 Wn.App. 108, 114 P.3d 1215 (2005). "If, among alternative constructions, one or more would involve serious constitutional difficulties, the court will reject those interpretations in favor of a construction that will sustain the constitutionality of the statute." *In the Matter of the Parentage of J.M.K. and D.R.K.*, 155 Wn.2d 374, 119 P.3d 840 (2005).

2. ADOPTION HEARINGS ARE AN EXCEPTION TO THE
RIGHT TO A PUBLIC HEARING

RCW 26.33.060 does not violate NP's state constitutional right to a public trial. The concept that trials are open to the public is not without limitation. In *Cohen vs Everett City Council*, 85 Wn.2d 385, 535 P.2d 801 (1975), the unanimous Supreme Court observed, when discussing open public trials, "There are

exceptional circumstances and conditions which justify some limitations on open judicial proceedings. For obvious reasons, adoption matters are usually heard privately as authorized by statute RCW 26.32.100." *Cohen* at 388.

Adoptions and juvenile proceedings are areas where the legislature and the courts have realized that at least some privacy and confidentiality is warranted because the subjects of the proceedings are children. Issues addressed in these cases involve minor children and intimate familial relationships involving very sensitive and critical personal family matters deserving some privacy. Adoption records are sealed pursuant to RCW 26.33.330. Juvenile court proceedings may be closed to the public pursuant to RCW 13.34.115. Original birth certificates are sealed. RCW 70.58.210.

NP cites:

- i. Criminal cases where the State is the moving party:
State vs. Bone Club, 128 Wn.2d 254, 906 P.2d 325 (1995)
State vs. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005) 2.
- ii. Mental health commitment cases where the State is

attempting to effectively incarcerate an individual:

In re the Detention of D.F.F., 172 Wn.2d 37, 256 P.3d 357
(2011);

iii. Cases where the State attempts to remove a child from a
parent:

In re Dependency of J.A.F., 168 Wn.App. 653, 278 P.3d 673
(2012);

iv. Cases where parties raise the issue of opening or closing a
proceeding with the trial court:

Dreiling v. Jain 151 Wn.2d 900, 93 P.3d 861 (2004);

Seattle Times v. Ishikawa, 97 Wash.2d 30, 640 P.2d 716
(1982); and

Tacoma News Inc. v. Cayce, 172 Wn.2d 58, 256 P.3d 1179
(2011).

None of the cases cited by appellant NP are adoption cases.

Appellant does not have standing to claim a violation of
United States Constitution First Amendment freedom of the press
protection. Judicial interpretation of the U.S. Constitution has
consistently required the party who invokes the court's authority

challenging a statute as unconstitutional must, at a minimum, show that he has been directly harmed by the statute's application, the statute must have caused the injury, and the injury must be capable of redress by the court. *Bender v. Williamsport Area School District*, 475 U.S. 534, 106 S. Ct. 1326, 89 L. Ed. 2d 501 (1986) citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982). With only limited exception, a party cannot challenge the constitutionality of a statute by invoking the rights of a third party, in this case, the press. See *Lopez v. Candaele*, 630 F. 3d 775 (9th Cir. 2010):

Even when plaintiffs bring an overbreadth challenge to a speech restriction, i.e., when plaintiffs challenge the constitutionality of a restriction on the ground that it may unconstitutionally chill the First Amendment rights of parties not before the court, they must still satisfy "the rigid constitutional requirement that plaintiffs must demonstrate an injury in fact to invoke a federal court's jurisdiction." *Dream Palace v. Cnty. of Maricopa*, 384 F.3d 990, 999 (9th Cir. 2004) (quoting *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1112 (9th Cir. 1999)); see also *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984). The touchstone for determining injury in fact is whether the plaintiff has suffered an injury or threat of injury that is credible, not "imaginary or speculative." *Babbitt*, 442 U.S. at 298 (quoting *Younger v. Harris*,

401 U.S. 37, 42 (1971)).

Where the State is a party, the need for public scrutiny is apparent. The State represents the people who have a direct interest in observing what is being done on their behalf.

In other categories of cases cited by the appellant, the issue of closing the hearing or sealing records was raised at the trial court level. Appropriately, the courts have provided clear tests to determine when and whether closing the courtroom would be justified (*Ishikawa*).

In adoption cases, the State is not a party. Unlike cases cited by NP, there is at least one birth parent of the child in favor of the adoption. Adoption is a very private and intimate subject to be handled in a manner that is in the "best interests of the child". RCW 26.33.010.

In the instant case, the State is not a party and there was no difference of opinion at the trial court level regarding who would be allowed in the courtroom.

Again, NP cites no case involving adoption. None of his authorities have any resemblance to his "afterthought" of asserting

that there had been a constitutional error, after having had no problem with the limitation of access to the courtroom at the trial, even when the subject had been addressed by the Judge and input of all parties had been sought.

3. THE BEST INTEREST OF THE CHILD REQUIRES
LIMITATIONS ON ACCESS TO ADOPTION RECORDS AND
HEARINGS

In *Cohen*, the Washington Supreme Court observed that adoption is an exception to Article I, Section 10 for "obvious reasons". Adoptions deal with children. "The guiding principle must be determining what is in the best interest of the child." RCW 26.33.010. The privacy of children is to be protected. Hearings are, at least initially, closed to the public. RCW 26.33.060. Adoption records are sealed. RCW 26.33.330. The consent to adoption by a birth parent may or may not disclose the name or other identifying information of the adopting parent. RCW 26.33.160(5).

Adoptions involve the court reviewing private intimate family relationships and details. Some are good, some are bad, and

some are potentially embarrassing. These subjects are discussed in adoption records and hearings. It does not take long to realize that exposing these intimate subjects and details to the public would be contrary as to what is in the best interest of the child. How can it be in the best interest of a twelve year old child and his parents to make public evidence of a birth father kicking the mother in the abdomen while she's pregnant, grabbing her by the throat, throwing her up against a wall, and subjecting her to physical and emotional abuse on a daily basis? RP 15-18. Exposure of such information to the general public could easily have a chilling effect on adoption which, again, would be contrary as to what is in the best interest of children.

It is not in the best interest of the child to expose children and their parents to just anyone walking down the courthouse hallway at this sensitive time. Opening the courtroom can obviously have a very negative effect on the birth parents and prospective adoptive parents at this most emotionally taxing and sensitive time. Adversely affecting birth parents and adoptive parents impacts the children who are the subjects of these

proceedings.

4. THE WASHINGTON COURT HAS DISCUSSED
CONFIDENTIALITY IN ADOPTION CASES, APPROVED IT,
AND FOUND IT CONSTITUTIONAL

The court *In The Matter of the Application of William Sage*, 21 Wn.App. 801, 586 P.2d 1201 (1978) spoke about these principles in adoption cases. There, the appellant sought to inspect sealed adoption records. In affirming the trial court's denial of access, the Court of Appeals detailed the justifications for confidentiality and privacy in the area of adoption law and found them to be appropriate and the statute to be constitutional. There the court addressed some issues presented in this case.

The court noted:

"...our courts are directed to make decisions consistent with 'the best interest of the child.' Sealed records statutes are codification of that directive. Confidentiality encourages and facilitates preadoption investigation and helps strengthen the family as a social unit." *Sage* at 805-806.

"The interests of natural parents are not likely to be furthered

if information regarding their identity and background is indiscriminately disseminated" *Id* at 806.

"The adoptive parents have interests deserving of our consideration as well. The adoptive parents should be given the opportunity to create a stable family relationship free from unnecessary intrusion. ...thus serious consideration should be given to those interests before adoption information is made public." *Id* at 806.

"The state's interest and the legislative purpose of our present adoption act is threefold: protection of the adopted child, the natural parents, and the adopting parent." *In re Adoption of Reinius*, 55 Wn 2d 117, 121, 346 P.2d 672 (1959). There is also a legislative policy of confidentiality. Making adoption records confidential, except upon a showing of good cause, represents a thoughtful balance between several important interests.

"Confidentiality encourages the development of the adoptive family as a stable social unit." *Sage* at 808.

"The policy of confidentiality is reflected in several other sections of the adoption act. Contrary to the contention of Mr.

Sage, confidentiality, and not absolute disclosure, is the controlling legislative declaration. For example, RCW 26.32.120 provides that the Decree of Adoption shall be secret, unless otherwise provided by the court. RCW 26.32.100 provides that the hearing pursuant to an adoption shall not be public. RCW 26.32.260 provides that all copies of pre-placement reports and all information upon which it is based is confidential and closed to public inspection except upon an order of the court. RCW 70.58.210 provides for the issuance of a new birth certificate upon an adoption, and the Bureau of Vital Statistics is directed to make no reference to the adoption when it issues a birth certificate and the names of new parents are to be inserted.” *Sage* at 809-810.

“We find no unconstitutional classification or discrimination in the sealed records statute and we find the legislative policy of confidentiality to be consistent with the overall purpose of the adoption act. In this connection, we adhere to the reasoning of the Missouri court when it said:

In developing the system, the legislature perceived a need for confidentiality of the records and the adopted child is not singled out and he alone prevented from pursuing the records, instead the

prohibition applies equally to parents (adoptive or natural) or a curious interloper seeking to invade the sanctuary provided by the statute. None should be permitted to exploit the record of tragic events which necessarily find their way into many adoption proceedings. The interest of the statute in protecting all concerned and in maintenance of a viable system of adoption is the manifest purpose of the statute. This system presents no invidious discrimination or denial of constitutionally protected rights...

Application of Maples, 563 S.W.2d 760, 765 (Mo. 1978)" *Sage* at 813.

Children need special protection.

5. RCW 26.33.060 CLOSES THE COURTROOM ONLY WHERE NO PARTY ASKS THAT IT BE OPENED

The *Ishikawa* case upon which appellant relies, predated the statute (RCW 26.33.060) which is the focus of appellant's claim of error. In fact, RCW 26.33.060 closes the courtroom only as a default measure in a case where neither party, as here, requests that anybody and everybody be allowed into the courtroom. It was that statute's predecessor, RCW 26.32.100 (repealed 1985) that the Washington Supreme Court acknowledged was an exception to the concept of public hearing in adoption for "obvious reasons". (*Cohen* at 388) That statute truly closed the hearings. It read, in

part, "...all such hearings, as well as any hearing incidental to an adoption, shall not be public unless specially ordered by the court." RCW 26.32.100.

Pursuant to the statute cited in *Cohen*, in order to allow access to a hearing, some sort of demonstration of reason for access would have to be presented to the court and the response to such a request would be left to the sound discretion of the court.

In contrast, the current statute, RCW 26.33.060, provides, in part, that "The general public shall be excluded and only those persons shall be admitted whose presence is requested by any person entitled to notice under this chapter for whom the judge finds to have a direct interest in the case or in the work of the court". RCW 26.33.060.

Statutes are to be read as a whole. Reading the entire sentence, since any party can completely open the courtroom at will, the closing of the courtroom turns out to be merely a legislative policy which is in no way binding on any party. Closing the courtroom is the default option if no party requests that it be open. The closure of the courtroom is meaningless to a party because

any party can open it.

Under the current statute, any party including the appellant, could request the presence of anyone or everyone. The current statute does not require an order of the court. The current statute does not leave this to the discretion of the court. It is the statutory right of a party to allow anyone or everyone in the courtroom.

In our case, the Judge read the statute and followed its directive. The court asked the parties if they had any input or thoughts on the subject. RP 5-6. NP had no objection. NP's counsel stated no objection. NP's counsel could have, with exactly the same effort, stated that there was an objection and that NP wanted the courtroom open to anyone who wanted to come into the courtroom. If nothing else had been said beyond that, all would have been allowed into the courtroom. It is that simple. Although adoptions are an exception to the right to a public hearing, under the current statute, it is barely an exception at all.

This issue was not raised at the trial level so no evidence could be taken on this matter but it would have been a simple matter to show that although courtrooms are initially closed in

adoption proceedings, in practice, frequently courtroom doors are open to any number of people at the request of a party, without the approval of the court. Of course, if this issue had been raised at the hearing in this case, the courtroom would have been open had either party so requested.

NP's argument is in effect that the trial court should have ignored the statute because the NP now thinks that it is unconstitutional.

The trial court did not ignore the statute. The court read the pertinent parts of the statute to the parties, although the court was not required to do so. The court then in effect asked either party if they had any input or thoughts, again, which the court was not statutorily obliged to do. "Because the adoption process is a creature of statute, the adoption statute must be strictly followed." *In re the Matter of the Adoption of R.L.M.* 138 Wn.App. 276, 150 P.3d 940 (2007). That is exactly what the trial court did.

If the trial court had ignored RCW 26.33.060 and left the courtroom open, NP would be arguing that since no party requested that anybody be allowed into the courtroom, it was error

not to close the courtroom.

Appellant's constitutional rights were not violated. Adoption is an exception to the Article I, Section 10 right to a public hearing. Furthermore, RCW 26.33.060 barely closes the courtroom door at all and appellant had the absolute right to open the door to the public with one sentence.

6. RCW 26.33.060 IS A PART OF A BALANCING OF INTERESTS IN ADOPTION STATUTES TO MEET THE INTERESTS OF VARIOUS PARTIES WHILE ACTING IN THE BEST INTEREST OF THE CHILD

Statutes relating to adoption strike a very well thought out and fair balance between various interests involved in adoption and the guiding principle which is accomplishing what is in the best interest of the child. Accomplishing what is in the best interest of the child involves preserving privacy and confidentiality to avoid exposing the child and the families to known and unknown harm in the present and the future. The balance struck between these various interests can be seen in several adoption statutes.

Adoption records are sealed pursuant to RCW 26.33.330.

However, the records may be open for good cause shown if it is demonstrated to the court that there are reasons why it would be in the best interest of the child and the parties for some or all the records to be open to some degree to certain parties. There is balance in that the records are closed but may, in appropriate circumstances, be opened.

When a child is adopted, a new birth certificate is issued for the child. The child's original birth certificate falls within the category of documents which are sealed under RCW 26.33.330. See also RCW 70.58.210. However, RCW 26.33.345(3) allows "for adoptions finalized after October 1, 1993, the Department of Health shall make available a non-certified copy of the original birth certificate to the adoptee after the adoptee's eighteenth birthday unless the birth parent has filed an affidavit of non-disclosure." Again, this is an example of balance between the need for confidentiality among the parties and yet allowing some disclosure when the child becomes an adult, unless it is opposed by a birth parent.

Adoption records are sealed. However, there may be

situations where a birth parent or adoptive child would like to obtain information regarding or search for his or her former relative. RCW 26.33.343 provides a very detailed mechanism and procedure for the appointment of a confidential intermediary to review the court record and make an independent report to the court as to whether or not some or all information in sealed adoption files should be disclosed for various purposes to the adopted child or birth parent. Again, adoption files are initially closed but there is a reasonable mechanism to allow information to be released under appropriate circumstances.

In the case of adoption hearings, the initial statutory position is that this is an exceptional situation and they are closed. However, the same statute allows any party to open a hearing to anyone they request. Each and every party to an adoption proceeding has the key to the courtroom door. (Actually, the statute striking a balance between closed hearings and open hearings may be the least restrictive of the statutory limitations on openness in that there is no action required by the court or showing that must be made to the court in order to completely

open the proceeding.)

These statutory protections of confidentiality and privacy, combined with appropriate and measured access by the parties are completely consistent with the guiding principle of adoption which is doing what is in the best interest of the child. RCW 26.33.010. Washington's balance of protections for children, parties and families, with flexibility and control granted to the parties to allow appropriate access to information, is commendable.

7. IN ADDITION TO FAILING TO SHOW ANY ERROR ON THE PART OF THE TRIAL COURT, APPELLANT SHOWS NO PREJUDICE RESULTING FROM THE COURTROOM BEING CLOSED

Appellant completely fails to demonstrate that he was in anyway prejudiced by what he claims was error at the trial level. At most, he asserts that what he claims was error constitutes prejudice. That bootstrap reasoning is nonsense. In *J.A.F.* the court clearly held that when this type of claimed error is raised for the first time on appeal, in a non-criminal matter, the appellant must

also demonstrate how he was prejudiced in order to be entitled to a remedy of reversal or remand. "Generally, a party asserting a constitutional error for the first time on appeal must show that the alleged error actually effected the party's rights at trial." *J.A.F.* at 659.

"Although neither party objected to the closure below, RAP 2.5(a)(3) allows a party to raise for the first time on appeal, a manifest error effecting this constitutional right. To demonstrate that an asserted error is manifest, the Appellant must show actual prejudice, – which means " 'the asserted error had practical and identifiable consequences in the trial of the case.' " " *J.A.F.* at 661-662.

The holding of the court in *J.A.F.* is that where, as here, a claim of constitutional error is raised for the first time on appeal, actual prejudice must be shown. The Court of Appeals noted that this was the opinion of the majority of the justices of the Supreme Court, on this particular issue in *D.F.F.* In *D.F.F.*, Justice Madsen (in her dissent, with whom four other justices joined on this particular issue,) noted that the structural error analysis has no place in the

civil arena. There must be some showing of prejudice.

Here, appellant demonstrates no error and no prejudice and thus is entitled to no relief.

D. CONCLUSION

Appellant did not have a constitutional right to an open courtroom at the trial. Appellant had the statutory right to request that anyone and everyone be admitted, but did not make such a request. Appellant in effect chose to leave the courtroom closed by not requesting it to be opened. Appellant fails to demonstrate that he was prejudiced in any way by the courtroom not being open to the public. The trial court did not err and the order of the trial court should be affirmed.

DATED this 4th day of June, 2013.

Respectfully submitted by
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