LJuCR 2.5: Modification of Shelter Care Order

Proposed edits to Emergency Rule on behalf of:

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(Proposed edits below in blue)

(a) 30-Day Hearing ~~s and New Issues~~.

(1) Scheduling. The initial 30-day shelter care hearing must be scheduled by the petitioner by filing a Note for Calendar upon filing the action. If the child remains out of home and has not yet been found dependent as to all ~~known~~ parents, each 30-day shelter care hearing order must set an additional 30-day shelter care hearing. ~~Time. The second hearing shall be set within 30 days of the first hearing, unless by agreement on the record or in writing of all parties or the order of the court.~~

~~(2) Procedure.~~

~~(A) If the court previously ordered that visitation between a parent and child be unsupervised, then unless any party seeks to raise issues pursuant to subsection (a)(3) of this rule, a hearing in open court will not occur, parties' presence will be excused, and the court will enter an order continuing the terms of the 72-hour shelter care hearing.~~

~~(B) If the court previously ordered that visitation between a parent and child be supervised or monitored, and no party has timely provided a report as described in subsection (a)(2)(C) of this rule, then a hearing in open court will not occur, parties' presence will be excused, and the court will enter an order removing any requirement for supervision or monitoring of visitation but continuing the remaining terms of the 72-hour shelter care hearing.~~

~~(C) If the court previously ordered that visitation between a parent and child be supervised or monitored, and a party has timely provided a report not later than noon three days prior to the 30-day shelter care hearing that includes evidence establishing that removing visit supervision or monitoring would create a risk to the child's safety, then the court shall hold a~~

~~hearing and determine on the record whether visit supervision or monitoring must continue.~~

(2) Report. The deadline for any report filed pursuant to RCW 13.34.065(7)(a)(ii) is noon three days before the 30-day shelter care hearing.

~~(3) Notice of Issues: Any party seeking to address an issue at the 30-day shelter care hearing shall file and serve a brief identifying the issue not later than noon three days prior to the hearing. Responses must be filed and served by noon the day before the hearing. Working copies should be provided as outlined in LJuCR 1.8(b)(4).~~

(3) Hearing. The parties may waive or continue a 30-day shelter care hearing by submitting an agreed proposed order. Absent such agreement, the 30-day shelter care hearing will be held in open court.

(b) Modification of Shelter Care Order ~~***after 30-Day Hearing***~~. A shelter care hearing order also may be modified upon motion filed ~~An additional shelter care hearing can be set by filing a motion~~ in accordance with LJuCR 1.8.

Clean version of proposed LJuCR 2.5:

(a) 30-Day Hearing~~.~~

(1) Scheduling. The initial 30-day shelter care hearing must be scheduled by the petitioner by filing a Note for Calendar upon filing the action. If the child remains out of home and has not yet been found dependent as to all parents, each 30-day shelter care hearing order must set an additional 30-day shelter care hearing.

(2) Report. The deadline for any report filed pursuant to RCW 13.34.065(7)(a)(ii) is noon three days before the 30-day shelter care hearing.

(3) Hearing. The parties may waive or continue a 30-day shelter care hearing by submitting an agreed proposed order. Absent such agreement, the 30-day shelter care hearing will be held in open court.

(b) Modification of Shelter Care Order. A shelter care hearing order also may be modified upon motion filed in accordance with LJuCR 1.8.

Comments on proposed edits to LJuCR 2.5(a)(1):

The Washington State Office of Public Defense, Legal Counsel for Youth and Children, King County Department of Public Defense, Raymond Delos Reyes, Roxana Florea, Olga Marin, David Hoekendorf, Meredith Hutchison, Cameron Buhl, Dennice Bryant, Justine Olimene, Craig McDonald, and Lacey Noel (collectively "the defense") object to a local court rule that includes language limiting 30-day shelter care hearings once dependency is established as to a "known" parent. The current language in the emergency rule, and the language proposed by the Washington State Attorney General's Office (AGO), limits regular court access and oversight while a dependency case is in shelter care, and is contrary to the stated intent and spirit of the court's ruling in *Matter of Dependency of Baby Boy B.*, 3 Wn.3d 569, 554 P.3d 1196 (2024), which struck down former King County LJuCR 2.5.

I. Depriving a parent of the right to 30-day shelter care hearing reviews after entry of a "known" parent's dependency order denies fit parents their right to court review under RCW 13.34.065(7).

A dependent child is defined as a child who is (a) abandoned; (b) abused or neglected; or a child who (c) has no parent, guardian, or custodian capable of adequately caring for the child, such that the child is in circumstances which constitute a danger of substantial damage to the child's psychological

or physical development. RCW 13.34.030(6). If the child *has* a parent who is capable, or a parent where fitness has not been adjudicated, the child is not dependent. *In re Walker*, 43 Wn.2d 710, 263 P.2d 956 (1953). When the Department has established dependency as to a "known" parent, but has not yet established dependency as to all parents, the child is not yet dependent.

> An order of dependency affects each parent's relationship with the child separately. A child is not dependent unless the child has *no* parent, guardian or custodian capable of providing adequate care. Each parent is entitled to mount a separate defense against that allegation; one cannot necessarily speak for the other. *In re Dependency of K.N.J.*, 151 Wn.App. 306, 211 P.3d 483 (2009) (emphasis in original).

In King County, the vast majority of dependencies are established pursuant to RCW 13.34.030(6)(c), where the parent agrees or the court determines the child has no capable parent. The proposed rule, eliminating 30-day shelter care hearings after dependency is established to a "known" parent, but before dependency is established to *all* parents, ignores the rights of the fit parent who has not yet had their day in court. That parent has not explicitly waived their right to ongoing shelter care hearings, as would be required under RCW 13.34.065(3)(b) and (7). Contrary to the AGO's assertion, when dependency is established as to only one parent, the child is not in a "permanent" placement, as the issue of disposition has yet to be litigated by the parent who is presumed fit. *See* RCW 13.34.130 (requiring a finding of dependency within the meaning of RCW 13.34.030 prior to entering an order of disposition). Rather, the child remains in shelter care pending the adjudication of dependency as to all parents.[1]

Denying fit parents rights under RCW 13.34.065, simply because a finding of dependency has been made as to another parent, violates the procedural and substantive protections parents are ensured in RCW 13.34.

> Placing a child in shelter care separates that child from their family and does so after only a minimal evidentiary showing. Under these circumstances, requiring the superior court to routinely inquire into the need for ongoing shelter care is especially critical to reuniting the family as soon as safely possible, holding parties accountable, ensuring that the case proceeds either to dismissal or dependency, and ensuring the 'health, welfare, and safety of the child.' *Baby Boy B.*, 3 Wn.3d at 577.

II. Ending 30-day reviews after entry of dependency as to a "known" parent is arbitrary and has no support in statute or caselaw.

The current emergency rule, and the AGO's proposed rule, would establish a practice where the entry of an order of dependency as to a "known" parent would trigger not only the end of 30-day

[1] The AGO avers that a child cannot be both "dependent" and "in shelter care." However, *see K.N.J.* (analysis set forth above). Further, the concept of a child's legal status being unresolved pending litigation is not new in this area of law. The Department can take actions that terminate the parental rights of one parent without affecting the parental rights of the other. RCW 26.33.130(3). The Department may accept a relinquishment of parental rights from one parent, but proceed to trial on the other parent. While the Department waits to proceed to trial, the child is not "legally free" for adoption; the Department cannot consent to the child's adoption or take other actions that it could if the child were "legally free."

shelter care reviews, but the end of shelter care. The AGO argues that a child's "temporary" placement ends once dependency is established as to one parent, but the AGO provides no authority to support the concept that "shelter care" ends before having dependency and disposition fully adjudicated as to all parents. Rather, the 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.* RCW 13.34.065(1)(a) (emphasis added). Since the dependency has not been adjudicated until it has been adjudicated as to all parents, the child remains in shelter care until this occurs.

Further, the use of the term "known" parent is vague and arbitrary. What constitutes a known parent? If the Department has a name of a parent, but no contact information, is that a known parent? If the Department has a name for the parent, but only information sufficient to publish notice to the parent, is that a known parent? Other practical concerns exist for implementation of this rule. What about sibling groups where siblings have different mothers, or different fathers, and dependency orders are entered at different times? Would the court cease holding 30-day shelter care hearings for some of the siblings, but not for others? As a practical matter, using the establishment of dependency as to a "known" parent to trigger the end of 30-day shelter care hearings will deprive parents, and the court, of review and oversight at critical times in many cases, to the detriment of the families involved.

The AGO's assurance that ending additional 30-day shelter care hearings is a minimal loss because cases will proceed to timely fact-finding trials and six month reviews does not justify violation of the shelter care statute. First, although the statute requires that dependency cases proceed to trial within 75 day unless extraordinary circumstances exist, King County struggles to meet this deadline at a rate lower than the vast majority of the counties in the state. 2021-2025 Dependency Timeliness Measures, Dependency Dashboard, Washington State Center for Court Research, https://public.tableau.com/app/profile/wsccr/viz/DependencyDashboard/MonthlyUpdates-CurrentYear (King County's time to trial in 75 days: 30% in 2023, 28% in 2024, 31% in 2025; compared to state time to trial in 75 days: 52% in 2023; 49% in 2024; 55% in 2025). Ceasing 30-day shelter care hearings once dependency is established as to a "known" parent presumes frequent court oversight is no longer required in a case and that the other parent's case will quickly resolve. If the other parent chooses to negotiate or go to trial, it could be many months before the case is resolved. The parent who does not resolve their case quickly is, in essence, being penalized for exercising legal rights. Caselaw bears out how this rule could be problematic in practice. *See Matter of Dependency of Z.A.*, 29 Wn.App.2d 167, 540 P.3d 173 (2023) (King County case; order of default entered as to mother in October 2021; custodial parent father proceeded to trial in March 2022); *see also Matter of W.W.S.*, 14 Wn.App.2d 342, 469 P.3d 1190 (2020) (King County case; order of default entered as to abusive father; custodial mother proceeded to trial); *see also in Matter of Dependency of J.D.P.*, 17 Wn.App.2d 744, 487 P.3d 960 (2021) (King County case; father agreed to dependency in March 2016; mother agreed to dependency in August 2016). King County, in particular, has a significant need for the court oversight and structure provided by regular 30-day shelter care hearings pending the resolution of all parents' cases, either by a dependency order or by a dismissal.

Second, former King County LJuCR 2.5 was struck down specifically because it attempted to short-cut families from having regular 30-day shelter care hearings. *See Baby Boy B.* The trial court, in

finding 30-day shelter care hearings unnecessary, called additional 30-day shelter care hearings a "…waste of judicial resources not completed by the statute." *Baby Boy B.*, 3 Wn.3d at 572. It is the right of the parent and the child, pursuant to RCW 13.34.065, to have frequent reviews, court oversight, and to have the Department demonstrate a need for continued out-of-home placement at these hearings. The proposed language of "known" parent is an effort to curb this right, as the previous King County rule did.

III. The rule proposed by the defense is practical, and the impacts described by AGO of a rule that does not include "known parent" language are exaggerated or do not exist.

The AGO has raised concerns about the difficulty in applying the shelter care statute if dependency was established to one parent, but the other parent's case was still in shelter care. However, this is not new; for decades and decades, cases have proceeded in King County where parents have resolved their cases at different times, with 30-day shelter care hearings continuing until dependency was established as to all parties, and it is only now – following the decision in *Baby Boy B.* – that the AGO has objected. The defense firmly believe that the court and parties are able to comply with holding the statutorily-required hearings that were occurring for years prior to recent litigation.

The AGO expresses concerns that the rights of parents who have agreed to dependency will be prejudiced because, at future hearings, hearsay could be introduced against them. However, parents who have agreed to dependency proceed to dispositional hearings, review hearings, and permanency planning hearings – all of which *already permit* the court to consider hearsay. ER 1101(c)(3). The AGO also complains that there will be confusion about which local rule to apply when determining notice for motions. Fortunately, King County's local rules spell out notice requirements not only for motions made in the "pre-dependency" and dependency phases of the case, but also for procedural motions and all other motions. *See* LJuCR 1.8 (defining procedural motions and "pre-dependency" motions, and setting forth notice provisions for procedural, pre-dependency, and all other motions). King County's local rules also allow parties to note motions on shortened time, if there are motions that need to be heard on an earlier timeline. *See* LJuCR 1.8(c). There is sufficient clarity and guidance in King County's LJuCR 1.8 to address the AGO's concerns, particularly since this is the way practice has already been occurring in King County.

Comments on proposed edits to LJuCR 2.5(a)(2):

The defense objects to language proposed by the AGO requiring a deadline for responses to be filed to reports filed pursuant to RCW 13.34.065(7)(a)(ii). This section of the statute states as follows:

> If the court previously ordered that visitation between a parent and child be supervised or monitored, *there shall be a presumption that such supervision or monitoring will no longer be necessary following a continued shelter care order* under (a)(i) of this subsection. *To overcome this presumption, a party must provide a report* to the court including evidence establishing that removing visit supervision or monitoring would create a risk to the child's safety, *and the court shall make a determination* as to whether visit supervision or monitoring must continue. RCW 13.34.065(7)(a)(ii). (Emphasis added).

Because RCW 13.34.065(7)(a)(ii) explicitly requires a party wishing to overcome the presumption to provide a report to court, the defense agrees with the current emergency rule and the proposed deadline of noon three days prior to the hearing for the party to provide a report to the court to rebut the presumption in the statute. However, there is no burden on the parent to provide a response in writing, or to provide any evidence at all. Setting a deadline for the parent to file a response shifts the burden to the parent to rebut the Department's evidence, rather than requiring the Department to overcome the presumption that supervision should no longer be necessary. Under the AGO's analysis, the AGO is asserting that if it provides its report and the parent does not file a response by noon the day prior, the AGO would have rebutted the presumption and visitation would remain supervised or monitored, and that is not the correct analysis. Instead, a parent should be able to provide evidence at the hearing that the presumption has not been rebutted. Moreover, ultimately, it is up to the court to "make a determination as to whether visit supervision or monitoring must continue" based upon the Department's report, regardless of whether the parent has filed any response at all. *See* RCW 13.34.065(7)(a)(ii).

The AGO asserts that requiring a deadline for a response is consistent with the procedures in LJuCR 1.8 and LJuCR 3.9. However, these local rules are general rules for responding to motions and review hearings, where no party has a statutory presumption to overcome. LJuCR 2.5(a)(2) is a specific local rule tailored to RCW 13.34.065(7)(a)(ii); the specific presumption in this statutory provision designating who has the burden to overcome the presumption distinguishes RCW 13.34.065(7)(a)(ii) and LJuCR 2.5(a)(2) from the more general local rules governing reports and responses.

Comments on proposed edits to LJuCR 2.5(b):

The defense objects to striking the word "also" from the proposed emergency rule. The AGO's position is that the only way a court can review or modify a shelter care hearing order at a 30-day shelter care hearing is under RCW 13.34.065(7)(a)(ii) (visitation) or by formal motion. The defense strongly disagrees, and this issue goes to the very heart of *Baby Boy B.*

"No child may be placed in shelter care for longer than thirty days without an order, signed by the judge, authorizing continued shelter care." RCW 13.34.065(7)(a)(i).

> Under the Act, judicial oversight begins within 72 hours of a child being placed in shelter care. RCW 13.34.060(1) (requiring the court to hold an initial shelter care hearing). In order to determine whether shelter care is appropriate, the court must engage in a searching inquiry. RCW 13.34.065(4). The Act specifically requires courts to inquire into at least 11 factors, including whether the child can be safely returned home, what efforts have been made to place the child with a relative, and what services have been offered to the family. *Baby Boy B.*, 3 Wn.3d at 576 (citing *In re Dependency of A.C.*, 1 Wn.3d 186, 525 P.3d 177 (2023)).

"[J]udicial review and a new shelter care order is required every 30 days to continue out of home placement before dependency is determined. During these hearings, the court may take notice of prior orders and the evidence those orders were based on. However, given that these are preliminary proceedings, prior orders shall have no preclusive effect." *Baby Boy B.*, 3 Wn.3d at 578. Since prior shelter care orders have no preclusive effect, at a continued 30-day shelter care hearing, if the

Department is asking to continue out of home placement, it is the Department's burden to present evidence to establish an ongoing basis for shelter care; the burden is not on the parent to present evidence establishing why the child should be released from shelter care.

Former King County LJuCR 2.5 allowed for one 30-day shelter care hearing, and then for no further hearings unless a party had filed and served a notice of new issues. Former King County LJuCR 2.5 "required that requests to modify a shelter care order be based on an 'Affidavit of Change of Circumstances' and 'specify the change in circumstances, relief requested, statement of facts and the evidence relied upon.'" *Baby Boy B.*, 3 Wn.3d at 571. The new rule proposed by the AGO is similar to the former rule stricken down by *Baby Boy B*.: although the court would hold additional 30-day shelter care hearings, the hearings would be meaningless, because unless a party filed a formal motion (akin to an "affidavit of change of circumstances") the court would be hamstrung to enter meaningful findings, and continued shelter care hearings would be hollow formalities. For example, RCW 13.34.065(4)(h) requires the court to inquire into whether the child is or may be an Indian child as defined in RCW 13.38.040, whether the provisions of ICWA or WICWA apply, and whether there is compliance with ICWA and WICWA; caselaw further requires that the court inquire whether there is reason to know the child is an Indian child as defined under ICWA and WICWA at every hearing. *See In re J.W.M.*199 Wn.2d 837, 514 P.3d 186 (2022). However, at a 30-day shelter care hearing, the court would have no ability to conduct its statutorily-required inquiry and, if necessary, modify findings in the shelter care order related to the child's ICWA or WICWA status, if a party had not filed a "motion in accordance with LJuCR 1.8" and since such a modification would be "beyond [that] permitted by RCW 13.34.065(7)(a)(ii)." *See* AGO Comment.

LJuCR 2.5(b) must be consistent with RCW 13.34.065(7), which requires the court to evaluate the shelter care finding anew at each 30-day shelter care hearing. If the Department is asking for continued out-of-home placement, the Department must bear the burden of establishing the basis for this request. The defense supports the language of LJuCR 2.5(b) as it is currently proposed in the emergency rule.