ARMITAGE & THOMPSON PLLC

January 31, 2023

Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929
Sent via email to supreme@courts.wa.gov

Re: Proposed new Superior Court Special Proceedings Rule 98.24W

Dear Honorable Justices of the Washington Supreme Court:

We write to express opposition to adopting the proposed SPR 98.24W because it attempts to resolve substantive matters and creates conflicts in the law for litigants who are operating within the intricate special proceedings statutes governing unlawful detainer actions as further explained herein.

In 2021, the Office of Civil Legal Aid ("OCLA") became responsible for implementing a program to provide an opportunity for indigent tenants to obtain free legal counsel in unlawful detainer matters. RCW 59.18.640; *see also* RCW 2.53.060(2) ("The legislature recognizes that the office of civil legal aid needs time to properly implement the right to attorney legal representation for indigent tenants under and consistent with RCW 59.18.640. Within 90 days after April 22, 2021, the office of civil legal aid must submit to the appropriate legislative committees a plan to fully implement the tenant representation program under and consistent with RCW 59.18.640 within 12 months of April 22, 2021.") Within its statutory responsibilities, OCLA is further directed by the legislature to prioritize resources for purposes of administering the statutorily created opportunity for counsel. *See* RCW 59.18.640(1) ("[OCLA] shall assign priority to providing legal representation to indigent tenants in those counties in which the most evictions occur and to indigent tenants who are disproportionately at risk of eviction.). Thus, OCLA owes a duty to all indigent tenants that face eviction to provide a workable program for obtaining the assistance of legal counsel, subject to prioritization considerations and variable funding limits that may impact the ability to provide free legal services to tenants.

As to OCLA's duty to create a workable program, when RCW 59.18.640 was adopted, the legislature was fully aware of the existing law mandating expedited resolution of the question of possession in unlawful detainer cases. *See Christensen v. Ellsworth*, 162 Wn.2d 365, 370–71, 173 P.3d 228, 231 (2007). In adopting RCW 59.18.640, however, the legislature chose not to disrupt the existing statutory framework, including an expedited resolution of the right to possession. The legislature did not direct that an opportunity to obtain free legal counsel required trial courts to elevate substantive rights of an indigent tenant over a non-indigent tenant; stated another way, a landlord's due process protections afforded under the RLTA are the same

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regardless of whether a tenant qualifies for an opportunity to have appointed counsel or not. Thus, it must logically follow that the legislature envisioned its charge to OCLA as one to develop a program consistent with the current state of the law, i.e., a program that functions with the expediency at which unlawful detainer actions are to be resolved by the courts. To the extent OCLA is not fulfilling its statutory duties to indigent tenants[1], the court should not adopt policies and rules that serve only to mitigate these failures, particularly when doing so conflicts with special proceedings statutes concerning substantive matters and elevates one litigant's access to justice rights over that of another.

As recently articulated by the Court of Appeals, Division 1:

> [T]he temporary deprivation of access to one's real estate in the landlord-tenant context is a significant one. The purpose of an unlawful detainer action is to provide "an expedited method of resolving the right to possession of property." *Christensen v. Ellsworth*, 162 Wash.2d 365, 370-71, 173 P.3d 228 (2007). This statute recognizes that a tenant who cannot pay rent may be judgment proof and expediting the tenant's departure allows the landlord to recover possession of the property before incurring extensive damages. Without the ability to exercise their rights under the RLTA and unlawful detainer statutes, the Landlords face the risk of never being able to recover the unpaid rent, even after they are eventually able to evict the defaulting tenant.

Rental Hous. Ass'n v. City of Seattle, 22 Wn. App. 2d 426, 455, 512 P.3d 545, 561 (2022) (analyzing the expediency of which unlawful detainer actions provide for a resolution of the right to possession of real property relative to balancing the interests involved, including the constitutionally protected interests of landowners); *see also Randy Reynolds & Assoc., Inv. V. Harmon*, 193 Wn.2d 143, 161-162, 437 P.3d 677, 686-687 (2019) (noting in the context of a court's inherent authority to grant a stay that "a trial court judge or commissioner must keep in mind that purpose underlying the RLTA and unlawful detainer actions—that these provisions were designed to hasten the recovery of possession and craft relief that properly and efficiently balances both the landlord's and the tenant's competing interests.") We should also not ignore the interests of neighboring families who are harmed when their landlord cannot remove disruptive or violent tenants without delay.

Proposed SPR 98.24W creates irreconcilable conflicts with the existing statutes that create, define, and regulate primary rights arising in the residential landlord-tenant relationship. "If a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both, but if they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters." *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 980, 216 P.3d 374, 377 (2009); *see also City of Fircrest v. Jensen*, 158 Wn.2d 384, 394, 143 P.3d 776, 781 (2006) ("Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary

[1] Without reservation, the concerns raised by the proponents of SPR 98.24W clearly shows OCLA is not meeting its obligations.

rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.").

The proposed SPR 98.24W directly conflicts with RCW 59.18.370. In pertinent part, RCW 59.18.370 mandates show cause hearings "shall not be less than seven nor more than thirty days from the date of service of the order upon defendant." In contrast, the proposed SPR 98.24W(1)(d) mandates that the trial court "[c]ontinue the hearing for at least 14 days" without regard to the limits mandated by RCW 59.18.370. An automatic continuance of "at least 14 days" will result in automatically continuing hearings past the limit provided in RCW 59.18.370 for all hearings initially set between the 16th and 30th days. The automatic continuance will also preclude resolving the right to possession prior to 21 days following service of the show cause order, despite the statute permitting such hearings being set as quickly as 7 days following service of the order.

The purported justifications for an automatic continuance are called into doubt in considering the automatic continuance in application. For example, the proposal requires courts automatically continue an initial hearing by at least 14 days regardless of whether the initial hearing afforded the minimum 7 days or the maximum 30 days. Under the proposed SPR 98.24W, a hearing pending for 30 days would thus be afforded the same minimum continuance of 14 days as a hearing pending for the minimum 7 days.

The proposed SPR 98.24W would further deprive courts from considering whether there has been a waiver of an opportunity for counsel under RCW 59.18.640. Notably, the legislature mandated that any summons served in an unlawful detainer action expressly instruct tenants that the right to counsel is waivable: "**GET HELP: If you do not respond by the deadline above, <u>you will lose your right to</u> defend yourself or <u>be represented by a lawyer</u> if you cannot afford one in court and could be evicted.**" RCW 59.18.365(3) (bolded emphasis in original, underline added). Additionally, tenants must be served a form notice to pay or vacate 14 days prior to even serving a summons, and the mandated notice must expressly provide, in relevant part: **"State law provides you the right to legal representation and the court may be able to appoint a lawyer to represent you without cost to you if you are a qualifying low-income renter."** RCW 59.18.057 (bolded emphases in original). The proposed SPR 98.24W effectively mandates a continuance and precludes courts from even considering whether the opportunity to obtain counsel had been waived based on the facts and circumstances.

Several other statutes stand in conflict with the proposed SPR 98.24W relative to substantive matters. Without limitation, the following exemplify additional substantive conflicts:

- RCW 59.12.120 mandates: "If on the date appointed in the summons the defendant does not appear or answer, the court shall render judgment in favor of the plaintiff as prayed for in the complaint."
- RCW 59.18.410(2) provides: "When the tenant is liable for unlawful detainer after a default in the payment of rent, execution upon the judgment shall not occur until the expiration of five court days after the entry of the judgment." This statute goes on to state: "If payment of the amount specified in this subsection is not made within five court

days after the entry of the judgment, the judgment may be enforced for its full amount and for the possession of the premises."

- RCW 59.18.390 directs that the sheriff shall not execute a writ of restitution until 3 days after the sheriff properly serves it.
- RCW 59.18.410(3)(c)(iii)(A) provides in the context of repayment plans that: "Upon service of the notice of default, the tenant shall have three calendar days from the date of service to vacate the premises before the sheriff may execute the writ of restitution." *See also,* RCW 59.18.410(3)(c)(iii)(B) (setting forth notice requirements following breach of repayment plan: "THE LANDLORD MAY SCHEDULE YOUR PHYSICAL EVICTION WITHIN THREE CALENDAR DAYS OF SERVICE OF THIS NOTICE." (capitalization in original)).
- The stay of writ of restitution under RCW 59.18.410(3) is not available to: "A tenant who has been served with three or more notices to pay or vacate for failure to pay rent as set forth in RCW 59.12.040 within twelve months prior to the notice to pay or vacate upon which the proceeding is based[.]" RCW 59.18.410(3)(d).
- The proposed SPR 98.24W does not account for when an indigent tenant is not able to obtain appointed counsel as a result of OCLA's program fulfilling the legislative directive of prioritization or the impact of limited funding. *See* RCW 59.18.640(1). The statute contemplates the possibility that some indigent tenants will not be able to obtain free legal counsel, but the proposed SPR 98.24W would still require the court continue and stay proceedings.
- The proposed SPR 98.24W mandates a stay of a writ of restitution for any tenant that files a motion prior to execution of a writ. Currently, trial judges are to consider the facts and circumstances that are offered in support of a request for a stay of a writ of restitution, including the interest of justice, post judgment reinstatement statutes, and other statutorily created processes depending on the basis for the motion to stay. CR 60; CR 62; RCW 59.18.410. In restricting the trial court judge's discretion to consider whether or not to grant a stay, the proposed SPR 98.24W also conflicts with CR 62, which expressly provides judges with discretion to grant a stay "on such conditions for the security of the adverse party as are proper." CR 62(b).
- RCW 59.18.290(3)(b) precludes courts from entering judgment for attorneys' fees "[i]f the total amount of rent awarded in the judgment for rent is equal to or less than two months of the tenant's monthly contract rent or one thousand two hundred dollars, whichever is greater." The consequence of automatic continuances of the duration proposed, relative to the duration of pre-suit notices and conditions following a breach, all but guarantees possession without payment of rent will span more than two months, such that an automatic continuance directly subjects a tenant to attorneys' fees despite RCW 59.18.290(3)(b).

The proponents of proposed SPR 98.24W stated:

> A tenant does not have the right to appointed counsel until a lawsuit is formally commenced, either by service of a summons and complaint or by the filing of the lawsuit with the court. The impact of this is that despite having received a notice terminating their tenancy, tenants do not have a right to consult with an attorney

> before the matter is escalated and the court can enter orders to remove them from their home."

(Proponents GR 9 Cover Sheet at C. Purpose, re: Section 2.) It is not clear what precludes OCLA from implementing a program that provides indigent tenants access to counsel *prior* to the formal commencement of an action. While RCW 59.18.640 directs *courts* to appoint counsel in unlawful detainer proceedings, the legislature did not restrict OCLA from adopting a program that provides legal services as soon as possible. *See* RCW 59.18.640; RCW 2.53.050. Ostensibly, the legislature designated standards of qualification that allow for a prompt threshold determination of qualification. RCW 59.18.640(2).

As previously noted, the legislative directive to OCLA necessarily requires it implement a program that comports with the expediency at which unlawful detainer cases proceed. Automatic continuances and stays will increase a landlord's damages without regard to justifications by increasing periods of loss of use, increasing rent arrears without security, and increasing attorneys' fees.[2] Given that notices are a necessary precondition to formal commencement of an unlawful detainer action and given that the content of the notice is statutorily required to inform a tenant of the right to counsel program (including specific contact information and instructions on how to engage the program), it seems the program ought to be implemented in a way that provides acess to legal counsel after service of the first notice. In this regard, there does not need to be a new special proceedings rule; rather, there needs to be a change in the program and administration to allow for indigent tenants to get the help when they call for assistance. The feasibility of prompt appointments is supported by Spokane County's use of a single case file (Case No. 21-2-88888-32) for appointment of counsel in all unfiled cases. If appointments can occur in unfiled cases, the same system can accommodate appointments after service of a notice.

For the foregoing reasons, we respectfully submit that the Washington Supreme Court should not adopt the proposed SPR 98.24W.

Respectfully submitted,

Nik Armitage JJ Thompson

[2] OCLA's failure to comply with its statutory mandate and any duties owed to an indigent tenant should not serve as the basis for imposing further financial harm to landlords. Any remedies occasioning such failures should be pursued by aggrieved tenants in actions against OCLA. *See Nw. Envtl. Advocates v. U.S. Dep't of Commerce*, 283 F. Supp. 3d 982, 986 (W.D. Wash. 2017) (explaining agencies may be liable for failure to comply with their statutory mandate where they "unlawfully withhold or unreasonably delay actions required by law, or take actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."); RCW 34.05.570(4)(c); *see also* RCW 4.92.090 (waiving State's sovereign immunity).

From: OFFICE RECEPTIONIST, CLERK
To: Martinez, Jacquelynn
Subject: FW: Comment on Proposed SPR 98.24W
Date: Tuesday, January 31, 2023 3:55:00 PM
Attachments: Comment on Proposed SPR 98.24W.pdf

From: JJ Thompson <JJT@law-wa.com>
Sent: Tuesday, January 31, 2023 2:02 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Nikalous Armitage <noa@law-wa.com>
Subject: Comment on Proposed SPR 98.24W

Please find attached hereto our comment on proposed SPR 98.24W.

Thank you,

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