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NO. 69222-4-1

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

In re 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 IN SUPPORT OF MOTION FOR ACCELERATED REVIEW

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A. ASSIGNMENTS OF ERROR

1. The trial court violated the right to a public trial under article I, section 10 of the Washington Constitution and the First Amendment of the United States Constitution.

2. Based on the first error, the trial court erred in entering all of its findings, conclusions, and order termination appellant's parental rights. CP 399-406.¹

Issues Related to Assignment of Error

1. Did the trial court violate the right to a public trial where it closed the courtroom in the absence of the requisite balancing of interests?

2. Is the error prejudicial where all of the evidence offered by the petitioners and considered by the trial court was admitted while the courtroom was closed?

¹ Normally this brief would attach the findings so that each one is set forth in full. Because the findings include the child's and all parties' full names, and because counsel for the respondent has taken numerous actions to protect the respondent's privacy, the findings are not set forth in full. They are, however, challenged in their entirety for the reasons stated.

B. STATEMENT OF THE CASE

1. Procedure

This case involves the termination of appellant NP's parental rights to MSM-P, his son. CP 397-406. The petition to terminate NP's rights was filed March 18, 2010. The petitioners were SK, the child's natural mother, and AK, the prospective adoptive father. At the time the petition was filed, MSM-P was nine years old. CP 292-94. At the time of trial he was 12 years old. CP 400; RP 22.

2. Trial Closure

Trial was held June 18, 2012. At the outset, the trial court said it had reviewed "the statute on proceedings, RCW 26.33.060," which says, "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." RP 5-6. The court said it would put a sign on the courtroom door "indicating that the hearing was closed by law." RP 6.

The petitioner's counsel said that would be "fine. What we generally do in these proceedings is when someone walks in, we all look and see who it is." NP's counsel said the defense had "no objection." RP 6.

NP was not personally present when the closure was discussed. RP 6. He was allowed to testify by telephone. RP 40-47.

The court later confirmed that the courtroom was closed to the public. The sign was on the door. RP 39.

All of the evidence was offered to the trial court while the courtroom was closed. RP 13-39, 40-71. Argument was heard while the courtroom was closed. RP 71-78.

The court entered its oral ruling two days after hearing the evidence. RP 81-89. The written findings, conclusions, and order terminating NP's parental rights were signed and filed July 27, 2012. CP 399-406.

The superior court file remains sealed and unavailable to the public. The pleadings in this Court's file relating to the appointment of counsel and efforts to prepare the record also establish that the petitioners have continued to make efforts to ensure the public cannot access the file or transcript in the superior court or in this Court. As shown in those pleadings, it has been a difficult process even for appellant's counsel to access the record.

C. ARGUMENT

THE COURTROOM CLOSURE VIOLATED THE CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL UNDER ARTICLE I, SECTION 10 AND THE FIRST AMENDMENT.

The trial court erred in closing the courtroom to the public without weighing the necessary factors set forth in Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 37–39, 640 P.2d 716 (1982) and its progeny. The claim is properly raised for the first time on appeal. Where all of the evidence was offered while the courtroom was closed, the error is not harmless. In re Detention of D.F.F., 172 Wn.2d 37, 256 P.3d 357 (2011); In re Dependency of J.A.F., 168 Wn. App. 653, 278 P.3d 673 (2012).

Article I, section 10 of the Washington Constitution commands "Justice in all cases shall be administered openly[.]" No exception is made for parental rights termination cases. Article I, section 10 expressly guarantees the right open court proceedings to the public and press, in civil and criminal cases. D.F.F., 172 Wn.2d at 39-41; J.A.F., 168 Wn. App. at 660-61 & nn. 6-7 (citing, Dreiling v. Jain, 151 Wn.2d 900, 908, 93 P.3d 861 (2004); Tacoma News, Inc. v. Cayce, 172 Wn.2d 58, 65, 256 P.3d 1179 (2011)). The First Amendment protects the same right and applies to civil cases. See, e.g., Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984);

Westmoreland v. Columbia Broadcasting System, Inc., 752 F.2d 16, 23 (2d Cir.1984); In re Continental Illinois Securities Litigation, 732 F.2d 1302, 1308-09 (7th Cir. 1984); NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal.4th 1178, 1207-09, 1212, 980 P.2d 337 (Cal. 1999).

Secret justice is inimical to the public trial right. Dreiling, 151 Wn.2d at 908. Public access to civil trials "assures the structural fairness of the proceedings, affirms their legitimacy, and promotes confidence in the judiciary." D.F.F., 172 Wn.2d at 40. Conversely, "[p]roceedings cloaked in secrecy foster mistrust and, potentially, misuse of power." Dreiling, 151 Wn.2d at 908. The public trial right also reminds officers of the court of the importance of their functions, encourages witnesses to come forward, and discourages perjury. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

Whether a trial court procedure violates the right to a public trial is a question of law reviewed de novo. D.F.F., 172 Wn.2d at 41. "The right of the public, including the press, to access trials and court records may be limited only to protect significant interests, and any limitation must be carefully considered and specifically justified." Dreiling, 151 Wn.2d at 904.

Before ordering closure of the courtroom or otherwise restricting public access to the proceedings, five requirements must therefore be met: (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than the right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; (5) the order must be no broader in its application or duration than necessary to serve its purpose. Ishikawa, 97 Wn.2d at 37-39; State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) (employing same closure standard for both article I, section 10 and article I, section 22); D.F.F., 172 Wn.2d at 42 (applying test to civil involuntary commitment proceeding); J.A.F., 168 Wn. App. at 661 n.8. The fourth factor requires the court to enter specific findings justifying the closure order. Bone-Club, 128 Wn.2d at 260; Easterling, 157 Wn.2d at 175; J.A.F., at 662.

In J.A.F. this Court addressed the same closure error in the same context of a trial to terminate parental rights. In the trial court,

the appellant Tucker did not object to the closure. All parties instead agreed a federal statute required the court to close the courtroom before one witness (Harris) could testify about information relating to Tucker's drug treatment. Tucker's trial counsel even stated a preference for closing the entire trial. J.A.F., 168 Wn. App. at 659-60.

On appeal, however, Tucker argued the closure violated the state and federal constitutions. This Court agreed that the record showed a violation of article 1, § 10, because the trial court closed the proceedings without first applying the Ishikawa factors. J.A.F., at 678-79. However, Tucker was unable to show prejudice from the error, because "the facts elicited from Harris were independently established by other evidence in portions of the proceedings that were open to the public." J.A.F., at 663. This Court then concluded that Tucker could not show that "Harris' testimony alone affected the outcome of the trial." J.A.F., at 663.

When applied here, J.A.F. requires reversal. The error is of constitutional magnitude and may be raised for the first time on appeal. This rule is particularly apt where NP was not even present when the court entered its closure order. The court neither considered nor balanced any of the factors required by Ishikawa.

This record suffers no similar absence of prejudice. The entire trial – all evidence offered by the petitioners and relied on by the trial court – was admitted when the courtroom was closed. The error requires reversal. J.A.F., 168 Wn. App. at 662-64; D.F.F., 172 Wn.2d at 46 (Sanders, J., writing for a 4-justice plurality), at 48 (J.M. Johnson and Chambers, J.J., concurring).

The respondents may point out the trial court relied on RCW 26.33.060. This appears to be true. It also is irrelevant. Washington courts have already recognized that statutes and court rules do not trump article 1, § 10. D.F.F., 172 Wn. 2d at 41-42 (MPR 1.3 is unconstitutional); J.A.F., 168 Wn. App. 659-60 (trial court erred in relying on federal statute to close the courtroom).

D. CONCLUSION

This Court should vacate the findings, conclusions, and order terminating appellant's parental rights. The case should be remanded for further proceedings.

DATED this 30th day of April, 2013.

Respectfully Submitted,

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OID No. 91051

Attorneys for Appellant

and via email
Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to a copy of the record of respondent's deposition, including a copy of the document to which this declaration is attached.
Albert Pichus
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.
[Signature] 4/30/13
Name Done in Seattle, WA Date

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