always Appealing: Supreme Court Provides Insight on the Standard for Interlocutory Review Under RAP 2.3(B)(2)

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By Valerie A. Villacin

Appellate lawyers have a reputation as a pretty staid bunch. We sit in our offices, staring at our computers, thinking deep thoughts about the law and generally interacting only by exchanging briefs (that are anything but brief). But in June 2022, the Supreme Court issued an opinion that caused a buzz among Washington appellate lawyers. No, I am not referring to any of the recent decisions from the United States Supreme Court. Instead, it was our state Supreme Court's decision in Dependency of N.G.1 that had the appellate bar in a twitter. In N.G., the Court for the first time extensively addressed the standards for interlocutory review under RAP 2.3(b)(2) and RAP 13.5(b)(2).

RAP 2.3 addresses interlocutory review of superior court decisions that are not appealable as a matter of right under RAP 2.2. RAP 13.5 addresses interlocutory review by the Supreme Court of Court of Appeals decisions that do not terminate review. The grounds for review under RAP 2.3(b) and RAP 13.5(b) are identical—including the provision at issue in N.G. that authorizes interlocutory review when the decision-maker commits probable error and its decision "substantially alters the status quo or substantially limits the freedom of a party to act."

The reason appellate nerds2 were atwitter when the Supreme Court issued its decision in N.G. was because there is little guidance in case law interpreting the rules for interlocutory review. The appellate courts' commissioners usually decide whether interlocutory review should be granted in unpublished orders that are rarely reviewed in the decision on the merits; at best, the published merits decision arising from the grant of interlocutory review will only mention that fact in passing as part of the case's procedural history. Even when the merits decision states on what ground interlocutory review was granted, it usually does not explain how the trial court's decision satisfied that ground.3

Having the Supreme Court weigh in on the standard for interlocutory review under RAP 2.5(b)(2) and RAP 13.5(b)(2) was important because while practitioners may have plenty of authority for claiming the lower court committed "probable error" in seeking interlocutory review, there was a paucity of authority for claiming that this purported error "substantially alters the status quo or substantially limits the freedom of a party to act." In fact, the first published Court of Appeals decision providing any sort of extensive discussion of this provision of the rule was not issued until 2014—nearly four decades after the RAPs became effective in 1976. And that decision, State v. Howland,4 relied extensively on former State Supreme Court Commissioner Geoffrey Crooks's law review article, Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure, then nearly three decades old, to provide meaning to the "effects provision" of the rule.5

The Howland court adopted Crooks's reasoning, as articulated in his law review article, that "discretionary review should be accepted only when a trial court's order has, as with an injunction, an immediate effect outside the courtroom."6 The Howland court reasoned that interlocutory review is appropriate when a court's error is "probable" and its "action has effects beyond the parties' ability to conduct the immediate litigation."7 But "where a trial court's action merely alters the status of the litigation itself or limits the freedom of a party to act in the conduct of the lawsuit, even if the trial court's action is probably erroneous, it is not sufficient to invoke review under RAP 2.3(b)(2). Errors such as these are properly reviewed, if necessary, at the conclusion of the case where they may be considered in the context of the entire hearing or trial."8

The same year Howland was issued, another law review article was published, authored by the Honorable Stephen Dwyer (one of the judges on the Howland panel), also advocating for the "immediate effects outside the courtroom" standard. That article proposed that "RAP 2.3(b)(2) should be limited to trial court orders granting or denying injunctive relief and other orders that impact parties' rights outside litigation proceedings—as opposed to a party's position within a case." Hon. Stephen J. Dwyer, Leonard J. Feldman, Hunter Ferguson, The Confusing Standards

for Discretionary Review in Washington and A Proposed Framework for Clarity.9 Judge Dwyer and his fellow authors reasoned that because RAP 2.3(b)(2) limits review to a court's action that "alters the status quo or substantially limits the freedom of a party to act," the rule "applies to orders that immediately change the rights of a party or modify some existing condition," which would preclude "CR 12 rulings, discovery orders, summary judgment rulings, and most evidentiary rulings."10

The superior court order at issue in N.G. allowed a nonparent to intervene in the child's dependency action over the objection of the child's biological mother. The mother sought interlocutory review of this decision in the Court of Appeals under RAP 2.3(b)(2). Although the Court of Appeals commissioner agreed that the trial court committed probable error in allowing the nonparent to intervene in the dependency action, the Commissioner relied on Howland to deny interlocutory review because "the juvenile court's probable error merely affects the status of the litigation," and thus does not substantially alter the status quo to warrant interlocutory review under RAP 2.3(b)(2).11

After a panel of judges in the Court of Appeals denied the mother's motion to modify the commissioner's ruling denying review, she sought interlocutory review of the appellate court's decision in the Supreme Court under RAP 13.5(b)(2). The Supreme Court commissioner stated whether the appellate court's reliance on Howland to deny interlocutory review was "probable error under RAP 13.5(b)(2) is debatable, given the lack of a definitive interpretation of RAP 2.3(b)(2), but a deeper exploration of the status quo element would have been helpful in resolving that question."12 The commissioner granted review because "[d]efinitive guidance from this court on the meaning and application of these rules will be most helpful in the future consideration of motions for discretionary review."13

In the majority decision, written by Justice Susan Owens and signed by five other justices, the Supreme Court affirmed the appellate court's order denying interlocutory review, adopting the holding of Howland and the interpretations advocated by Crooks and Judge Dwyer in their law review articles. The Court reasoned that requiring that probable errors have an immediate effect outside the courtroom is necessary to distinguish RAP 2.3(b)(2) from RAP 2.3(b)(1), which authorizes interlocutory review when the court commits an "obvious error which would render further proceedings useless."14 Adopting the distinction noted in Judge Dwyer's article, the Court "reasoned that without the limiting principle requiring effects outside of the courtroom, the more favorable probable error standard of (b)(2) would render (b)(1) redundant because practitioners would always argue for discretionary review under (b)(2)."15

In her concurring opinion, Justice Sheryl Gordon McCloud agreed that the Court of Appeals properly denied interlocutory review, but disagreed with the majority's holding that RAP 2.3(b)(2) requires an "effect outside the courtroom" or "outside the litigation." Justice Gordon McCloud noted that if the drafters intended for the rule to apply to situations where the impact of the court's ruling is "outside the courtroom" then it could have said exactly that when it drafted the rule.16 Justice Gordon McCloud also disagreed "that adding this extratextual limitation on discretionary interlocutory review is the only way to make sure that RAP 2.3(b)(1) is not 'meaningless,'" reasoning that it is not unusual for the RAPs to contain some "overlap" when the rules contain alternative grounds for acceptance of review.17 Just because a case might satisfy two separate provisions of a rule does not make either provision meaningless. Specifically with regard to RAP 2.3(b), Justice Gordon McCloud stated, "RAP 2.3(b)(1) provides a narrow and important instance in which review might be warranted; RAP 2.3(b)(2) provides a broader standard under which review might also be warranted."18

Notwithstanding Justice Gordon McCloud's criticisms in her concurrence, it now appears settled that, as former Commissioner Crooks first opined 36 years ago, for a court's probable error to warrant interlocutory review under RAP 2.3(b)(2), the decision must have an effect outside of the litigation. Even before Howland and the Supreme Court's decision in N.G., the "immediate effects outside the courtroom" standard had traction. Looking back at merits decisions where interlocutory review was granted under RAP 2.3(b)(2), most of the orders being reviewed had an impact outside of the litigation, even if the merits decisions do not explain that this was the reason review was granted. Examples include an order removing a child from their relative placement with their grandparents in a dependency action,19 an "oral advisement" by the court restraining defendant from being "anywhere near a firearm" or "in the same house or the same care with a firearm,"20 an order requiring disclosure of files that potentially violated the privacy rights of third parties,21 and an order that prevented the Department from determining its proportionate share of attorney fees and costs in other third party recovery cases until the issue was decided in the present case.22

The Supreme Court's decision in N.G. is greatly appreciated in providing guidance on interlocutory review under RAP 2.3(b)(2). Not to press the point, but could we also get some guidance on RAP 2.3(b)(3)? That rule authorizes interlocutory review when the court "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court." Division One's recent decision in State v. Alpert23 provides some tantalizing insight—but, alas, is unpublished.

Valerie Villacin is a principal in Smith Goodfriend. She is co-president of the Washington Appellate Lawyers Association and a fellow in the American Academy of Appellate Lawyers. Valerie can be reached at valerie@washingtonappeals.com.

1 510 P.3d 335 (June 2, 2022).

2 I use this term kindly and include myself among them.

3 See, e.g., Volkert v. Fairbank Constr. Co., Inc., 8 Wn. App. 2d 399, 406, 438 P.3d 1203 (2019); McLain v. Kent Sch. Dist., No. 415, 178 Wn. App. 366, 374, 314 P.3d 435 (2013); Dep't of Soc. & Health Servs. v. Paulos, 166 Wn. App. 504, 516, 270 P.3d 607 (2012).

4 180 Wn. App. 196, 321 P.3d 303 (2014). The reason the Court of Appeals addressed interlocutory review in its decision was due to the fact that the matter had been presented to them as an appeal. In its opinion, the Court first addressed whether the matter was properly before it, which they concluded it was not because the order appealed from was not a final order appealable as matter of right. The Court then considered whether it should grant interlocutory review under RAP 2.3(b), which it concluded it would not.

5 61 Wash. L. Rev. 1541 (1986). Commissioner Crooks's article, along with Judge Stephen Dwyer's article, The Confusing Standards for Discretionary Review in Washington and A Proposed Framework for Clarity, 38 Seattle U.L. Rev. 91 (2014) discussed later in this column, remain the "go to" sources for analysis of the grounds for review under RAP 2.3(b).

6 180 Wn. App. at 207.

7 180 Wn. App. at 207.

8 180 Wn. App. at 207.

9 38 Seattle U.L. Rev. 91, 102 (2014).

10 38 Seattle U.L. Rev. at 102-03.

11 Court of Appeals Cause no. 53386-4-II Ruling Denying Review (5/10/2021).

12 Supreme Court Cause no. 10008-1 Ruling Granting Review (9/21/2021).

13 Supreme Court Cause no. 10008-1 Ruling Granting Review (9/21/2021).

14 510 P.3d at 341.

15 510 P.3d at 341.

16 510 P.3d at 344.

17 510 P.3d at 345.

18 510 P.3d at 345.

19 Dep't of Soc. & Health Servs. v. Paulos, 166 Wn. App. 504, 516, 270 P.3d 607 (2012).

20 State v. Lee, 158 Wn. App. 513, 516, 243 P.3d 929 (2010).

21 T.S. v. Boy Scouts of Am., 157 Wn.2d 416, 422, 138 P.3d 1053 (2006).

22 Ravsten v. Dep't of Labor & Indus., 72 Wn. App. 124, 129, 865 P.2d 1 (1993).

23 Cause no. 82960-2-I (4/25/2022).

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