

SUPREME NO. 90467-7  
NO. 69222-4-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

STATE OF WASHINGTON, DSHS,

Respondent,

v.

N.P.,

Petitioner

Received *E*  
Washington State Supreme Court  
JUL 08 2014 *bjh*  
Ronald R. Carpenter  
Clerk

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

The Honorable Michael Trickey, Judge

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner NP asks this Court to review the following Court of Appeals decision.

B. COURT OF APPEALS DECISION

NP seeks review of Division One's published decision in In re Adoption of M.S.M.-P., \_\_\_ Wn. App. \_\_\_, 325 P.3d 392 (2014). A copy of the decision is attached as appendix A.

C. INTRODUCTION AND ISSUES PRESENTED FOR REVIEW

The trial court erroneously closed the courtroom for the entire trial that resulted in the termination of appellant's parental rights to his son. The Court of Appeals correctly concluded this was constitutional error.

1. Did the Court of Appeals wrongly conclude the trial court's error was not "manifest," and that it lacked "practical and identifiable consequences"?

2. The proper standard for determining when a civil litigant has been prejudiced by an erroneous courtroom closure previously divided this Court in In re Detention of D.F.F., 172 Wn.2d 37, 256 P.3d 357 (2011). Should this Court grant review to provide clear guidance on this important constitutional question?

D. STATEMENT OF THE CASE

1. Background and Trial Proceedings

This case involves the termination of NP's<sup>1</sup> parental rights to MSM-P, his son. CP 397-406. This petition was filed in March 2010 by private petitioners<sup>2</sup> under RCW Chapter 26.33. MSM-P was nine years old when the petition was filed, and at trial he was 12. CP 292-94, 400; RP 22.

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 attorney 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 attorney said the defense had "no objection." RP 6.

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<sup>1</sup> The parties are referenced by initials throughout the briefing and published decision. M.S.M.-P., 325 P.3d at 394 n.1.

<sup>2</sup> The petitioners were SK, the child's natural mother, and AK, the prospective adoptive father.

NP was not personally present when the closure was discussed. RP 6. He was in custody, and he later was allowed to testify by telephone. RP 40-47.

The court confirmed the courtroom was closed to the public and the sign was on the door throughout the trial. RP 39. All of the evidence was offered, and all argument heard, while the courtroom was closed. RP 13-39, 40-78.

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.

## 2. Appellate Proceedings

On appeal, NP argued the courtroom closure violated the right to a public trial under article 1, section 10 of the Washington Constitution and the First Amendment to the United States Constitution. NP relied on this Court's decisions in In re Detention of D.F.F., 172 Wn.2d 37, 256 P.3d 357 (2011) and Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982), and the Court of Appeals decision in In re Dependency of J.A.F., 168 Wn. App. 653, 278 P.3d 673 (2012). BOA at 4-7. Because the order terminating NP's parental rights was based solely on evidence that was admitted

while the courtroom was closed, the error was prejudicial and required reversal. BOA at 7-8 (citing J.A.F. and D.F.F.).

The respondent largely claimed that adoption statutes, and the best interests of children, require secrecy and confidentiality of court proceedings. BOR at 3-14, 18-21. The response also argued NP had not shown prejudice from the courtroom closure. BOR at 21-23.

In its published decision, the Court of Appeals distilled the response into three main claims and rejected two.<sup>3</sup> The court recognized that two cases relied on by the respondent<sup>4</sup> predated Ishikawa and did not directly address this issue. M.S.M.-P., 325 P.3d at 397-98. Instead, the recent decision in J.A.F. made it clear that parental termination proceedings are presumptively open to the public, and it is constitutional error for a trial court to close the

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<sup>3</sup> In footnotes, the court also dispensed with: (1) the respondent's claim that NP lacked standing to raise a public trial claim under article 1, section 10 (cf. M.S.M.-P., 325 P.3d at 395 nn. 5-6 with BOR at 6-8); and (2) the respondent's strained contention that RCW 26.33.060 permitted a party to demand that any and all members of the public be allowed entry into court (cf. M.S.M.-P., 325 P.3d at 395 n.8, with BOR at 14-18).

<sup>4</sup> The respondent cited Cohen v. Everett City Council, 85 Wn.2d 385, 535 P.2d 801 (1975) and In re the Application of William Sage, 21 Wn. App. 803, 586 P.2d 1201 (1978) for the general proposition that adoption proceedings are closed to the public.

proceedings without first considering the Ishikawa factors. M.S.M.-P., 325 P.3d at 398.

The court concluded, however, that NP had not shown “actual prejudice” from the erroneous courtroom closure. Based on this, the court held the error was not “manifest” because there was no showing that the “error had practical and identifiable consequences in the trial[.]” M.S.M.-P., 325 P.3d at 398 (quoting State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) and State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). For this reason, the court concluded NP could not raise the claim for the first time on appeal under RAP 2.5(a)(3). M.S.M.-P., 325 P.3d at 398-99.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW SHOULD BE GRANTED TO DECIDE A QUESTION THAT HAS DIVIDED THIS COURT.

The Court of Appeals properly held the courtroom closure is constitutional error. Article I, section 10 of the Washington Constitution commands “Justice in all cases shall be administered openly[.]” The scope of this right has generated substantial recent appellate litigation in a variety of contexts. In criminal cases, for example, the violation of the right to a public trial is usually considered “structural error” requiring reversal. See generally, State v. Wise, 176 Wn.2d 1, 15, 288 P.3d 1113 (2012).

This case, however, raises a narrow issue: what constitutes “prejudice” when a trial court erroneously closes proceedings to terminate parental rights to a father’s or mother’s child. NP asserts the prejudice threshold has been satisfied where the closure encompasses the entire trial, including the admission of all testimony and the hearing and consideration of the parties’ arguments.

In J.A.F., the Court of Appeals addressed the same error in the same context of a trial to terminate parental rights. At trial, 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. The Court of Appeals agreed the trial court violated article 1, section 10, by briefly closing the proceedings without first considering the Ishikawa factors. J.A.F., at 678-79. However, Tucker could not 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. The Court of Appeals then concluded that Tucker

could not show that “Harris’ testimony alone affected the outcome of the trial.” J.A.F., at 663.

As NP argued below, J.A.F. requires reversal. This 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 closed the courtroom. Nor did the trial court consider or balance any of the factors required by Ishikawa.

But unlike J.A.F., prejudice is established where 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).

In D.F.F., this Court addressed the erroneous closure of an entire RCW 71.05 commitment trial. Four members of the Court held the error required reversal without a specific showing of prejudice. D.F.F., 172 Wn.2d at 43-47. Two concurring justices concluded “D.F.F., as a respondent committed after a closed hearing, demonstrates sufficient prejudice to warrant relief.” 172 Wn.2d at 48-49. Three justices asserted the majority had wrongly incorporated “structural error” concepts into a civil case. 172 Wn.2d at 51-56.

The Court of Appeals concluded the split decision in D.F.F. led to the conclusion that “structural error” does not apply, and distinguished NP’s case because NP was not at risk of confinement. M.S.M.-P., 325 P.3d at 399. This reasoning is flawed.

First, as the J.A.F. court reasoned, the violation of article 1, section 10 in a civil case need not be considered a “structural error” because the error can be cured. In J.A.F. the error in briefly closing the courtroom was cured when the same evidence was later admitted in open court. But no such cure occurred here. In NP’s case, unlike J.A.F. or Reyes, all the evidence was admitted and all argument was heard in an erroneously closed courtroom.

Second, although NP discussed the J.A.F. court’s analysis in his brief and at oral argument, the published decision neglects that analysis. The court instead concluded that NP “points to no practical or identifiable consequence that the closure had on the trial of the case.” M.S.M.-P., 325 P.3d at 398 (citing dicta in In re Reyes, 176 Wn. App. 821, 309 P.3d 745, 757-58 (2013) (opinion withdrawn and republished at 315 P.3d 532 (2013)), for the proposition that Reyes did not show actual prejudice where legal argument on a non-evidentiary motion to dismiss was heard in a closed courtroom).

NP disagrees with the Court of Appeals. Washington courts have often recognized the “practical and identifiable” consequences of administering justice in secret. Open proceedings are required “to ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.” State v. Sublett, 176 Wn.2d 58, 72, 292 P.3d 715 (2012) (quoting State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)).

A public trial is a core safeguard in our system of justice. Be it through members of the media, victims, the family or friends of a party, or passersby, the public can keep watch over the administration of justice when the courtroom is open. The open and public judicial process helps assure fair trials. It deters perjury and other misconduct by participants in a trial. It tempers biases and undue partiality. The public nature of trials is a check on the judicial system, which the public entrusts to adjudicate and render decisions of the highest import. It provides for accountability and transparency, assuring that whatever transpires in court will not be secret or unscrutinized. And openness allows the public to see, firsthand, justice done in its communities.

State v. Wise, 176 Wn.2d 1, 5–6, 288 P.3d 1113 (2012). “People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.” State v. Jones, 175 Wn. App. 87, 303 P.3d 1084 (2013) (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980)).

Third, this is not a routine “civil” case about property rights. This trial court order terminated NP’s parental rights. This Court has long recognized that the constitutionally protected interest of parents is “fundamental,” “far more precious ... than property rights” and a “sacred right” which is “more precious ... than the right of life itself.” In re Welfare of Myricks, 85 Wn.2d 252, 253–54, 533 P.2d 841 (1975); In re Sumey, 94 Wn.2d 757, 621 P.2d 108 (1980). NP’s interest is at least as significant as the liberty interest at issue in D.F.F.

Nor does the Court of Appeals’ reliance on Kirkman and O’Hara withstand scrutiny, because neither case involved violations of article 1, section 10.<sup>5</sup>

Despite these cases, the Court of Appeals published a decision that holds there is no “practical or identifiable” consequence from the erroneous closure of an entire trial to terminate a parent’s rights. This conclusion conflicts with J.A.F. and the opinion of six Justices in D.F.F., and it raises significant constitutional questions and questions

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<sup>5</sup> Kirkman addressed a claim regarding improper witness opinion, and O’Hara involved arguably erroneous jury instructions.

of substantial public interest. This Court should grant review. RAP 13.4(b)(1), (3), (4).

F. CONCLUSION

For the reasons set forth above, this Court should grant review.

RAP 13.4(b), 13.6.

DATED this 18<sup>th</sup> day of June, 2014.

Respectfully submitted,

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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of respondent/appellant/plaintiff containing a copy of the document to which this declaration is attached.

*John Kachemert, Albert Linker*  
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

*[Signature]* 6/18/14  
Name Done in Seattle, WA

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(Cite as: 325 P.3d 392)

Court of Appeals of Washington,  
Division 1.  
In re ADOPTION of M.S.M.-P., a Minor. State of  
Washington,  
A.K. and S.K., Respondents,  
v.  
N.P., Appellant.

No. 6922-4-I.  
May 19, 2014.

**Background:** Mother's husband filed petition for termination of incarcerated biological father's parental rights and for adoption. The Superior Court, King County, Michael J. Trickey, J., granted petition. Biological father appealed.

**Holdings:** The Court of Appeals, Spearman, C.J., held that:

- (1) closure of courtroom during termination of parental rights proceeding violated biological father's constitutional right to public trial;
- (2) biological father waived appellate review of his claim of constitutional error; and
- (3) violation of biological father's constitutional right to public trial did not warrant reversal of termination.

Affirmed.

West Headnotes

[1] Appeal and Error 30 893(1)

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate

Court

30k893(1) k. In general. Most Cited

Cases

Appellate court reviews claims of denial of the state constitutional right to public trial de novo. West's RCWA Const. Art. 1, § 10.

[2] Appeal and Error 30 893(1)

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate

Court

30k893(1) k. In general. Most Cited

Cases

Whether a statute is constitutional is a question of law reviewed de novo.

[3] Constitutional Law 92 2311

92 Constitutional Law

92XIX Rights to Open Courts, Remedies, and Justice

92k2311 k. Right of access to the courts and a remedy for injuries in general. Most Cited Cases

State constitution guarantees the public open access to judicial proceedings and court documents in civil and criminal cases. West's RCWA Const. Art. 1, § 10.

[4] Constitutional Law 92 1204

92 Constitutional Law

92X First Amendment in General

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92X(B) Particular Issues and Applications  
 92k1203 Access to Courts in General  
 92k1204 k. In general. Most Cited Cases

First Amendment preserves a right of access to court proceedings and records. U.S.C.A. Const.Amend. 1.

**[5] Criminal Law 110**  **635.5(1)**

110 Criminal Law  
 110XX Trial  
 110XX(B) Course and Conduct of Trial in General  
 110k635 Public Trial  
 110k635.5 Limitations on Power to Close Proceedings  
 110k635.5(1) k. In general. Most Cited Cases

**Criminal Law 110**  **635.6(3)**

110 Criminal Law  
 110XX Trial  
 110XX(B) Course and Conduct of Trial in General  
 110k635 Public Trial  
 110k635.6 Considerations Affecting Propriety of Closure  
 110k635.6(3) k. Overriding interest; necessity. Most Cited Cases

**Criminal Law 110**  **635.12**

110 Criminal Law  
 110XX Trial  
 110XX(B) Course and Conduct of Trial in General  
 110k635 Public Trial  
 110k635.12 k. Objections to closure and proceedings thereon. Most Cited Cases

Before courts order restrictions on access to criminal hearings or records from criminal hearings: (1) proponent of closure must make a showing of need for closure and, when closure is sought based on an interest other than right to a fair trial, serious and imminent threat to that interest must be shown; (2) anyone present when closure motion is made must be given opportunity to object to closure; (3) court, proponents of, and objectors to closure should analyze whether proposed method for curtailing open access would be least restrictive means available and effective in protecting the threatened interests; (4) court must weigh competing interests of defendant and public; and (5) order must be no broader in its application or duration than necessary to serve its purpose. U.S.C.A. Const.Amend. 1; West's RCWA Const. Art. 1, § 10.

**[6] Criminal Law 110**  **635.11(5)**

110 Criminal Law  
 110XX Trial  
 110XX(B) Course and Conduct of Trial in General  
 110k635 Public Trial  
 110k635.11 Proceedings on Request for Closure  
 110k635.11(5) k. Findings. Most Cited Cases

Trial court must enter specific findings justifying a closure order in a criminal case.

**[7] Trial 388**  **20**

388 Trial  
 388III Course and Conduct of Trial in General  
 388k20 k. Publicity of proceedings. Most Cited Cases

Procedure required for closure of the courtroom in a criminal proceeding applies to civil proceedings.

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**[8] Infants 211 ↪2098**

211 Infants

211XIV Dependency, Permanent Custody, and Termination of Rights; Children in Need

211XIV(E) Proceedings

211k2093 Hearing

211k2098 k. Public access; closure.

Most Cited Cases

Closure of courtroom during termination of parental rights proceeding incident to step-parent adoption violated biological father's constitutional right to public trial, where court closed courtroom with parties' consent but without weighing factors relevant to need for and scope of closure and potential outcome of termination of parental rights implicated concerns underlying constitutional public trial rights. West's RCWA Const. Art. 1, § 10.

**[9] Infants 211 ↪2381**

211 Infants

211XIV Dependency, Permanent Custody, and Termination of Rights; Children in Need

211XIV(K) Appeal and Review

211k2378 Preservation of Grounds for Review

211k2381 k. Objections and motions and rulings thereon. Most Cited Cases

Biological father waived appellate review of his claim that closure of courtroom during hearing on termination of his parental rights incident to step-parent adoption violated his constitutional right to public trial, where father failed to object to closure before trial court and failed to carry his burden of demonstrating prejudice arising out of closure. U.S.C.A. Const. Amend. 1; West's RCWA Const. Art. 1, § 10.

**[10] Appeal and Error 30 ↪181**

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k181 k. Necessity of objections in general. Most Cited Cases

Manifest error, as an exception to the preservation rule, requires a showing of actual prejudice.

**[11] Appeal and Error 30 ↪181**

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k181 k. Necessity of objections in general. Most Cited Cases

To demonstrate actual prejudice required for a finding of manifest error as an exception to the preservation rule, there must be a plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial of the case.

**[12] Appeal and Error 30 ↪181**

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k181 k. Necessity of objections in general. Most Cited Cases

For purposes of manifest error analysis in connection with an unpreserved claim of error, to deter-

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mine whether an error is practical and identifiable, the appellate court must put itself in the shoes of the trial court to ascertain whether, given what the trial court knew at the time, the court could have corrected the error.

[13] Infants 211  2427

211 Infants

211XIV Dependency, Permanent Custody, and Termination of Rights; Children in Need

211XIV(K) Appeal and Review

211k2419 Harmless or Prejudicial Error

211k2427 k. Hearing, instructions, and issues relating to jury. Most Cited Cases

Violation of biological father's constitutional right to public trial in closure of courtroom during termination of parental rights proceeding incident to step-parent adoption did not warrant reversal of termination, where father did not dispute trial court's findings of fact, claim error in its conclusions of law, or contest its finding that termination of his parental rights was in child's best interest, and reversal of termination order would have additional effect of setting aside child's adoption. U.S.C.A. Const.Amend. 1; West's RCWA Const. Art. 1, § 10.

\*393 Eric Broman, Nielsen Broman & Koch PLLC, Seattle, WA, for Appellant.

Albert George Lirhus, John Keckemet, Lirhus & Keckemet LLP, Seattle, WA, for Respondent.

SPEARMAN, C.J.

¶ 1 A.K. petitioned the court for an order terminating N.P.'s parental rights to N.P.'s son, M.S.M.-P. and granting A.K. permanent legal custody with the right to adopt M.S.M.-P. as his own child. In a hearing on the petition the court heard testimony and took evidence regarding the termination and the prospective adoption. Pursuant to RCW 26.33.060, the trial

court closed the hearing to the public, but did not follow the procedure under *Seattle Times Co. v. Ishikawa*, 97 Wash.2d 30, 640 P.2d 716 (1982). The court granted the petition and N.P. appeals, claiming the closure violated his right to a public trial under article I, section 10 of the Washington State Constitution and the First Amendment to the United States Constitution. We hold that, while N.P. raises a constitutional claim of error, because he does not demonstrate actual prejudice, he may not raise this claim for the first time on appeal.

*FACTS*

¶ 2 M.S.M.-P., a minor, was born in April 2000 and is the biological child of S.K. and N.P., who were never married.<sup>FN1</sup> The relationship between S.K. and N.P. was a violent one. On multiple occasions S.K. sought and obtained no-contact orders against N.P. At least two incidents of domestic violence by \*394 N.P. against S.K. occurred while S.K. was pregnant with M.S.M.-P. On one of these occasions, N.P. kicked and hit S.K. in the stomach, knocked her to the ground and then threw her on a bed. Within two weeks of M.S.M.-P.'s birth, his parents' relationship ended. One month later, N.P. was jailed for violating the no-contact order. On one occasion, N.P. assaulted S.K., breaking a wooden spoon over her thigh in front of M.S.M.-P. Although M.S.M.-P. was only two years old at the time, he cried for several hours after witnessing the assault. N.P. has also been convicted of felony harassment for threatening to kill S.K. During the first three years of M.S.M.-P.'s life N.P. visited him less than ten times. He has not seen M.S.M.-P. since then. He has not acknowledged M.S.M.-P.'s birthdays, other holidays, or had any other contact with him. Until this litigation commenced, M.S.M.-P. had no recollection of N.P.

FN1. The entire file in this case is sealed. Initials will be used as necessary to identify parties and other individuals.

¶ 3 In 2002, when M.S.M.-P. was two years old,

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S.K. began a relationship with A.K. S.K. and A.K. began living together in 2003 and married in 2008. Since he began living with S.K., A.K. has cared for M.S.M.-P. and has been the only father M.S.M.-P. has known. In early 2010, A.K. decided to adopt M.S.M.-P. Even though N.P. had had no contact with M.S.M.-P. for nearly seven years, he refused S.K.'s request for his consent to the adoption.

¶ 4 On March 18, 2010, A.K. filed a petition to terminate N.P.'s parental rights and to obtain permanent custody with the right to adopt.<sup>FN2</sup> A hearing on the petition was held on June 18, 2012. All parties were represented by counsel, but because N.P. was incarcerated, he participated by phone. At the beginning of the hearing, the trial court cited RCW 26.33.060 and engaged in the following exchange with the parties' attorneys:

FN2. Under RCW 26.33.100, a prospective adoptive parent seeking to adopt the child of a spouse may file a petition for termination of the parent-child relationship of a parent. The parent-child relationship

may be terminated upon a showing by clear, cogent, and convincing evidence that it is in the best interest of the child to terminate the relationship and that the parent has failed to perform parental duties under circumstances showing a substantial lack of regard for his or her parental obligations and is withholding consent to adoption contrary to the best interest of the child.

RCW 26.33.120(1).

THE COURT: I read the materials which were submitted, including the various trial briefs. I looked at the statute on proceedings, [RCW] 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?

[Counsel for A.K.]: 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.

[Counsel for N.P.]: No objection.

THE COURT: Okay. All right.

Verbatim Report Proceedings (VRP) at 5–6. Argument was heard and evidence was taken while the courtroom was closed. N.P. testified by telephone from Coyote Ridge Prison but did not otherwise listen in on the proceedings. At no time did N.P. or his attorney object to the fact that the courtroom was closed, nor did either of them request anyone's presence at the hearing.

¶ 5 The trial court made an oral ruling on June 20, 2012, granting the petition to terminate N.P.'s parental rights and indicating the adoption would move forward. A.K. thereafter filed a petition for adoption, which was granted. On July 27, 2012, the trial court entered written findings of fact and conclusions of law terminating N.P.'s parental rights, an order terminating N.P.'s parental rights, findings of fact and conclusions of law as to the adoption petition, and a decree of adoption.<sup>FN3</sup> N.P. appeals, claiming only that \*395 the trial court violated his constitutional public trial rights. His challenge to the trial court's findings of fact and conclusions of law is based solely on his constitutional

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claim.

FN3. At the time the petition for termination was filed, M.S.M.-P. was nine years old. At the time of trial, he was 12 years old.

#### DISCUSSION

[1][2] ¶ 6 This court reviews claims based on article I, section 10 of the Washington constitution de novo. *In re Dependency of J.A.F., E.M.F., V.R.F.*, 168 Wash.App. 653, 661, 278 P.3d 673 (2012). Whether a statute is constitutional is a question of law reviewed de novo. *In re Dependency of M.S.R. and T.S.R.*, 174 Wash.2d 1, 13, 271 P.3d 234 (2012). Statutes are presumed constitutional. *State v. McCuiston*, 174 Wash.2d 369, 387, 275 P.3d 1092 (2012) cert. denied, — U.S. —, 133 S.Ct. 1460, 185 L.Ed.2d 368 (2013). The party challenging the constitutionality of a statute bears the burden to prove that it is unconstitutional beyond a reasonable doubt. *In re Dependency of I.J.S.*, 128 Wash.App. 108, 115, 114 P.3d 1215 (2005).

¶ 7 The statute at issue in this case is RCW 26.33.060, which provides that, in all hearings under chapter 26.33 RCW,<sup>FN4</sup> “[t]he 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.”

FN4. Chapter 26.33 RCW governs adoptions.

¶ 8 For the first time on appeal, N.P. contends that his rights to a public hearing under the First Amendment to the United States Constitution (“Congress shall make no law ... abridging the freedom ... of the press....”) <sup>FN5</sup> and article I, section 10 of the Washington Constitution (“Justice in all cases shall be administered openly....”) <sup>FN6</sup> were violated when the trial

court followed the procedure under RCW 26.33.060 without applying the *Ishikawa* requirements before it closed the courtroom.<sup>FN7</sup> A.K. argues that N.P.'s appeal should be rejected because (1) adoption records and hearings are an exception to the right to a public hearing and RCW 26.33.060 properly balances various parties' interests while acting in the best interest of the child; (2) RCW 26.33.060 closes the courtroom only where no party asks that it be opened,<sup>FN8</sup> and (3) N.P. fails to show \*396 actual prejudice resulting from the courtroom being closed. We conclude that N.P. raises a constitutional claim of error but agree with A.K. that N.P. does not demonstrate actual prejudice and therefore may not raise this claim for the first time on appeal.

FN5. A.K. contends that N.P. does not have standing to claim a violation of the First Amendment freedom of the press protection by invoking the rights of a third party (i.e., the press), citing *Bender v. Williamsport Area School District*, 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986) and *Lopez v. Candaele*, 630 F.3d 775 (9th Cir.2010). N.P. does not respond to this argument. We nonetheless disagree with A.K. *Bender* and *Lopez* referred to the standing requirements needed to invoke the jurisdiction of federal courts. *Bender*, 475 U.S. at 541–42, 106 S.Ct. 1326; *Lopez*, 630 F.3d at 785. N.P. does not, however, contend that the First Amendment provides greater or different protection here than article I, section 10 and does not analyze the First Amendment separately. Thus, we do not consider the First Amendment separately.

FN6. A.K. does not contend that N.P. lacks standing to raise an article I, section 10 violation. Furthermore, N.P. does not appear to be asserting a violation of article I, section 10 on behalf of the public at large. Therefore, it is unnecessary to determine whether N.P. has third-party standing, an issue addressed in

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some of the cases cited by N.P. *See State v. Wise*, 176 Wash.2d 1, 16 n. 9, 288 P.3d 1113 (2012) (noting the Washington Supreme Court has not yet decided whether a criminal defendant has standing to raise an article 1, section 10 challenge when the public is excluded from court proceedings); *In re Detention of Reyes*, 176 Wash.App. 821, 309 P.3d 745, 757–58 (2013) (civilly committed sex offender lacked standing to assert that public's rights under article I, section 10 were violated when it was excluded from a pretrial motion hearing); *In re Detention of Ticeson*, 159 Wash.App. 374, 381–82, 246 P.3d 550 (2011) (appellant, as a member of public, was protected by article I, section 10 and thus there was no reason to apply third-party standing rule to rights granted to public at large), abrogated on other grounds by *State v. Sublett*, 176 Wash.2d 58, 72, 292 P.3d 715 (2012).

FN7. At oral argument before this court, N.P. clarified that his position is that only the termination portions of the proceedings below, not the entire adoption proceedings, were subject to *Ishikawa* closure requirements.

FN8. We reject this argument. A.K. contends that, under RCW 26.33.060, any party can open the courtroom at will by requesting that anyone and everyone be let into the courtroom. Thus, he contends, the statute barely closes the courtroom at all. This is not what the statute says. Under the statute, the general public “shall be excluded” and only those persons whose presence is requested by a person entitled to notice or found by the judge to have a direct interest in the case or work of the court may be admitted. The statute does not permit a party to demand that the courtroom doors be opened to anyone and

everyone who wishes to enter.

[3][4] ¶ 9 Article I, section 10 guarantees the public open access to judicial proceedings and court documents in civil and criminal cases. *In re Dependency of J.A.F.*, 168 Wash.App. at 660, 278 P.3d 673 (citing *Dreiling v. Jain*, 151 Wash.2d 900, 908, 93 P.3d 861 (2004)). Similarly, the First Amendment “preserves a right of access to court proceedings and records.” *Tacoma News, Inc. v. Cayce*, 172 Wash.2d 58, 65, 256 P.3d 1179 (2011). “This court has clearly and consistently held that the open administration of justice is a vital constitutional safeguard and, although not without exception, such an exception is appropriate only under the most unusual circumstances and must satisfy the five requirements as set forth in [ *Ishikawa* ].” *In re Detention of D.F.F.*, 172 Wash.2d 37, 41, 256 P.3d 357 (2011).

[5][6][7] ¶ 10 Under *Ishikawa*, before courts order restrictions on access to criminal hearings or the records from criminal hearings, five requirements must be met: (1) the proponent of closure must make a showing of the need for a closure and, when closure is sought based on an interest other than the right to a fair trial, a serious and imminent threat to that interest must be shown; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the court, the proponents of, and the objectors to the closure should analyze whether the proposed method for curtailing open access would be the least restrictive means available and effective in protecting the threatened interests; (4) the court must weigh the competing interests of the defendant and the public; (5) the order must be no broader in its application or duration than necessary to serve its purpose. *Ishikawa*, 97 Wash.2d at 37–39, 640 P.2d 716. In addition, the trial court must enter specific findings justifying its closure order. *State v. Bone-Club*, 128 Wash.2d 254, 260, 906 P.2d 325 (1995); *J.A.F.*, 168 Wash.App. at 661, 278 P.3d 673. Courts have held that the *Ishikawa* procedure applies to civil proceedings. *See D.F.F.*, 172 Wash.2d at 41–42, 256 P.3d 357

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(applying *Ishikawa* to civil involuntary commitment proceeding).

¶ 11 A.K. contends adoption hearings are nonetheless an exception to the right to a public hearing. He contends that cases cited by N.P. in which courts have held that *Ishikawa* applies are distinguishable, pointing out that they consist of criminal cases;<sup>FN9</sup> a case involving civil commitment (effectively incarceration against one's will, *D.F.F.*, 172 Wash.2d at 40 n. 2, 256 P.3d 357);<sup>FN10</sup> and cases in which the issue of closing the hearing or sealing records was raised at the trial court level, where courts on appeal appropriately determined what standards apply to closure.<sup>FN11</sup>

FN9. See *Bone-Club*, 128 Wash.2d at 256–62, 906 P.2d 325 (criminal defendant's right to public trial under article I, section 22 of Washington Constitution requires that the trial court, before closing a pretrial suppression hearing, follow five criteria under *Ishikawa* and its progeny; failure to do so in case of record lacking any consideration of defendant's public trial rights, results in presumption of prejudice and remand for new trial), *State v. Brightman*, 155 Wash.2d 506, 514–18, 122 P.3d 150 (2005) (criminal defendant's public trial rights under article I, section 22 of Washington Constitution and sixth amendment to United States Constitution were violated where trial court fails to engage in *Bone-Club* analysis before closing courtroom during jury selection; failure to apply *Bone-Club* results in remand for new trial).

FN10. See *D.F.F.*, 172 Wash.2d at 38–49, 256 P.3d 357 (court rule providing that involuntary commitment proceedings be closed to the public unless the person who was the subject of the proceedings or his attorney filed with the court a written request that the proceedings be public violated right

to open administration of justice under article I, section 10; remedy was new commitment trial).

FN11. See *Tacoma News*, 172 Wash.2d at 60–61, 256 P.3d 1179 (media challenged closure of courtroom during deposition of witness in criminal trial; court held that neither article I, section 10 nor the First Amendment was violated by trial court's ruling that deposition proceeding was not open to public); *Dreiling*, 151 Wash.2d at 905–07, 915, 93 P.3d 861 (media sought to intervene and unseal records related to a motion to terminate a shareholder's derivative suit; Washington Supreme Court granted review on limited question of whether trial court applied correct legal standard in sealing material and briefing, held that under article I, section 10 and state common law, *Ishikawa* must be applied to documents filed in support of dispositive motions, including motions to terminate); *Ishikawa*, 97 Wash.2d at 32–33, 640 P.2d 716 (media challenged closure of pretrial hearing involving motion to dismiss in a criminal case).

\*397 ¶ 12 A.K. contends that this case presents a different scenario because it involves an adoption proceeding. He cites the following statement by the Washington Supreme Court in *Cohen v. Everett City Council*, 85 Wash.2d 385, 535 P.2d 801 (1975): “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.” *Id.* at 388, 535 P.2d 801 (citing RCW 26.32.100, repealed by Laws 1984, ch. 155, § 38, eff. Jan. 1, 1985).<sup>FN12</sup> The specific issue in *Cohen* was whether the trial court properly entered an order sealing a written transcript of the proceedings of a city council license revocation action, after the trial court has considered the transcript on an appeal of that proceeding. *Id.* at 386, 535

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P.2d 801. The court held that the Washington constitution “mandates an open public trial in a civil case, absent any of the statutory exceptions or compelling reasons calling for exercise of the court's inherent power to control its proceedings....” *Id.* at 388–89, 535 P.2d 801. It held that, in that case, because the trial court's review of the city council's action was of a transcript of proceedings before the city council, the record was the equivalent of testimony and became public property, *Id.* at 389, 535 P.2d 801. The statement cited by A.K. was made in the context of the court's general discussion of public trial rights.

FN12. RCW 26.32.100 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.

¶ 13 A.K. also cites *In re the Application of William Sage*. 21 Wash.App. 803, 586 P.2d 1201 (1978). There, the appellant, Sage, was an adopted child who, as an adult, was denied access to inspect adoption records that were sealed pursuant to a Washington statute. *Id.* at 804, 586 P.2d 1201. This court affirmed the superior court's denial of access, holding that access was not required under the statute and that the trial court did not err in ruling that Sage did not establish good cause to inspect the records. *Id.* at 807–11, 586 P.2d 1201. In describing the justifications for confidentiality and privacy in the area of adoption law, this court noted,

In the adoption context, our courts are directed to make decisions consistent with “the best interests of the child.”<sup>1</sup> The sealed records statutes are a codification of that directive. Confidentiality encourages and facilitates preadoption investigation and helps to strengthen the adoptive family as a social unit.

*Id.* at 805–06, 586 P.2d 1201 (footnote omitted). We also held that full disclosure was not mandated by

the public disclosure act, chapter 42.17 RCW, and that the sealed records statute did not violate Sage's equal protection rights. *Id.* at 811–13, 586 P.2d 1201.

¶ 14 *Cohen* and *Sage* support the general proposition that heightened privacy in adoption matters has been approved by the courts. Likewise, our legislature has enacted laws that provide greater privacy and confidentiality in adoption matters and recognize that the best interests of the children involved in these matters are paramount. *See, e.g.*, RCW 26.33.330 (adoption records are sealed and not open to inspection except upon order of the court for good cause shown or by using procedure under RCW 26.33.343); RCW 26.33.010 (“The guiding principle [in adoptions] must be determining what is in the best interest of the child.”). But neither *Cohen* nor *Sage* addressed constitutional public trial rights as they relate to termination proceedings arising in the context of adoption matters. Furthermore, both cases predated *Ishikawa*.

¶ 15 We find *J.A.F.*, a recent decision of this court, to be more on point, as it addressed closure in the context of termination proceedings. In *J.A.F.*, all parties agreed in open court that a federal statute required the court to close the courtroom before a particular witness, Harris, could testify about the \*398 drug treatment of the children's father, Fleming. 168 Wash.App. at 659, 278 P.3d 673. Trial counsel for the mother, Tucker, even stated a preference for closing the entire trial. *Id.* at 660, 278 P.3d 673. The parents appealed the trial court's order terminating their parental rights. They argued, among other things, that the partial closure violated article I, section 10 of the Washington State Constitution. *Id.* at 656, 278 P.3d 673. We explained that the appellants demonstrated a violation of article I, section 10 because the trial court closed part of the proceedings without applying the *Ishikawa* factors and did not articulate findings justifying the closure. *Id.* at 662, 278 P.3d 673. We nonetheless refused to review the claim of error because the appellants did not demonstrate actual prejudice. *Id.* at

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663–64, 278 P.3d 673.

[8] ¶ 16 Here, similar to *J.A.F.*, the termination hearing was closed without applying *Ishikawa*. Although, the termination petition in this case arises in the context of an adoption matter brought by a prospective adoptive parent, insofar as N.P.'s interests and rights are concerned, the distinction is immaterial. Whether the termination petition was brought by the State or by a prospective adoptive parent, the same potential outcome is at stake: termination of the parent-child relationship. In a case where a party faces such a potential consequence, the concerns underlying constitutional public trial rights are undoubtedly present. We conclude that N.P. raises a constitutional error.

[9][10][11][12] ¶ 17 However, as in *J.A.F.*, we also conclude that N.P. waived the error by failing to object below. A party may raise for the first time on appeal a manifest error affecting a constitutional right. RAP 2.5(a)(3). A manifest error requires a showing of actual prejudice. *State v. O'Hara*, 167 Wash.2d 91, 99, 217 P.3d 756 (2009). To demonstrate actual prejudice, there must be a “plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.” *Id.* (quoting *State v. Kirkman*, 159 Wash.2d 918, 935, 155 P.3d 125 (2007)). To determine whether an error is practical and identifiable, the appellate court must put itself in the shoes of the trial court to ascertain whether, given what the trial court knew at the time, the court could have corrected the error. *O'Hara*, 167 Wash.2d at 100, 217 P.3d 756.

¶ 18 N.P. contends that the record here “suffers no absence of prejudice” because, unlike in *J.A.F.*, he was not personally present when the courtroom was ordered closed and the entire trial took place when the courtroom was closed. But it is N.P.'s burden to affirmatively show prejudice and he points to no practical or identifiable consequence that the closure had on the trial of the case. *See In re Reyes*, 176

Wash.App. 821, 309 P.3d 745 (appellant who was civilly committed as sexually violent predator could not raise claimed violation of article I, section 10 for first time on appeal where he did not show actual prejudice or provide a plausible theory of how he was harmed by closure of hearing on his motion to dismiss). Furthermore, if we put ourselves in the shoes of the trial court, as we must, it is evident that under *J.A.F.*, which we decided one week before the trial of this case, had N.P. raised the objection below the trial court would have had an opportunity to correct the error.

¶ 19 N.P. also relies on *D.F.F.*, 172 Wash.2d 37, 256 P.3d 357, to argue that his claim is properly before us. In that case, D.F.F. was involuntarily committed for psychiatric treatment under chapter 71.05 RCW. She did not object to the trial judge's closure of the proceedings pursuant to former Mental Proceeding Rules (MPR) 1.3.<sup>FN13</sup> On appeal, D.F.F. argued that the closure violated her rights under article 1, section 10. The Supreme Court was unanimous that former MPR 1.3 violated article 1, section 10, but divided on whether D.F.F. made a sufficient showing of prejudice to warrant reversal of the commitment order and a new hearing.

FN13. Former MPR 1.3, which was rescinded effective April 30, 2013, read in relevant part:

Proceedings had pursuant to RCW 71.05 shall not be open to the public, unless the person who is the subject of the proceedings or his attorney files with the court a written request that the proceedings be public.

¶ 20 Four justices joined in the lead opinion, which concluded that the closure was \*399 sufficient, by itself, to warrant a new trial. The lead opinion relied primarily on criminal cases involving public

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trial rights under article 1, section 22, which guarantees a criminal defendant a “speedy public trial.” Those cases hold that the failure to raise a public trial objection in the trial court does not waive the right because, in the criminal context, the closure results in “structural error”<sup>FN14</sup> and prejudice is presumed. *State v. Wise*, 176 Wash.2d 1, 16, 288 P.3d 1113 (2012); *Bone-Club*, 128 Wash.2d at 257, 261–62, 906 P.2d 325. The lead opinion justified its reliance on criminal cases, noting that “commitment is a deprivation of liberty. It is incarceration against one’s will, whether it is called ‘criminal’ or ‘civil.’” *D.F.F.*, 172 Wash.2d at 40, n. 2, 256 P.3d 357, quoting *In re Application of Gault*, 387 U.S. 1, 50, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

FN14. “An error is structural when it ‘necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.’” *State v. Momah*, 167 Wash.2d 140, 149, 217 P.3d 321 (2009) (quoting *Washington v. Recuenco*, 548 U.S. 212, 218–19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)) (alteration in original) (quoting *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).

¶ 21 Two justices rejected the lead opinion’s reliance on criminal precedent and agreed with the three dissenting justices that “the ‘structural error’ analysis does not apply to the civil context.” *Id.* at 48, 256 P.3d 357. Nonetheless, they concurred in the result because since *D.F.F.* was “committed after a closed hearing, [she] demonstrate[d] sufficient prejudice to warrant relief.” *Id.*

¶ 22 *D.F.F.* is of no help to N.P. The case makes clear that the “structural error” analysis is inapplicable in a civil case, such as a termination proceeding. Thus, here, there is no presumption that N.P. was prejudiced by the closure. Furthermore, the majority in *D.F.F.* appears to have concluded that because *D.F.F.* was

confined as a result of a closed hearing, no showing of actual prejudice was necessary to entitle her to a new trial. N.P. cannot claim he was subject to the same risk. Unlike a criminal or involuntary commitment trial, the proceeding in this case could not result in N.P.’s confinement. Thus, *D.F.F.* is inapposite.

[13] ¶ 23 Moreover, other than the closure, N.P. does not dispute the trial court’s findings of fact or claim that the trial court’s conclusions of law are erroneous.<sup>FN15</sup> Thus, there is little, if any, likelihood that a new termination trial would yield a different outcome. Yet, reversing the termination order would have the additional consequence of setting aside M.S.M.-P.’s adoption. The trial court found that N.P.’s withholding of his consent to the adoption was not in the best interests of M.S.M.-P. We see nothing in the record to dispute this finding. In light of that, we see no reason, and N.P. offers none, to disturb the finality of M.S.M.-P.’s adoption by the only father he has known.

FN15. The trial court found, among other things, that: N.P. displayed a “serious pattern of criminal conduct,” including his incarceration at the time of the hearing for drug and firearms violations; N.P. had never expressed “personal concern for the health, education and general wellbeing of [M.S.M.-P.]”; N.P. had never spent time with M.S.M.-P., whether incarcerated or free; N.P. had never expressed love or affection for M.S.M.-P.; N.P. was an unfit parent and his withholding of consent to the adoption was contrary to M.S.M.-P.’s best interests; and that, until the adoption proceedings began, M.S.M.-P. had no memory of N.P. CP 250–53.

¶ 24 We conclude the closure of that portion of the proceedings below relating to the termination of N.P.’s parental rights violated article 1, section 10 and was thus, error of constitutional magnitude.<sup>FN16</sup> But because N.P. failed to object and fails to demonstrate

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actual prejudice, he waived the error and may not assert it for the first time on appeal.

FN16. In light of our disposition of this case, it is unnecessary to, and we do not, decide the constitutionality of RCW 26.33.060 in an adoption context.

¶ 25 Affirmed.

WE CONCUR: DWYER and BECKER, JJ.

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