

SUPREME COURT OF THE STATE OF WASHINGTON

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

REPLY IN
SUPPORT OF
MOTION TO
STRIKE

I. INTRODUCTION

There is no support in the RAPs for D.B.-K.'s contention that a party can wait until "final action" on an appellate matter before seeking review of interlocutory decisions by the Court of Appeals with which that party disagrees. To the contrary, the Court of Appeals gave clear instructions in this case in its letter to the parties on February 7, 2024: "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." D.B.-K. failed to follow those instructions. Her untimely arguments should be stricken.

II. ARGUMENT

A. D.B.-K. Must Challenge the Court of Appeals' Denial of Discretionary Review of Two Interlocutory Orders Within 30 Days

RAP 13.5(a) directs that a party seeking discretionary review of an interlocutory order by the Court of Appeals must file that motion within 30 days. D.B.-K. failed to do so here. Any challenge to that decision is not timely and should be stricken.

The Court of Appeals' directive in its February 7, 2024 letter aligned with RAP 13.5(a). It directed that any party seeking to challenge the ruling granting review in part and denying review in part to do so within 30 days. DCYF's Appendix to Motion to Strike at 1. D.B.-K. failed to follow that directive.

D.B.-K. contends that the Rules of Appellate Procedure contemplate a "unitary" request for Supreme Court review after the Court of Appeals issues its final decision disposing of all issues in a case. Answer to Motion to Strike (Answer) at 8. For this, the only RAP she cites to is RAP 13.5(d). Answer at 8. That rule states, "Denial of discretionary review of a decision does not

affect the right of a party to obtain later review of the Court of Appeals decision or the issues pertaining to that decision.” D.B.-K. contends that this rule demonstrates that interlocutory decisions may be challenged through later review of the Court of Appeals decision after the COA has addressed all the other issues in a case. Answer at 9.

RAP 13.5(d) does not support such a proposition. In fact, it reflects that parties can seek discretionary review of an interlocutory decision prior to a final Court of Appeals resolution of the matter. And RAP 13.5(d) does not alter RAP 13.5(a), which states that “A party seeking review by the Supreme Court of an interlocutory decision of the Court of Appeals must file a motion for discretionary review in the Court of Appeals within 30 days after the decision is filed.” (Emphasis added.) RAP 13.5(d) simply clarifies that a party may still seek review of the final decision as they would usually be entitled to under RAP 13.4(b), even if this Court previously denied review of an interlocutory order. If the final decision is accepted for review,

D.B.-K. would be entitled to raise any relevant discretionary orders to this Court. However, it is difficult to conceive how the interlocutory decision by the Court of Appeals denying review of separate and unrelated orders would be relevant to the health and safety issue raised by D.B.-K.

D.B.-K. contends that the rule suggested by DCYF would result in piecemeal litigation, which she contends is not efficient. Answer at 2. However, it actually ensures that issues are addressed as timely as possible.

This case is a good example. The mother sought to challenge multiple different orders in multiple Notices of Discretionary Review, which were consolidated below. The Court of Appeals denied review of several orders and accepted review of one. The February 3, 2023, order and the March 30, 2023, order could be reviewed independently and entirely separately from the single order accepted for review, allowing the mother's arguments regarding the Indian Child Welfare Act and Indian Child Welfare Act to proceed in a timely fashion.

There is no inefficiency in addressing the ICWA issues separately from the health and safety issue. The issues are entirely different. The criteria for review are different, given that review of a denied motion for discretionary review will be under RAP 13.5 instead of RAP 13.4.

Additionally, DCYF's interpretation of the RAPs presents predictability for everyone involved. If the Court of Appeals denies review of an interlocutory order and the party does not seek discretionary review by this Court, the parties and the trial court below rely on that information to consider the matter settled and to move forward. The interpretation of the RAPs advocated for by D.B.-K. would hold everyone in suspense, not knowing if the challenged orders could still potentially be taken up and reversed. In this case, over a year passed between the Court of Appeals' denial of discretionary review of the February 3 and March 30 order and D.B.-K.'s Petition for Review. D.B.-K.'s proposed rule allows presumably settled issues to rise again.

Additionally, DCYF's interpretation ensures that the mother receives any relief she is entitled to in a timely fashion. If indeed this Court decided to accept review and determined that the mother was entitled to relief under those orders, that should happen as soon as possible. This is necessary not just for the parent but for all involved, as such a result would have significant impact on the family if the dependency was ongoing. Of course, in this case the issues are moot as the dependency is dismissed and there is no relief to be granted the mother. However, if the dependency still proceeded below, timely resolution of the ICWA issues would be critical.

D.B.-K. advocates for all the interlocutory rulings of the Court of Appeals to be bundled with the "final action." She seeks to obtain a more favorable standard for discretionary review by having all her issues treated under the same RAP 13.4(b) standard, as if they had all been accepted and addressed by the Court of Appeals. Petition for Review at 48. But RAP 13.5(b) puts forth "'specific and stringent' criteria that reflect the

appellate system's 'plain and intentional bias against interlocutory review.'" *In re Dependency of N.G.*, 199 Wn.2d 588, 595, 510 P.3d 335 (2022) (quoting Geoffrey Crooks, Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure, 61 WASH. L. REV. 1541, 1545, 1547 (1986)). This Court should not permit D.B.-K. to evade the strict criteria for her challenge to the interlocutory orders entered by the dependency court.

B. This Court Should Refuse to Waive the 30-Day Requirement for D.B.-K.

As for D.B.-K.'s alternative argument that this Court should waive the deadline in this case, DCYF previously addressed that argument. *See* Motion to Strike at 8-11. The rare waiver under RAP 18.8(c) should be limited to those situations where "the lost opportunity to appeal would constitute a gross miscarriage of justice because of the appellant's reasonably diligent conduct." *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763, 766, 764 P.2d 653 (1988). Here, there is no gross miscarriage of justice, given that these issues are moot, D.B.-K.

has her child returned to her care, and any action by this Court on D.B.-K.'s ICWA arguments will not actually impact D.B.-K. or her child in any way. There is no basis for such waiver.

III. CONCLUSION

DCYF respectfully requests that this Court strike the untimely arguments raised in D.B.-K.'s Petition for Review.

This document contains 1,232 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 24th day of April, 2025.

NICHOLAS W. BROWN
Attorney General

A handwritten signature in black ink, appearing to read "Rachel BK", with a long horizontal line extending from the end of the signature.

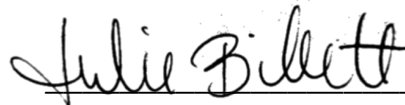
RACHEL BREHM KING
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Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury of the State of Washington that on the below date the original Reply in Support of 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 24th day of April, 2025, at Everett, Washington.



JULIE BILLETT
Paralegal

ATTORNEY GENERAL'S OFFICE - EVERETT

April 24, 2025 - 9:13 AM

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