



**WASHINGTON STATE
OFFICE OF PUBLIC DEFENSE**

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December 29, 2021

Justice Charles Johnson
Justice Mary Yu
Co-Chairs, Supreme Court Rules Committee
Washington Supreme Court
415 12th Ave SW
Olympia, WA 98501-2314

RE: Proposed Changes to CR 39

Dear Justices Johnson and Yu,

The Washington State Office of Public Defense (“OPD”) is concerned that the proposed changes to Civil Rule 39 (CR 39) may have unintended and negative consequences in dependency, guardianship, and termination of parental rights cases under RCW 13.34 and 13.36. While OPD supports the Court Recovery Child Welfare Committee’s recommendation to draft a separate juvenile court rule, OPD writes separately given the fundamental liberty issues at stake. Where a person has a constitutional or statutory right to counsel, the presumption should be that all trials are in person. This presumption should only be rebutted by either 1) a decision by the person with the right to counsel to proceed by remote means, or 2) if the person is incarcerated and cannot be transported for trial, that due process is satisfied by alternate means as identified in Matter of Welfare of M.B., 195 Wn.2d 859, 868, 467 P.3d 969, 974 (2020).”

Remote technology has been a vital tool for courts in the midst of a public health crisis. However, the use of remote technology, and its possible expansion post-crisis, raises critical questions about how parents’ due process rights and their access to justice may be impacted and what courts and other stakeholders can do to mitigate any harms. When seeking to interfere in a parent’s fundamental liberty interest to raise his/her child, the Court must provide the parent with a fundamentally fair procedure. It must apply the balancing test as set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L. Ed. 2d 18 (1976) before allowing dependency, guardianship, and termination trials to proceed virtually under the current Washington State Supreme Court Extended and Revised Order Re: Dependency and Termination Cases, No. 25700-B-647. Under this test, the Court balances (1) the private interests affected, (2) the risk of erroneous deprivation of the private interest created by the procedures used, and (3) the State’s interest in using the challenged procedure. *Mathews*, 96 S.Ct. at 903. The proposed change to CR 39 allows the Court to hold a trial by videoconference without going through the *Mathews* analysis, and does not allow a parent an opportunity to object to having the trial in whole or in part by videoconference.

Because credibility determinations are often central to case outcomes, the effect of video appearance on credibility has important implications on the overall fairness of remote proceedings. In RCW 13.34 and 13.36 proceedings, “...where the State is already advantaged and the outcome

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largely turns on subjective standards, the benefits of nuanced communication and an increased ability to convey truth-telling are particularly important for a parent.” *Matter of Welfare of M.B.*, 195 Wn.2d 859, 871, 467 P.3d 969, 976 (2020). It is difficult to assess witness credibility, recognize witness coaching, or detect improper use of notes in virtual hearings. Additionally, remote trials can feel dehumanizing to parents and mask the fundamental liberty interests at stake. Thus, preference should be given to in person testimony as it “not only bolsters the accuracy of a credibility assessment but also reduces the risk of error by ‘impress[ing] the factfinder with the importance of the decision’.” *Matter of Welfare of MB*, 195 Wn.2d 859, 871, 467 P.3d 969, 976 (2020) (quoting *Santosky v. Kramer*, 455 U.S. 745, 787, 102 S. Ct. 1388, 1412, 71 L. Ed. 2d 599 (1982)). Trials involving documentary evidence also present logistical challenges in the virtual environment. The handling of exhibits and the challenging of witness testimony with documentary evidence while on the stand is completely eliminated when a remote trial is occurring. A virtual trial eliminates an attorney’s ability to simply hand a witness a document and ask questions thereby interrupting the flow and effectiveness of cross-examination.

Another question raised by the use of video trials is whether they impact communication and other aspects of the relationship between attorneys and their clients, who are frequently separated during remote proceedings. This separation of counsel and client makes it extremely difficult for the client to immediately confer with counsel about the testimony currently being provided by the witness. In a virtual trial, the client’s ability to provide immediate information to the attorney regarding testimony that an attorney deems significant is nonexistent, increasing the chances that relevant information gets lost.

Trials held by videoconference also present technical challenges as well. For example, when the audio and video are not properly synchronized it compromises interpretation of the witness’ demeanor and responses. Portions of questions and answers may be dropped for some participants but not others without all parties being aware that something has been lost. Transcripts may have missing information, possibly rising to the level of being unusable, and potentially requiring reconstruction of the record or a new trial. Objections may be lost or failed to be made timely if an issue arises with the signal for the Court or the objecting attorney. Too often, anyone who has participated in a video hearing or meeting can recall a frozen screen or garbled audio. These technical issues do not arise when a trial is held in person and lawyers are better able to communicate with their clients, handle exhibits and witnesses more efficiently, and judges can better assess the credibility of those who appear before them. Being in the courtroom creates more fair proceedings.

Just as significant is the potential impact video trials may have on marginalized communities. In June 2020, the Washington Supreme Court signed an [open letter to the legal community](#) acknowledging that “injustices faced by Black Americans are not relics of the past. We continue to see racialized policing and the overrepresentation of Black Americans in every stage of our criminal and juvenile justice systems.” The Court called upon the legal community to “recognize that we all bear responsibility for this on-going injustice.” It is upon us, as judges, lawyers, and members of the bar to “recognize the harms that are caused when meritorious claims go unaddressed due to systemic inequities or the lack of financial, personal, or systemic support. And we must recognize that this is not how a *justice* system must operate.”

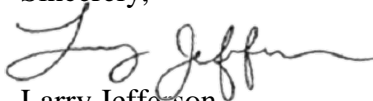
Implementation of CR 39 may exacerbate the existing inequities in our justice system for Black, Indigenous, Hispanic, as well as indigent persons and persons with disabilities. While access over the internet and technology has improved, considerable disparities still exist between demographic groups with regard to access to technology and internet connectivity. According to the National Telecommunications and Information Administration's 2018 [survey](#), African American, Hispanic, and Indigenous families had much lower access to the internet than White and Asian families. The same is true for people with [disabilities](#), who may also require special technology in order to engage in online activities such as remote court proceedings, as well as those living in [rural](#) communities. Additionally, it is well documented that Black, Indigenous and Families of Color are overrepresented in our child welfare system. See for example, J. Christopher Graham. 2019 Washington State Child Welfare Racial Disparity Indices Report. Washington State Department of Children, Youth, and Families – Office of Innovation, Alignment, and Accountability (2020) (assessed online December 28, 2021 at: <https://www.dcyf.wa.gov/sites/default/files/pdf/reports/CWRacialDisparityIndices2019.pdf>).

Although video conference technology has been a valuable tool during the Covid-19 pandemic, the above stated concerns are reasons to be cautious about adopting and implementing the proposed changes to CR 39. For further discussion and analysis, See Brennan Center for Justice, *The Impact of Video Proceedings on Fairness and Access to Justice in Court* (2020) (Discussing research on the impact of video proceedings but suggesting caution in long-term expansion of such technology) (accessed online December 20, 2021 at: <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court>).

Finally, parents have a fundamental liberty interest in the care and custody of their child. “Few consequences of judicial action are so grave as the severance of natural family ties.” *Santosky v. Kramer*, 455 U.S. 745, 787, 102 S. Ct. 1388, 1412, 71 L. Ed. 2d 599 (1982). Given the significant liberty interest at stake, any changes to CR 39 should include a presumption that a parent involved in RCW 13.34 or 13.36 trials has a right to an in-person trial. This presumption should only be rebutted by either 1) a decision by the person with the right to counsel to proceed by remote means, or 2) if the person is incarcerated and cannot be transported for trial, that due process is satisfied by alternate means as identified in *Matter of Welfare of M.B.*, 195 Wn.2d 859, 868, 467 P.3d 969, 974 (2020).” OPD supports the Court Recovery Child Welfare Committee’s proposal to draft a juvenile court rule with input from stakeholders to specifically address videoconference trials in RCW 13.34 and 13.36 proceedings. OPD cautions against implementing proposed changes to CR 39 that would apply to RCW 13.34 and 13.36 trials without a separately implemented juvenile court rule given the fundamental liberty interests at stake.

Thank you for your consideration of this comment.

Sincerely,



Larry Jefferson
Director

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Good morning.

Please see attached.

Thank you,

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