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THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

In Re the Dependency of:

T.P.

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

BRIEF OF PETITIONER

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A. ASSIGNMENT OF ERROR AND ISSUE PRESENTED

RCW 13.34.065 sets out a straightforward rule: “When a child is taken into custody, the court shall hold a shelter care hearing within seventy-two hours, excluding Saturdays, Sundays, and holidays.” Rather than within 3 days, the shelter care hearing in this case took place 49 days after T.P. was removed from her parents’ care. The court’s justification for this delay was the parents’ assertion of their right to contest the State’s allegations as guaranteed by due process and the statute. But, RCW 13.34.065 provides no exception to its seventy-two rule when parents exercise that right. Dan Peterson’s¹ statutory and constitutional rights were violated by the trial court failure to comply with this simple statutory timeline.

B. STATEMENT OF THE CASE

The Department of Children Youth and Families (Department) removed T.P. from her parents on December 11,

¹ Pursuant to General Order 2006-1 of this Court, “Dan Peterson” is a pseudonym for the father D.P.

2018. By statute the juvenile court must conduct a shelter care hearing within 72 hours of a child's removal from her home.

Two days after the Department took T.P from her home, pursuant to the notice he had received from the Department, Mr. Peterson appeared in court for a Shelter Care Hearing. CP 7; RP 5. At that hearing, the State explained that because the parents were seeking to contest the State's allegations the hearing would be held 20 days later on January 2, 2019.

Mr. Peterson asked that the hearing be set within 72 hours. RP 4-5. Mr. Peterson's attorney, who also represented T.P.'s mother informed the court "I've explained the normal court practice of setting out a few weeks, but they are requesting that this contested hearing happen today. RP 5.

The Department responded that the hearing should be set "according to the Court's schedule. And the soonest possible date that was not Thursday was January 2nd." RP 5. The Department did not explain why the hearing could not be

held on a Thursday. The Department did not explain why the hearing could not proceed on December 13 or within 72 hours of T.P.'s removal as required by statute.

The court responded, "January 2nd is the first available date we have." RP 5-6. Nothing in the record explains why the hearing could not proceed on December 13 or within 72 hours of T.P.'s removal as required by statute. There is no record or explanation of why the hearing could not take place in the nearly three weeks between December 13 and January 2.

The court subsequently continued the January 2, 2019, hearing due to the unavailability of Mr. Peterson's attorney. A shelter care order was not entered until January 28, 2019 – 49 days after T.P. was taken from her parents.

This Court granted Mr. Peterson's motion for discretionary review concluding the trial court's failure to comply with the straightforward timeline in RCW 13.34.065 was probable error.

C. ARGUMENT

1. RCW 13.34.065 unambiguously required a shelter care hearing within seventy-two hours of T.P.'s removal from her parents' home.

RCW 13.34.065(1) provides:

(a) When a child is taken into custody, the court shall hold a shelter care hearing within seventy-two hours, excluding Saturdays, Sundays, and holidays. The primary purpose of the shelter care hearing is to determine whether the child can be immediately and safely returned home while the adjudication of the dependency is pending.

(b) Any parent, guardian, or legal custodian who for good cause is unable to attend the shelter care hearing may request that a subsequent shelter care hearing be scheduled. The request shall be made to the clerk of the court where the petition is filed prior to the initial shelter care hearing. Upon the request of the parent, the court shall schedule the hearing within seventy-two hours of the request, excluding Saturdays, Sundays, and holidays. The clerk shall notify all other parties of the hearing by any reasonable means.

When used in a statute “shall” is presumptively a mandatory directive. *State v. Krall*, 125 Wn.2d 146, 148, 681 P.2d 1040 (1994). Nothing in RCW 13.34.065 suggests a contrary meaning of the word.

Courts have already interpreted RCW 13.34.065 as mandating a shelter care hearing whenever the state seeks to

place a child outside of her family home, unless waived as permitted by the statute. *In re the Dependency of R.H.*, 129 Wn. App. 83, 86, 117 P.3d 1179 (2005). The term “shall” in the phrase “the court shall conduct a hold a shelter care hearing within seventy two hours” must be mandatory with respect to both the necessity of a hearing as well as the timing

Because it pertains to a timeline it would be nonsensical to read “shall” as permissive, i.e., “The court may hold a shelter care hearing within seventy-two hours. . . .” If the timing of the hearing is entirely discretionary than the words “within seventy-two hours” are meaningless. But, “a court must not interpret a statute in any way that renders any portion meaningless or superfluous.” *State v. K.L.B.*, 180 Wn.2d 735, 742, 328 P.3d 886 (2014). The requirement that the shelter care hearing occur within seventy-two hours is mandatory. *See Krall*, 125 Wn. 2d at 148 (statutory requirement that restitution “shall” be determined within 60 days of sentencing was mandatory).

Such a reading is also consistent with the purpose of the statute. The statute requires a hearing “[w]hen a child is taken into custody” because the “primary purpose [of the hearing] . . . is to determine whether the child can be immediately and safely returned home while the adjudication of the dependency is pending.” Making the determination seven weeks later rather than shortly after the child is taken into custody and does not permit the child’s “immediate” return while the matter proceeds. Such an untimely determination frustrates the primary purpose of prompt determination.

The intent and function of a shelter care hearing mirrors function of a probable cause or preliminary hearing in a criminal case. Both must occur promptly after the initiation of the case, either arrest or removal of the child. Both hearings serve to obtain judicial review of a significant government intrusion into constitutionally protected rights. In a criminal case, a court must determine probable cause exists in order to justify continued detention or warrant bail

in light of the Fourth Amendment or Article I, §section 22. *Gerstein v. Pugh*, 420 U.S. 103, 112-14, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975); *Westerman v. Cary*, 125 Wn.2d 277, 293, 892 P.2d 1067 (1994). Similarly, a court must find justification to permit state intrusion into family and assess the initial proper placement of the child during the process.

In *Khandewal v. Seattle Municipal Court*, this Court found the requirement in CrRLJ 3.2.1 that a preliminary hearing must occur by close of business the next court day following a warrantless arrest was unambiguous and mandatory. 6 Wn. App. 2d 323, 332, 431 P.3 506 (2018). Thus, a municipal court policy of setting over preliminary hearings where defendant filed disqualification of judge violated the plain requirement of the rule. 6 Wn. App. 2d at 336.

The timeline of RCW 13.34.065 is similarly mandatory, requiring a hearing within seventy-two hours of the child's removal. The statute expressly guarantees the right to present testimony. Nothing in the statute excludes such contested hearings from the seventy-two hour rule.

The statute permits a continuance only if a parent, guardian, or legal custodian is unable to attend for good cause. By expressly stating under which circumstances a continuance is permissible, the statute necessarily excludes any other circumstances. *State v. Linville*, 191 Wn. 2d 513, 520, 423 P.3d 842 (2018) (“*expressio unius est exclusio alterius* - the express inclusion of specific items in a class impliedly excludes other such items that are not mentioned.”) The statute does not permit a continuance due to judicial unavailability of courtroom congestion or for any reason other than the absence for good cause of the parent, guardian, or legal custodian. Here the parents were available and did not request a continuance. Thus, the statute did not permit the court to continue the hearing.

Even if there were a basis for a continuance under the statute, at the request of the parents, the court “shall schedule the hearing within seventy-two hours of the request” to continue. Here, despite the parents’ specific request that the court schedule any continued hearing within 72 hours, the

court refused, setting the hearing for 20 days later contrary to the plain language of the statute.

Mr. Peterson paid a steep, if not exorbitant, price of a weeks-long separation from his daughter for the exercise of his rights under the statute and due process to challenge the State's intrusion into his family. In this case, it included the added cost of a separation over the Holidays. To avoid that cost, and potentially quickly reunite with his child, he was required to forego any challenge to State's actions no matter how meritorious that challenge may be. The court's "normal" practice penalizes parents who exercise their constitutional and statutory rights.

The initial twenty-day continuance and the ultimate 49-day delay of the shelter care hearing violated RCW 13.34.065. The court's practice of routinely setting over shelter care hearings where the parent challenges the department's allegations is contrary to the statute and violates due process.

If the court does not conduct the hearing, contested or otherwise, within the statutory timeframe, the remedy must be to dismiss the petition and return the child home. Anything else ignores the plain language of the statute and frustrates the statute's intent of providing prompt judicial review of the initial allegations and removal.

2. What occurred on December 13 was not a shelter care hearing.

In its order issued on December 13, 2018, in which the court continued the hearing, the court also purported to make the following finding.

[x] It is currently contrary to the welfare of the child to remain in the child's home. The petition and/or supporting declarations and affidavits establish reasonable grounds to believe that the child is dependent and the child's health safety, and welfare will be seriously endangered if not taken into custody.

The petitioner has demonstrated that there is a risk of imminent harm to the child in the child's home. The assessment of risk by petitioner constitutes reasonable efforts to prevent or eliminate the need for removal of the child from the child's home.

CP 38.

But the court never gave the parents the opportunity to challenge the State's allegations. If the December 13, 2018 order is deemed a shelter care order it violates due process.

While it is a flexible concept, at a minimum due process requires a person be afforded notice and opportunity to be heard at a meaningful time and in a meaningful way. *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965). It is not disputed that the court did not afford the parents the opportunity to contest the allegations at the December 13, 2018, hearing. The parents were not afforded that most basic component of due process until 49 days later. To the extent the State wishes to argue the December 13, 2018, order was the shelter care order, that order deprived the parents of due process.

Even the Attorney General agrees that government actions separating families without meaningful hearings is unconstitutional and an affront to fundamental values. Press Release, Washington State Office of the Attorney General, statement by Bob Ferguson (July 2, 2018) ("The gut-

wrenching stories we have heard from families demonstrate just how much it violates basic decency and fundamental American values. The policy also violates the Constitution, and I will continue to fight to put an end to it.”) (available at <https://www.atg.wa.gov/news/news-releases/ag-ferguson-asks-court-accelerate-family-separation-case>) (Last accessed July 3, 2019). While decrying federal policies separating families, the Attorney General defends a policy that separated a child from her parents for 7 weeks, over the Holidays, without any meaningful opportunity to challenge the government’s actions and in direct contradiction of RCW 13.34.065. Such a policy also violates fundamental values, and as has been shown, violates the Constitution.

Before a shelter care order is entered, a parent must be afforded the opportunity to be heard and to challenge the State’s allegations. The hearing that occurred on December 13, 2018, did not comport with either RCW 13.34.065 or due process. In fact, if either the State or trial court actually believed the December hearing satisfied the requirements of

RCW 13.34.065 there is no explanation for why the hearing was continued at all. The order that was entered cannot be considered the shelter care order.

D. CONCLUSION

The trial court failed to conduct a shelter care hearing within the statutory timeline. That statutory and constitutional violation must result in the dismissal of the petition and return of the child home.

DATED this 12th day of July, 2019.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

IN RE T.P.,
A MINOR CHILD.

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NO. 52928-9-II

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