

December 22, 2021

Honorable Charles W. Johnson, Co-Chair
Honorable Mary I. Yu, Co-Chair
Washington State Supreme Court Rules Committee
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

RE: Civil Rule 39, Trial by Jury or by the Court – Proposed Change

Dear Honorable Justices Johnson and Yu:

The Court Recovery Child Welfare Committee of the Board for Judicial Administration Court Recovery Task Force submits this comment to the proposed change to Civil Rule 39 (CR 39), Trial by Jury or by the Court, for two reasons. First, our comment explains the challenges and impracticalities of the proposed rule in ch. 13.34 and 13.36 RCW proceedings, which are civil proceedings with multiple parties. Second, we want to inform you that our Committee intends to draft and propose a juvenile court rule (JuCR) to address videoconference and hybrid trials in ch. 13.34 and 13.36 RCW proceedings.¹ In the meantime, the Supreme Court’s *Extended and Revised Order Re: Dependency and Termination Cases* (Order No. 25700-B-547, October 14, 2020), which addresses trial procedures by remote means, would remain effective.

The Court Recovery Child Welfare Committee includes participants from the Administrative Office of the Courts, Office of Public Defense Parents Representation Program², Office of Civil Legal Aid, Washington Child Advocates Program, Department of Children, Youth & Families, Attorney General’s Office, Family Juvenile Court Improvement Program, Children’s Home Society of Washington, court staff, and a parent with lived child welfare experience. Its mission is to “assess challenges and opportunities and recommend improved practices in child welfare cases resulting in better outcomes for children, youth, and families, including considerations of race equity, trauma, access to justice, technology, and funding, in light of the limitations courts have experienced due to the global pandemic.”

Our Committee is concerned that the proposed changes to CR 39 may have unintended, and possibly negative, consequences in dependency, guardianship, and termination of parental rights cases governed by ch. 13.34 and 13.36 RCW. First, proposed CR 39(d)(2) is unclear as to the scope of the court’s authority to use videoconference in trial. The references to “videoconference trials” and that trials “may occur over videoconference” does not clearly instruct that while trials

¹ The Superior Court Civil Rules apply in dependency, ch. 13.36 guardianship, and termination of parental rights proceedings when not inconsistent with the Juvenile Court Rules. JuCR 1.4(a).

² The Office of Public Defense Parents Representation Program (OPD) supports this Committee’s comments and recommendations. But because of the significant liberty interest at stake and the possibility that this Committee may not be given the opportunity to draft and propose a separate juvenile court rule that specifically governs dependency and termination proceedings, OPD will submit its own comments on the proposed changes to CR 39.

may occur by videoconference in full, they may also be conducted by videoconference in part, such as a hybrid trial where some parties or participants appear remotely and others appear in-person. In our Committee members' experience, a hybrid trial is feasible in some cases, and when implemented appropriately, even preferable under some circumstances for everyone.³

Second, in the context of dependency, guardianship, and termination of parental rights proceedings under ch. 13.34 and 13.36 RCW, it is unclear to whom "participant" in proposed CR 39(d)(2)(A) refers, and therefore, it is unclear who must be able to "simultaneously see, hear, and speak with each other" in a videoconference trial. Without clear instruction, the circumstances under which a videoconference trial may proceed will likely vary widely from county to county. In addition, parents may not have consistent or reliable access to videoconference technology. If the parent's in-person appearance is preferable, it may not be feasible for a variety of reasons, such as accessibility, safety, security, and distance. However, these challenges should not preclude the court from being able to conduct a videoconference trial or a hybrid trial as long as the parents, including those who are incarcerated, are provided a meaningful opportunity to be heard and defend through alternative measures. *See, e.g., Matter of Welfare of M.B.*, 195 Wn.2d 859, 876, 467 P.3d 969 (2020) (referring to other methods of full participation, such as telephonic participation for the entire hearing or a bifurcated trial with an opportunity for the parent to review transcripts of the State's evidence).

Finally, due to the statutory requirement that dependency fact-finding hearings are held no later than seventy-five days after the petition is filed, proposed CR 39(d)(3) is likely not practical in many dependency cases, and this timing requirement should be reserved for local court rules. RCW 13.34.070(1). Application of the proposed rule in dependency cases would likely preclude some jurisdictions from utilizing videoconference trials in dependency cases due to their case scheduling operations. For these reasons, the content of CR 39(d)(3) is more appropriate for local court rulemaking, rather than a statewide rule.

Thank you for the opportunity to comment on proposed CR 39. Our Committee looks forward to drafting a proposed juvenile court rule to address videoconference and hybrid hearings in dependency, ch. 13.36 guardianship, and termination of parental rights proceedings for your consideration in the future.

With appreciation,

/s/ Linnea Anderson

Linnea Anderson, Chair
Court Recovery Child Welfare Committee
Board for Judicial Administration Court Recovery Task Force

³ For additional resources and information about using alternative methods to enable court participation in child welfare cases, please see *Resuming Dependency Fact Finding and Termination of Parental Rights Trials in Washington State, Guidelines for Operations [D]uring the COVID-19 Pandemic* (June 2020), available at <http://www.courts.wa.gov/content/publicUpload/COVID19%20Response/Resuming%20Dependency%20Fact%20Finding%20070220.pdf>. This resource was prepared by a workgroup including the Honorable Justice Barbara A. Madsen and members from the King County Superior Court, Pierce County Superior Court, Attorney General's Office, Office of Public Defense, and Office of Civil Legal Aid.

From: [OFFICE RECEPTIONIST, CLERK](#)
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Subject: FW: Comment to Proposed Amendment to CR 39
Date: Wednesday, December 22, 2021 12:00:13 PM
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From: Greenberg, Carissa Ann (ATG) [<mailto:carissa.greenberg@atg.wa.gov>]
Sent: Wednesday, December 22, 2021 11:55 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Linnea Anderson <LinneaA@sanjuanico.com>; Burns, Sarah <Sarah.Burns@courts.wa.gov>
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Good morning:

Attached please find the BJA Court Recovery Child Welfare Committee's comment to the proposed rule change to Civil Rule 39. Thank you for your consideration.

Sincerely,

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