

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Dependency of X.T.J. and
X.M.J.

MOTION TO
STRIKE

I. INTRODUCTION

RAP 18.9(c)(3) provides that this Court will, following a party's motion, dismiss review of a case for failure to timely seek review. Here, D.B.-K., the mother of X.T.J. and X.M.J., sought to challenge several interlocutory orders entered in a dependency matter over a four-month period. Over one year ago, the Court of Appeals denied review of all orders except one. The Court of Appeals then issued an unpublished opinion as to the sole issue accepted for review, dismissing the matter due to mootness. D.B.-K. now files a Petition for Review, seeking review of many of the issues she originally raised, but that were rejected for review by the Court of Appeals. However, those challenges are untimely as she did not seek this Court's review within 30 days

of the Court of Appeals' decision on the motion to modify. Pursuant to RAP 18.9(c)(3), this Court should strike all arguments related to those issues for which D.B.-K. failed to timely seek review. This Court should consider only D.B.-K.'s argument related to the April 10, 2023 order, challenging the juvenile court's authority to direct health and safety visits in the home.

II. FACTS RELEVANT TO THE MOTION

This case involves the Department of Children, Youth, and Families (DCYF)'s intervention regarding this family between January and April 2023. CP 2, 130. D.B.-K. and both children (two-year-old X.T.J. and one-year-old X.M.J.) were members of the Cowlitz Indian Tribe (Cowlitz Tribe). CP 2.

DCYF filed dependency petitions as to X.M.J. and X.T.J. on February 3, 2023. CP 1-8. On that same date, a Juvenile Court Commissioner removed the children via ex parte order and placed them in out-of-home care pending a shelter care hearing.

CP 9-13. Following the shelter care hearing, the court returned the children to D.B.-K.'s care. CP 88-98.

X.T.J. unfortunately died on March 27, 2023, due to a genetic heart condition, although his cause of death was not immediately clear. CP 122, 4/4/23 RP 69. On March 30, 2023, the juvenile court again removed X.M.J. while the cause of her brother's death was investigated. CP 124-26. The court returned X.M.J. to her mother's care the following week pending a dependency fact-finding hearing. CP 128-29. The court then entered an order on April 10, 2023, directing DCYF to conduct one health and safety visit every 30 days until the fact-finding hearing. CP 129. Four days later, DCYF voluntarily dismissed the dependency petition. CP 130-32.

D.B.-K. sought discretionary review of the following orders:

- February 3, 2023, Order to Take Child into Custody and Place in Shelter Care. CP 9-13.
- February 24, 2023, Shelter Care Order. CP 88-98.
- February 24, 2023, Order and Authorization re Health Care and Education. CP 99-100.

- March 30, 2023, Order to Take Child into Custody and Place in Shelter Care. CP 124-126.
- April 10, 2023, Order After Hearing. CP 128-29.

CP 101-102, 133-34. The Cowlitz Tribe sought review of several of these orders as well. CP 103-104, 141-42. The Court of Appeals consolidated the motions for discretionary review.

A Court of Appeals Commissioner denied discretionary review. Commissioner Ruling Denying Review filed 10/31/23 (Commissioner Ruling).¹ D.B.-K. and Cowlitz Tribe filed motions to modify. The Court of Appeals granted review of only the April 10, 2023, order and denied review as to the remaining issues/challenged orders. Order Granting Motion to Modify Commissioners Ruling (April 10, 2023 Order) filed 2/7/23.² The Court of Appeals advised D.B.-K. that she had 30 days to seek this Court's review of the order denying discretionary review of

¹ A copy of this ruling is in the Petition for Review Appendix at pages 1-18.

² A copy of this order is in the Petition for Review Appendix at page 19.

the remaining issues. DCYF Appendix at 1. D.B.-K. did not seek review.

In her opening brief before the Court of Appeals, D.B.-K. challenged the juvenile court's authority to order health and safety visits in the April 10, 2023, order. *See* Appellant's Opening Brief. The Court of Appeals issued an unpublished opinion on January 30, 2025, dismissing the appeal as moot. *In re Dependency of X.T.J. and X.M.J.*, No. 39591-0-III, 2025 WL 338596 (Wash. Ct. App. Jan. 30, 2025) (unpublished – see GR 14.1).³

D.B.-K. filed her Petition for Review with this Court on March 3, 2025. She seeks review of the April 10, 2023, order and the issue related to health and safety visits. Petition for Review (Petition) at 3, 30-43.

However, she also seeks review of the other orders of which the Court of Appeals denied review: the February 3, 2023,

³ This slip opinion is in the Petition for Review Appendix at page 20-25.

Order to Take Child into Custody and Place in Shelter Care and the March 30, 2023, Order to Take Child into Custody and Place in Shelter Care. Petition at 2, 16-30.

DCYF's Answer to the Petition for Review is filed concurrently with this motion.

III. GROUNDS FOR RELIEF

This Court should grant DCYF's motion to strike for two reasons. First, the petition for review is untimely as to any issue raised other than the challenge to health and safety visits ordered in the April 10, 2023, shelter care order. Second, this Court should decline D.B.-K.'s request to waive the rules of appellate procedure.

A. The Petition for Review is Untimely as to All Issues Other than the Health and Safety Visits

Each challenged order in this case is an interlocutory order not appealable as a matter of right. RAP 2.2(a)(5); *see, e.g., In re Dependency of L.C.S.*, 200 Wn.2d 91, 94, 514 P.3d 644 (2022) (discussing that a shelter care order is subject to discretionary review). Any party may seek review of any order not appealable

as a matter of right. RAP 2.3(a). Discretionary review may only be granted if the matter meets the criteria of RAP 2.3(b).

RAP 13.3 governs what decisions may be reviewed as a matter of discretion by this Court. Any party may seek discretionary review of any interlocutory decision of the Court of Appeals, including a decision denying a motion to modify a ruling of the commissioner which denies a motion for discretionary review. RAP 13.3(a)(2). Review of interlocutory orders are governed by RAP 13.5. RAP 13.3(c). Such a motion must be brought within 30 days of the interlocutory decision. RAP 13.5(a).

D.B.-K. and Cowlitz Tribe sought review of orders entered February 3, 2023 (pick-up order), February 24, 2023 (shelter care order and Order and Authorization re Health Care and Education), March 30, 2023 (pick-up order), and April 10, 2023 (Order After Hearing). CP 101-102, 103-104, 133-34, 141-42. In its February 7, 2024, order on D.B.-K.'s and Cowlitz Tribe's motions to modify, the Court of Appeals denied discretionary

review of all orders except the April 10, 2023, order. Petition for Review Appendix (Petition Appendix) at 19. At that time, the Court of Appeals notified D.B.-K. that she had the right to seek discretionary review of that decision under RAP 13.5(a) and advised her that she needed to file that motion for discretionary with the Supreme Court within 30 days. DCYF Appendix at 1. She did not do so. Instead, she challenged the other orders in her Petition for Review and therefore failed to timely seek this Court's review.

RAP 18.9(c) directs dismissal. Here, however, D.B.-K. timely sought review of the April 10, 2023, order. Therefore, rather dismiss her Petition as a whole, DCYF requests that any portions of D.B.-K.'s Petition for Review related to anything other than the April 10, 2023, order be stricken and not considered by this Court.

B. This Court Should Decline to Waive the Requirements of RAP 13.5

D.B.-K. requests that this Court waive the requirements of RAP 13.5(b) and instead consider the pick-up orders under

RAP 13.4(b), relying on RAP 1.2(c) and RAP 18.8(c). Petition at 49. In the alternative, she proposes that the Court grant review of the February 3 pick-up order and March 30 pick-up order under RAP 13.5(b), essentially asking the Court to excuse her one-year delay in seeking review under that rule. Petition at 49. This Court should refuse to waive the rules when mother has not asserted a basis for doing so.

RAP 1.2(a) generally provides for liberal interpretation of the Rules of Appellate Procedure “to promote justice and facilitate the decision of cases on their merits.” But under the expressly narrow restrictions of RAP 18.8(c), the appellate court can extend the time in which a party must file a notice of appeal “only in extraordinary circumstances and to prevent a gross miscarriage of justice.” *See Beckman v. Dep’t of Soc. & Health Servs.*, 102 Wn. App. 687, 693, 11 P.3d 313 (2000). “The rule will not be waived.” *In re Dependency of A.L.F.*, 192 Wn. App. 512, 525, 371 P.3d 537 (2016).

“Extraordinary circumstances” include “circumstances wherein the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control.” *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763, 765, 764 P.2d 653 (1988). “Negligence, or lack of reasonable diligence, does not amount to extraordinary circumstances.” *A.L.F.*, 192 Wn. App. at 525; *Beckman*, 102 Wn. App. at 695.

The standard set forth in RAP 18.8(c) is rarely satisfied. *Shumway v. Payne*, 136 Wn.2d 383, 395, 964 P.2d 349 (1998). In the cases able to meet the “rigorous test” of RAP 18.8(c), “the moving party actually filed the notice of appeal within the 30-day period but some aspect of the filing was challenged.” *Reichelt*, 52 Wn. App. at 765; *see, e.g., Weeks v. Chief of State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982) (notice timely filed, but filed in wrong court); *State v. Ashbaugh*, 90 Wn.2d 432, 438, 583 P.2d 1206 (1978) (notice timely filed but rejected by court for lack of filing fee). In those cases, “the lost opportunity to appeal would constitute a gross miscarriage of

justice because of the appellant's reasonably diligent conduct."

Reichelt, 52 Wn. App. at 766.

D.B.-K. has not asserted a reason for her failure to timely seek review of the denial of her motion to modify. Instead, she simply asks this Court to waive the rules as to her. Petition at 49. Even if the appeal raises important issues, it would be improper to consider those issues absent sufficient grounds for granting an extension of time. *Schaeferco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn.2d 366, 368, 849 P.2d 1225 (1993).

Should this Court permit D.B.-K.'s petition to be heard on the untimely issues, DCYF further addresses why D.B.-K.'s arguments fail to meet any criterion for review under RAP 13.5(b) in its answer to the Petition for Review.

This Court should strike D.B.-K.'s arguments related to those untimely orders.

IV. CONCLUSION

DCYF respectfully requests that this Court strike the portions of D.B.-K.'s Petition for Review related to any order other than the

April 10, 2023, Order After Hearing and any issue other than her challenge to the juvenile court's order permitting health and safety visits. All other arguments were not timely raised and are not properly before this Court and should be stricken.

This document contains 1,774 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 2nd day of April, 2025.

NICHOLAS W. BROWN
Attorney General

A handwritten signature in black ink, appearing to read "Rachel B. King", written over a horizontal line.

RACHEL BREHM KING
WSBA #42247
Assistant Attorney General

**DCYF MOTION TO STRIKEAPPENDIX
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Court of Appeals Letter Dated February 7, 2024..... 1

Tristen L. Worthen
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

*The Court of Appeals
of the
State of Washington
Division III*



500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
<http://www.courts.wa.gov/courts>

February 7, 2024

Rachel Brehm King
Office of the Attorney General
3501 Colby Ave Ste 200
Everett, WA 98201-4795
Email: rachel.king@atg.wa.gov

Alana K Martin
Attorney at Law
PO Box 996
Ridgefield, WA 98642-0996
Email: amartin@cowlitz.org

Jodi R. Backlund
Backlund & Mistry
PO Box 6490
Olympia, WA 98507-6490
Email: backlundmistry@gmail.com

Justin Daniel Derhammer
Cowlitz Indian Tribe - Legal Department
PO Box 996
Ridgefield, WA 98642-0996
Email: jderhammer@cowlitz.org

Kim M. Kremer
Franklin County Prosecutors Office
1016 N 4th Ave
Pasco, WA 99301-3706
Email: kmkremer@franklincountywa.gov

CASE # 395910 (consolidated w/ #395928, #396355, #397297 & #397301)
In re the Dependency of: X.T.J.
YAKIMA COUNTY SUPERIOR COURT No. 2370010239

This may be the only notice you will receive concerning due dates. A document filed prior to or after its due date may affect all subsequent due dates. The parties are responsible for determining adjusted due dates by reviewing the appropriate rules of appellate procedure. Failure to comply with the provision of the rules may result in the imposition of sanctions pursuant to RAP 18.9.

Dear Counsel:

Enclosed is a copy of the Order Granting the Motion to Modify Commissioner's Ruling of October 31, 2023 only as to the April 10, 2023 order.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.5(a). A party seeking discretionary review must file a motion for discretionary review in the Supreme Court and a copy in the Court of Appeals within 30 days after this Court's Order.

Given the entry of the above order, the time periods for compliance with the Rules of Appellate Procedure are as follows:

1. The **designation of clerk's papers** is due to be filed and served with the trial court, with a copy filed in this court, by March 8, 2024. RAP 9.6(a).

2. The party seeking review must timely arrange for transcription of the report of proceedings and must file a **statement of arrangements** in this court by March 8, 2024. To comply with RAP 9.2(a), the statement should include the name of each court reporter, the hearing dates, and the trial court judge. Serve each court reporter and all counsel of record with a copy of the statement of arrangements, and provide this court with proof of service.

If the party seeking review arranges for less than all of the report of proceedings, all parties must comply with RAP 9.2(c).

If a verbatim report of proceedings will not be filed, you must notify this court, in writing, by March 8, 2024. RAP 9.2(a).

3. The **verbatim report of proceedings** must be filed with Court of Appeals, Division III, no later than 60 days after service of the statement of arrangements. The court reporter or authorized transcriptionist shall promptly serve notice of filing on all parties and shall provide a copy of the report of proceedings to the party who arranged for transcript. RAP 9.5(a).

Please note:

- 1) The Court will post public accessible briefs to the Washington Courts website.
- 2) All parties filing a brief must serve one copy of the brief on every other party and on any amicus curiae and must file proof of service with this court. RAP 10.2(h).
- 3) When preparing your brief and referring to clerk's papers, use the page numbers assigned on the index to clerk's papers. Do not refer to the Superior Court docket numbers.

4. The **Appellants' briefs** are due in this court 45 days after the report of proceedings is filed. RAP 10.2(a).

If the record on review does not include a report of proceedings, the appellants' briefs are due 45 days after the designation of clerk's papers has been filed. RAP 10.2(a).

5. **Respondent's brief** is due in this court 30 days after service of the last appellants' brief. RAP 10.2(c).

6. A **reply brief**, if any, is due 30 days after service of respondent's brief. RAP 10.2(d).

Please note: The parties may include in their briefing a designation of pronouns and honorifics (Mr./Ms./Mx. etc.) for themselves and their counsel.

Sincerely,



Tristen Worthen
Clerk/Administrator

TLW:jld

Courtesy copy sent to Yakima Superior Court Clerk
Email

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

IN RE THE DEPENDENCY OF)	
)	
)	No. 39591-0-III
X.T.J.,)	(Consol. with 39592-8-III,
)	39635-5-III, 39729-7-III, and
)	39730-1-III)
)	
)	ORDER GRANTING
)	MOTION TO MODIFY
)	COMMISSIONER'S RULING
)	(April 10, 2023 ORDER)

Having considered petitioner's motion to modify the commissioner's ruling of October 31, 2023, respondent's answer to the motion, and the record and file herein;

IT IS ORDERED the motion to modify the commissioner's ruling is GRANTED only as to the April 10, 2023 order.

PANEL: Judges Staab, Fearing, Cooney

FOR A MAJORITY:



GEORGE FEARING
Chief Judge

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury of the State of Washington that on the below date the original Motion to Strike to which this Declaration is attached was filed with the Washington State Supreme Court, through the Court's online filing system. An electronic copy was delivered to all parties of record through the filing portal.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 2nd day of April, 2025, at Everett, Washington.

A handwritten signature in blue ink, appearing to read 'K. Sparks', is written over a horizontal line.

KRISTEN SPARKS
Paralegal

ATTORNEY GENERAL'S OFFICE - EVERETT

April 02, 2025 - 4:21 PM

Transmittal Information

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Superior Court Case Number: 23-7-00102-5

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- lbui@cowlitz.org

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