Beyond the Writ: Restoring the Protective Power of RAP 2.3(b)(3)

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In *Dependency of C.J.J.I.,1* the Washington Supreme Court provided the first in-depth discussion of RAP 2.3(b)(3) in any court decision. While I believe *C.J.J.I.* correctly rejected the interpretation of RAP 2.3(b)(3) adopted by the Court of Appeals, I believe it missed an opportunity to interpret the rule in a way that achieves its intended purpose — allowing review of orders that impact significant rights but cannot be effectively remedied in an appeal from a final judgment. This article provides an overview of RAP 2.3(b)(3) and C.J.J.I. and then argues that the language of RAP 2.3(b)(3), the context surrounding its adoption, and Washington precedent support an interpretation of RAP 2.3(b)(3) that focuses on whether effective relief can be granted in an appeal from a final judgment.

RAP 2.3(b)(3) states an appellate court may grant discretionary review when "[t]he superior 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." As Commissioner Crooks noted in his oft-cited article on discretionary review, "[t]o say that discretionary review will be granted if the situation 'calls for review' is obviously circular."2

Given its inscrutable language, it is not surprising that C.J.J.I. was the first case to provide any analysis of RAP 2.3(b)(3). C.J.J.I. was a dependency case under the federal and state Indian Child Welfare Acts (ICWA/WICWA). After the Department of Children, Youth, and Families failed to provide the mother court-ordered visitation, she sought an order returning her children to her, arguing the Department was not, as required by ICWA/WICWA, making "active efforts" to provide visitation.3 The trial court denied the mother's request and she moved for discretionary review under RAP 2.3(b)(3).4

The Court of Appeals denied review, reasoning the mother sought review of a "substantive irregularity" and "that RAP 2.3(b)(3) applies only to address a procedural irregularity."5 The Supreme Court granted review under RAP 13.5(b)(3), which allows it to grant discretionary review of Court of Appeals' decisions based on language that mirrors RAP 2.3(b)(3).6

The Supreme Court rejected the idea that RAP 2.3(b)(3) applies only to "a procedural irregularity, not a substantive irregularity."7 The Supreme Court also put its own gloss on the rule, observing it presumes "courts in judicial proceedings follow a generally recognized and approved practice," and that establishing a "departure" from those proceedings requires "a significant deviation, not merely a commonplace error."8 The Supreme Court explained the Court of Appeals' ruling warranted review because its erroneous interpretation of RAP 2.3(b)(3) was a "departure" "from the generally recognized and approved practice" and the departure was "significant enough" to warrant review because the "erroneous interpretation precludes review of an entire category of 'irregularities'" and "is likely to affect future cases in the absence of guidance from this court."9

I agree that the "substantive/procedural" distinction misinterprets RAP 2.3(b)(3). But I also believe C.J.J.I. missed what should be the primary consideration under RAP 2.3(b)(3) — whether the harm caused by the trial court's decision can be effectively remedied in an appeal from a final judgment. If not, and if the trial court's decision impacts an important right, then RAP 2.3(b)(3) allows review. As explained below, this interpretation is consistent with the language of RAP 2.3(b)(3), the drafters' comment to the rule, and cases applying it.

Analyzing the language of RAP 2.3(b)(3) requires a brief history of the writ system RAP 2.3 replaced. Prior to the RAPs, the Supreme Court granted interlocutory review by issuing writs of prohibition, mandamus, and certiorari directed to the trial court.10 Article IV, § 4 of Washington's Constitution gives the Supreme Court original jurisdiction to issue these writs "and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction." RCW Chapter 7.16 also authorizes courts to issue writs. Issuing a writ of prohibition, mandamus, or certiorari required that there be no adequate remedy by appeal.11

Thus, the Supreme Court (at least in theory)12 would not issue a writ of prohibition "for grievances which may be redressed, in the ordinary course of judicial proceedings, by appeal."13 Likewise, mandamus would only issue where "there is no adequate remedy in the ordinary course of procedure"14 and certiorari would not issue "where there is a plain, speedy, and adequate remedy by appeal in the ordinary course."15 The standard for issuing statutory writs of prohibition and mandamus likewise requires the lack of an adequate remedy "in the ordinary course of law."16 With this history in mind, the opaque language of RAP 2.3(b)(3) referring to an "accepted and usual course of judicial proceedings" becomes clearer — the "ordinary" or "usual" course refers to whether the trial court has acted in a way that cannot be remedied after final judgment.

The drafters' comment to RAP 2.3(b)(3) confirms the rule was intended to incorporate the standard for granting extraordinary writs. The comment states, "Subsection (b)(3) governs the relatively unusual case calling for the exercise of revisory jurisdiction. See Const. art. 4 § 4."17 By referring to an appellate court's "revisory jurisdiction" and citing Article IV, § 4, the comment makes an explicit connection between the standard for issuing writs and the standard for granting review under RAP 2.3(b)(3).18

A review of Washington precedent further supports an interpretation of (b)(3) that focuses on whether there is an adequate remedy via appeal. In C.J.J.I., for example, the only means of correcting the Court of Appeals' erroneous interpretation of RAP 2.3(b)(3) was discretionary review. Another example is Dependency of B.B.B., where the Court of Appeals granted review of the trial court's order refusing to hold further "30-day" shelter care hearings based on its interpretation of RCW 13.34.065(7)(a)(i).19 Although the case had become moot

(the mother agreed to a dependency order), the Court of Appeals nonetheless granted review and issued a published opinion, reasoning "[t]he statute's proper meaning ... is a public issue that would benefit from further guidance" and that shelter care hearings "typically evade appellate review."20

Orders requiring the disclosure of information21 or ruling on a motion to change venue22 have also been reviewed under RAP 2.3(b)(3).23 As Commissioner Crooks noted, "[o]nly interlocutory review can provide effective relief" from "an order requiring pretrial disclosure of information despite a claim that it is privileged."24 And venue decisions are difficult to remedy via appeal because a party challenging a venue decision after entry of judgment must establish prejudice, a virtual impossibility given that "the mills of justice grind with equal fineness in every county of the state."25 The Supreme Court thus explained in a case brought shortly before the RAPs became effective that the proper method of challenging a venue decision "was to seek review by certiorari and not to wait until the trial was concluded."26 Consistent with this instruction, Division Three recently granted review of a venue decision under RAP 2.3(b)(3) while noting both a connection to the former writ practice and the need to consider whether an appeal would provide an adequate remedy.27

The Court of Appeals has also granted review of orders that could not be remedied after judgment under RAP 2.3(b)(1) or (2) while acknowledging that the orders did not meet the requirements of those subsections. For example, in another recent venue case, the appellate court observed that RAP 2.3(b)(2) — the only subsection cited by the petitioner — was unsuitable for reviewing venue decisions because they do not have effects "outside the courtroom,"28 as required under RAP 2.3(b)(2).29 The commissioner nonetheless granted review, and the Court of Appeals denied a motion to modify the commissioner's ruling, because discretionary review was the petitioner's "last opportunity to raise venue prior to trial."30 Washington courts have also reviewed immunity orders "under RAP 2.3(b)(1) or (2) if obvious or probable error is shown regardless of whether the error renders 'further proceedings useless' or 'substantially alters the status quo or substantially limits the freedom of a party to act.'"31 Rather than shoehorn review of orders that cannot be effectively remedied via appeal into RAP 2.3(b)(1) or (2), Washington courts should recognize that the purpose of RAP 2.3(b)(3) is to allow for review of these orders.

To be clear, I am not proposing that every order that cannot be effectively remedied on appeal should be reviewed under RAP 2.3(b)(3). Where an important right is not at stake, the well-founded reasons for disfavoring interlocutory review should prevail. But where a significant right is in jeopardy — such as the parent-child relationship in C.J.J.I. and B.B.B. — Washington appellate courts should recognize RAP 2.3(b)(3) allows review.

Ian Cairns is a principal in Smith Goodfriend and former Chair of the King County Bar Association's Appellate Section. He can be reached at ian@washingtonappeals.com.

1 565 P.3d 891 (Wash. 2025).

2 Geoffrey Crooks, Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure, 61 Wash. L. Rev. 1541, 1548 (1986).

3 565 P.3d at 892.

4 565 P.3d at 893.

5 Id.

6 Id.

7 Id.

8 565 P.3d at 894.

9 565 P.3d at 895.

10 See Bennett Feigenbaum, Interlocutory Appellate Review Via Extraordinary Writ, 36 WASH. L. REV. 1 (1961).

11 Feigenbaum, supra, 36 Wash. L. Rev. at 3.

12 As Feigenbaum explains, the Supreme Court often "indulged itself in games of semantics and judicial gymnastics" to avoid the requirement of an inadequate remedy. 36 Wash. L. Rev. at 21.

13 State v. Superior Ct. of King Cnty., 13 Wash. 226, 228, 43 P. 43 (1895) (quoting High, Extr. Rem. (2d Ed.) § 765).

14 State v. Hinkle, 131 Wash. 86, 91, 229 P. 317 (1924).

15 State v. Superior Ct. of King Cnty., 56 Wash. 649, 651, 106 P. 150 (1910).

16 RCW 7.16.170; RCW 7.16.300; see also RCW 7.16.040 (certiorari requires there be "no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law").

17 Rule 2.3 cmt., 86 Wn.2d 113, 1148 (1976) (emphasis added), reprinted in 2A Elizabeth Turner, Wash. Prac., Rules Practice RAP 2.3 (9th ed. May 2025 update).

18 Although Commissioner Crooks should be lauded for his many helpful insights regarding discretionary review, I believe he mistakenly dismissed this comment as "unhelpful[]." 61 Wash. L. Rev. at 1548. Commissioner Crooks himself noted, albeit without tying it to any particular subsection of RAP 2.3(b), that "[a]nother potentially critical consideration may be the adequacy of an appeal to remedy the effects of the claimed pretrial error" and that "[t]his type of inquiry ... is somewhat similar to an inquiry required under the writ practice." 61 Wash. L. Rev. at 1551.

19 27 Wn. App. 2d 825, 831, 533 P.3d 1177 (2023), reversed 554 P.3d 1196 (Wash. 2024). Although the Supreme Court reversed the Court of Appeals on the merits in B.B.B., in C.J.J.I., it cited B.B.B. as an example of a case that correctly applied RAP 2.3(b)(3). See 565 P.3d at 894.

20 Id.

21 Matter of Welfare of O.C., 27 Wn. App. 2d 671, 680, 533 P.3d 159 (2023).

22 Commissioner's Ruling, K.R.M. v. Eastmont School District #206, No. 39123-0-III (Nov. 15, 2022). The Commissioner's ruling is available through the Appellate Document Portal on the Washington State Courts' website (www.courts.wa.gov).

23 Federal courts, which still employ writs, use them to review discovery and venue orders. See 16 Wright & Miller, Fed. Prac. & Proc. Juris. § 3935.7 (3d ed. May 2025 Update) (noting regular use of writs "in areas in which appellate supervision is difficult to achieve by ordinary appeals, such as discovery and transfer orders").

24 61 Wash. L. Rev. at 1551.

25 Lincoln v. Transamerica Inv. Corp., 89 Wn.2d 571, 578, 573 P.2d 1316 (1978).

26 Id.

27 Commissioner's Ruling, K.R.M., at 10 ("[h]istorically, a venue decision was one such decision reviewed in writ practice ... so that parties desiring to enforce their statutory rights may have an adequate remedy.").

28 Raab v. Nu Skin Enters., Inc., 28 Wn. App. 2d 365, 536 P.3d 695 (2023) aff'd, 565 P.3d 895 (Wash. 2025).

29 See Dependency of N.G., 199 Wn.2d 588, 596, 510 P.3d 335 (2022).

30 28 Wn. App. 2d at 377.

31 Walden v. City of Seattle, 77 Wn. App. 784, 789–90, 892 P.2d 745 (1995) (emphasis added).