Agenda

Advisory Committee on Rules of Civil Procedure

February 26, 2003
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Council Room, Suite N31

Approval of minutes	Fran Wikstrom
Recodification of Code of Judicial Administration into Rules of Civil Procedure	Cullen Battle
Rule 68; HJR 3	Fran Wikstrom
Notice to defendant of signature requirement	Tim Shea
Uniform Child Witness Testimony by Alternative Methods Act	Fran Wikstrom
Disqualification of trial judge after remand	Fran Wikstrom

Meeting Schedule

March 26
April 23
May 28
September 24
October 22
November 19 (3rd Wednesday)

MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF CIVIL PROCEDURE

Wednesday, January 22, 2003
Administrative Office of the Courts

Francis M. Wikstrom, Presiding

PRESENT: Francis M. Wikstrom, David W. Scofield, R. Scott Waterfall, Francis J. Carney, Terrie T. McIntosh, Thomas R. Lee, Glenn C. Hanni, Paula Carr, W. Cullen Battle, Leslie W. Slaugh, Virginia S. Smith, Debora Threedy, James T. Branch, Honorable Lyle R. Anderson (via telephone conference)

STAFF: Tim Shea, Judith Wolferts

EXCUSED: Honorable Anthony W. Schofield, Honorable Anthony B. Quinn, Thomas R. Karrenberg, Janet H. Smith, Todd M. Shaughnessy

GUESTS: Matty Branch

I. WELCOME AND APPROVAL OF MINUTES

Committee Chairman Francis M. Wikstrom called the meeting to order at 4:00 p.m. The minutes of the December 18, 2002 meeting were reviewed and approved.

II. RECODIFICATION OF CODE OF JUDICIAL ADMINISTRATION INTO RULES OF CIVIL PROCEDURE

Prior to the meeting, W. Cullen Battle, Tim Shea, and Mr. Wikstrom (the "subcommittee") reviewed several items that had been under consideration at earlier meetings. Mr. Shea has now prepared and circulated a memorandum that presents several items identified as requiring additional consideration. Mr. Battle presented these items to the Committee for comments.

1. **Motions and Memoranda.** The state rules and federal rules differ as to which motions require no accompanying memorandum. Mr. Battle suggested that the current state rule, which excepts only uncontested and ex parte motions, be retained. There was no opposition.

2. **Time Limits for Filing Memoranda.** The federal rules provide different times for filing opposing and supporting memoranda on summary judgment motions and on other motions, whereas the state rules establish a uniform time for all motions. The subcommittee recommends that the present state rule be retained.

In response, Leslie Slaugh pointed out that the Committee has expanded the page limit for summary judgment memoranda, and that this should be taken into consideration since a greater page limit may require a longer time for responding. James Blanch commented that although most timing issues can be worked out by counsel, it makes sense to allow more time for summary judgment motions. After discussion pro and con, Mr. Battle moved to retain the present time limits. Thomas Lee seconded the motion, which passed unanimously.

3. **Page Limits.** The Committee discussed its earlier decision to increase the page limits for summary judgment memoranda. The Committee's consensus was that its earlier decision should stand.

4. Content of Memoranda. Mr. Battle stated that there presently is no state rule regulating the content of memoranda, and asked whether the Committee believes that it is appropriate to mandate specific requirements. Mr. Lee commented that he does not believe that a blanket set of requirements is needed. After Glenn Hanni expressed his preference for requiring a Table of Authorities, Mr. Battle moved to require a Table of Contents and Table of Authorities if the argument exceeds ten pages. The motion was seconded by Glenn Hanni, and passed without opposition. Additional questions were posed for the subcommittee's consideration: (a) Should all evidence be attached to the memoranda, or is it sufficient to cite to the record? (b) Should there be a requirement to attach a proposed order with findings of fact and conclusions of law?

5. **Restating the Facts in Opposing Summary Judgment.** The state rules require the party opposing summary judgment to restate each of the movant's material facts to which the opposing party contends there is a genuine issue. Mr. Battle commented that, in his experience, this is rarely done. He asked whether the Committee should adopt the federal rule, which requires only restating the facts to which there is a dispute. Judge Lyle Anderson stated that he likes the state rule, since it is difficult for judges to move back and forth between memoranda to determine which facts are opposed or unopposed. The consensus was that the state rule should be retained.

6. **Citation of Supplemental Authority.** Mr. Battle stated that the subcommittee believes that a rule on supplemental authority is not needed. Mr. Wikstrom commented that a rule is not needed because counsel will find a way to cite new precedent if it comes up.

7. **Hearings on Motions.** Mr. Battle stated that at the present time, the only way to request a hearing is in the Notice to Submit for decision. Committee members suggested other ways to include in the rules a request for a hearing, including placing it in the reply memorandum or in the opposing memorandum. Mr. Blanch suggested also including a provision where the court could schedule a hearing on

its own motion. Mr. Lee asked whether a hearing on a motion is waived if it is not specifically requested. Mr. Slaugh stated that he likes the language as it is, which implies that a hearing is waived if it is not requested. Judge Anderson asked whether judges should have more discretion in denying requests for hearings. In response, Mr. Hanni stated that oral argument is a fundamental and integral part of the legal system. If a party requests it, even if the judge does not want it, a hearing should be permitted. He further commented that this is such a fundamental right that the Committee should do everything it can to preserve it. No consensus was reached on this issue.

III. STYLE AND GRAMMAR CHANGES

The Committee members then made specific suggestions for style and grammar changes in rules that have already been considered.

After suggestions by Mr. Lee, Mr. Slaugh, and Frank Carney, the subcommittee agreed that it would work on language as to how facts should be opposed. Mr. Lee agreed to prepare a preliminary draft on this issue and submit it to the subcommittee.

Mr. Slaugh agreed to work on the language of Rule 75, including language about attorneys' fees for prosecuting **or** defending an action.

IV. ADJOURNMENT

The meeting adjourned at 6:00 p.m. The next meeting of the Committee will be held at 4:00 p.m. on Wednesday, February 26, 2003, at the Administrative Office of the Courts.

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: February 14, 2003
Re: Recodification of CJA; Motions

Once again, my running list of committee action to date. The committee has tentatively agreed to recommend the following for repeal. Some are governed by existing rules, some select provisions are being integrated into existing rules, some provisions are being substantially rewritten.

Rule 4-102. Law and motion calendar.
Rule 4-105. Continuances in special circumstances.
Rule 4-107. Consolidation of cases.
Rule 4-501. Motions.
Rule 4-503. Requests for jury instructions.
Rule 4-504. Written orders, judgments and decrees.
Rule 4-505. Attorney fee affidavits
Rule 4-505.01. Awards of attorney fees in civil default judgments with a principal amount of $5,000 or less
Rule 4-507. Disposition of funds on trustee's sale.
Rule 4-508. Unpublished opinions.
Rule 4-802. Motion to reinstate small claims proceedings.
Rule 4-803. Trials de novo in small claims cases.
Rule 6-501. Attorney fees.
Rule 6-502. Attorney fees in conservatorships.

The committee has tentatively agreed to recommend the following be retained in the Code of Judicial Administration.

Rule 4-901. Coordination of cases pending in district court and juvenile court.
Rule 4-903. Uniform custody evaluations.

T committee has tentatively agreed to recommend the following be amended. The proposed amendments are attached.

450 South State Street / P.O. Box 140241 / Salt Lake City, Utah 84114-0241 / 801-578-3808 / Fax: 801-578-3843 / email: timmys@email.utcourts.gov

URCP 7. Pleadings and motions. Subcommittee of Cullen Battle, Tom Lee and Fran Wikstrom.

Rule 75. Attorney fees. Subcommittee of Leslie Slaugh.

Rule 4-506 (URCP 76). Withdrawal of counsel.

Rule 4-509 (URCP 77). Property bonds.

Rule 75. Attorney fees.

(a) Attorney fees shall not be awarded unless authorized by contract or by law. A request for attorney fees shall be supported by affidavit or testimony unless the party claims attorney fees in accordance with the schedule in subsection (c) or in accordance with Utah Code §75-718 and no objection to the fee has been made.

(b) An affidavit supporting a request for attorney fees shall set forth:

(1) the basis for the award;

(2) a reasonably detailed description of the time spent and work performed, including for each item of work, the name, profession and hourly rate of the persons who performed the work;

(3) factors showing the reasonableness of the fees; and

(4) if the affidavit is in support of attorney fees for services rendered to an assignee or a debt collector, the terms of any agreement for sharing the fee and a statement that the attorney is not sharing the fee or any portion thereof in violation of Rule of Professional Conduct 5.4.

(c) No affidavit is required if a party requests attorney fees in accordance with the schedule below. The party's complaint shall state the basis for attorney fees, state the amount of attorney fees allowed by the schedule, and cite the authorizing law or attach a copy of the contract. The schedule of attorney fees includes fees for routine collection procedures. Attorney fees awarded under the schedule may be augmented only for extraordinary efforts incurred in collecting or defending the judgment and only after further order of the court.[1]

Principal Amount of Damages, Exclusive of Costs and Interest, Between	and:	Attorney Fees Allowed
$0.00	$700.00	$150.00
700.01	900.00	175.00

[1] Advisory Committee Note: Judges should limit augmentation to circumstances requiring extraordinary attorney time and not including routine collection methods or routine defense of a motion to set aside the judgment. Even where extraordinary collection efforts have occurred, the court should consider whether the attorney fees included in the judgment are sufficient to cover the collection efforts, taking into account the attorney time prior to entry of judgment.

900.01	1,000.00	200.00
1,000.01	1,500.00	250.00
1,500.01	2,000.00	325.00
2,000.01	2,500.00	400.00
2,500.01	3,000.00	475.00
3,000.01	3,500.00	550.00
3,500.01	4,000.00	625.00
4,000.01	4,500.00	700.00
4,500.01	or more	775.00

~~Rule 4-506.~~ Rule 76. Withdrawal of counsel ~~in civil cases~~.

~~Intent:~~

~~To establish a uniform procedure and criteria for withdrawal of counsel in civil cases.~~

~~Applicability:~~

~~This rule shall apply to all counsel in civil proceedings in trial courts of record except guardians ad litem and court-appointed counsel.~~

~~Statement of the Rule:~~

~~(1) Withdrawal requiring court approval. Consistent with the Rules of Professional Conduct, an attorney may withdraw as counsel of record only upon approval of the court when~~ (a) If a motion is not pending and a certificate of readiness for trial has not been filed, an attorney may withdraw as counsel of record by filing with the court and serving on all parties notice of withdrawal and the address of the attorney's client. If a motion ~~has been filed and the court has not issued an order on the motion or after~~ is pending or a certificate of readiness for trial has been filed~~. Under these circumstances~~, an attorney may not withdraw except upon motion and order of the court.

~~(2) Withdrawal not requiring court approval.~~ If ~~an attorney withdraws under circumstances where~~ court approval is not required, the notice of withdrawal shall include a statement by the attorney that no motion ~~has been filed on which the court has not issued an order~~ is pending and that no certificate of readiness for trial has been filed.

~~(3) If an attorney withdraws as counsel of record, the withdrawing attorney must serve written notice of the withdrawal upon the client of the withdrawing attorney and upon all other parties not in default. A certificate of service must be filed with the court. If a trial date has been set, the notice of withdrawal shall include a notification of the trial date.~~

~~(4)~~ (b) If an attorney withdraws, dies, is suspended from the practice of law, is disbarred, or is removed from the case by the court, opposing counsel shall serve a Notice to Appear or Appoint Counsel on the unrepresented ~~client~~ party. ~~The Notice to Appear or Appoint Counsel must inform the unrepresented client~~ informing the party of the responsibility to appear ~~in a court~~ personally or appoint counsel. A copy of the Notice to Appear or Appoint Counsel must be filed with the court. No further proceedings shall be held in the case until 20 days ~~have elapsed from~~ after filing ~~of~~ the Notice to Appear or Appoint Counsel unless the ~~client of the withdrawing attorney~~ unrepresented party waives the time requirement or unless otherwise ordered by the court.

~~(5)~~(c) Substitution of counsel. An attorney may replace the ~~current~~ counsel of record by filing and serving a notice of substitution of counsel signed by former counsel, new counsel and the client. Court approval is not required if new counsel certifies in the notice of substitution that counsel will comply with the hearing schedule and deadlines. ~~Filing a substitution of counsel enters the appearance of new counsel of record and effectuates the withdrawal of the attorney being replaced. Where a request for a delay of proceedings is not made, substitution of counsel does not require the approval of the court. Where new counsel requests a delay of proceedings, substitution of counsel requires the approval of the court as provided in this rule.~~

~~Rule 4-509.~~ Rule 77. Property bonds.

~~Intent:~~

~~To establish criteria for real property bonds posted in civil proceedings.~~

~~Applicability:~~

~~This rule shall apply to the district court.~~

~~Statement of the Rule:~~

~~(1) Each~~ (a) A real property bond posted with the court ~~in a civil proceedings~~ shall:

~~(A) be prepared by an owner of record or counsel;~~

~~(B)~~(1) be signed by all owners of record;

~~(C)~~(2) contain the complete legal description of the property and the property tax identification number;

~~(D)~~(3) be acknowledged before a notary public;

~~(E)~~(4) be accompanied by a copy of the document ~~by which title is vested~~ vesting title in the owners;

~~(F)~~(5) be accompanied by a copy of the property tax statement for the current or previous year;

~~(G)~~(6) be accompanied by a current title report, a current foreclosure report, or such other information as required by the court; and

~~(H)~~(7) be accompanied by a written statement from each lienholder stating:

~~(i)~~(A) the current balance of the lien;

~~(ii)~~(B) the date the most recent payment was made;

~~(iii)~~(C) that the debt is not in default; and

~~(iv)~~(D) that the lienholder will notify the court if a default occurs or if a foreclosure process is commenced during the period the property bond is in effect.

~~(2) Each property bond accepted by the court shall be recorded~~ (b) The bond is not effective until recorded with the county recorder of the county ~~or counties where~~ in which the property is located. Proof of recording shall be filed with the court.

~~(3)~~(c) Upon exoneration of the bond, the property owner shall present a release of property bond to the court.

~~Rule 4-905.~~ Rule 101. Domestic pretrial conferences and orders.

~~Intent:~~

~~To establish a uniform procedure for conducting pretrial conferences in contested domestic matters.~~

~~To provide for uniformity in pretrial orders in contested domestic matters.~~

~~Applicability:~~

~~This rule shall apply to the district courts which have court commissioners.~~

~~Statement of the Rule:~~

~~(1)~~(a) ~~Court commissioners~~ In the judicial districts with a court commissioner, a court commissioner shall conduct the pretrial conference~~s~~ in all contested matters seeking divorce, annulment, paternity or modification of a decree of divorce.

~~(2)~~(b) At the pretrial conference, the commissioner shall discuss the issues with counsel and the parties, may receive proffers of evidence, and may receive evidence if authorized to do so by the presiding district judge.

~~(3)~~(c) Following the pretrial conference, the commissioner shall issue a pretrial order which shall include:

~~(A)~~(1) the issues stipulated to by the parties;

~~(B)~~(2) the disputed issues ~~which remain in dispute~~; and

~~(C)~~(3) the commissioner's recommendations as to the disputed issues if the commissioner conducted an evidentiary hearing on those issues.

(4) The commissioner may designate one of the parties' counsel to ~~reduce the pretrial order to writing pursuant to Rule 4-504~~ prepare a written order in accordance with Rule 7.

(5) ~~The disputed issues identified in the pretrial order shall remain at issue for purposes of trial.~~ Issues not resolved at the pretrial conference shall be set for trial.

~~Rule 4-911.~~ Rule 102. Motion and order for payment of costs and fees.

~~Intent:~~

~~To establish the process by which the court may order the payment by one party of the costs and fees of another party in a domestic relations or domestic violence action.~~

~~Applicability:~~

~~This rule applies to the district court.~~

~~Statement of the Rule:~~

~~(1)~~(a) In any action designated by § 30-3-3(1), either party may move the court for an order requiring the other party to provide costs, attorney fees, and witness fees, including expert witness fees, to enable the moving party to prosecute or defend the action. The motion shall be accompanied by an affidavit setting forth the factual basis for the motion and the amount requested. The motion may include a request for costs or fees incurred:

~~(A)~~(1) prior to the commencement of the action;

~~(B)~~(2) during the action; or

~~(C)~~(3) after entry of judgment for the costs of enforcement of the judgment.

~~(2)~~(b) The court may grant the motion if the court finds that:

~~(A)~~(1) the moving party lacks the financial resources to pay the costs and fees;

~~(B)~~(2) the non-moving party has the financial resources to pay the costs and fees;

~~(C)~~(3) the costs and fees are necessary for the proper prosecution or defense of the action; and

~~(D)~~(4) the amount of the costs and fees are reasonable.

~~(3)~~(c) The court may deny the motion or award limited payment of costs and fees if the court finds that one or more of the grounds in paragraph (2) is missing or enters in the record the reason for denial of the motion.

~~(4)~~(d) The order shall specify the costs and fees to be paid within 30 days of entry of the order or the court shall enter findings of fact that a delay in payment will not create an undue hardship to the moving party and will not impair the ability of the moving party to prosecute or defend the action. The order shall specify the amount to be paid. The court may order the amount to be paid in a lump sum or in periodic payments. The court may order the fees to be paid to the moving party or to the provider of the services for which the fees are awarded.

~~Rule 4-912.~~ Rule 103. Child support worksheets.

~~Intent:~~

~~To assist judges and commissioners in applying the statutory child support guidelines to determine child support awards.~~

~~To assist the Administrative Office in collecting data regarding child support awards in compliance with 42 U.S.C. § 667.~~

~~Applicability:~~

~~This rule applies to every final order of child support, including modifications of existing awards.~~

~~Statement of the Rule:~~

~~(1) The parties shall prepare a worksheet containing information set forth in Appendix G. If the filing party is the Office of Recovery Services, the section on "child care adjustment" need not be completed.~~

~~(2) The parties shall file a completed worksheet with the court and the information thereon shall be provided to the Administrative Office of the Courts.~~

~~(A) If the information on the worksheet is not electronically transferred to the Administrative Office by the filing party, that party shall~~ (a) When filing a child support worksheet required by Utah Code §78-45-7.3, a party shall:

(1) file the worksheet in duplicate ~~with the court. The~~ and the clerk of court shall send one copy ~~of the worksheet~~ to the Administrative Office of the Courts~~.~~; or

~~(B) If~~ (2) file one worksheet with the court, send the information on the worksheet ~~is~~ electronically ~~transferred~~ to the Administrative Office ~~by the filing party, that party shall~~ and so indicate on the worksheet ~~and shall file a single copy of the worksheet with the court~~.

~~(3)~~(b) The court shall not enter the final decree of divorce, final order of modification, or final decree of paternity until the completed worksheet is filed.

~~(4) The Administrative Office shall compile the data contained on the worksheet and shall annually provide a report to the Child Support Guidelines Advisory Committee regarding the compiled data.~~[2]

~~Rule 4-913.~~ Rule 104. Divorce decree upon affidavit.

~~Intent:~~

~~To authorize the use of an affidavit of a party for the entry of a default divorce decree as permitted by § 30-3-4.~~

~~To establish the minimum requirements for the content of the affidavit and accompanying documents.~~

~~Applicability:~~

~~This rule shall apply in district court.~~

~~Statement of the Rule:~~

[2] ¶4 is administrative. It appears to be a self imposed requirement. I find nothing in state or federal statutes requiring the annual report.

~~(1)~~(a) A party in a divorce case may apply for ~~a default judgment in accordance with the Utah Rules of Civil Procedure if~~ entry of a decree without a hearing in cases in which the opposing party fails to make a timely appearance after service of process or other appropriate notice, waives notice, stipulates to the withdrawal of the answer, or stipulates to the entry of the decree or entry of default. An affidavit in support of the decree shall accompany the application ~~for default~~. The affidavit shall contain evidence sufficient to support necessary findings of fact and a final judgment by stating that:

~~(A)~~(1) either petitioner or respondent was at the time of the petition

~~(i)~~ a resident of ~~Utah~~ the county in which the action was filed for at least three months immediately prior to the commencement of the action and

~~(ii) a resident of the county in which the action was filed;~~

~~(B)~~(2) petitioner and respondent are currently married;

~~(C)~~(3) the grounds for divorce provided in Utah Code §30-3-1 that exist;

~~(D)~~(4) public assistance has been provided or is being provided, or that public assistance has not been and is not being provided; and

~~(E)~~(5) the proposed findings of fact and decree conform to the complaint or to the stipulation, whichever forms the basis for entry of the decree ~~by default~~.

~~(2) If the grounds for divorce are irreconcilable differences of the marriage, the affidavit shall further state the steps taken to try to resolve the differences and that despite the attempts at resolution, irreconcilable differences remain.~~

~~(3)~~(b) At a minimum the affidavit shall contain or be accompanied by the following:

~~(A)~~(1) the stipulation of the non-moving party, if applicable; and

~~(B)~~(2) as required by ~~CJA 4-504~~ Rule 5(d), proof of service of the proposed order on the non-moving party; and

~~(C)~~ (3)as required by Utah Code §78-45-7.3 and Rule ~~4-912~~ 104,

~~(i)~~(A) a written statement that there are no dependent children of the marriage; or

~~(ii)~~(B) two copies of a completed child support worksheet; and

~~(iii)~~(C) a written statement that the amount of requested child support is or is not consistent with the child support guidelines; and

~~(D)~~(4) as required by Utah Code §78-45-7.5,

~~(i)~~(A) a statement of petitioner's current earnings;

~~(ii)~~(B) a statement of respondent's current earnings;

~~(iii)~~(C) verification of earnings such as petitioner's and respondent's tax returns, pay stubs, or employer statements or records of the Department of Employment Security pursuant to the Employment Security Act, ~~Section~~ Utah Code §35-4-312 and the rules of the Department; and

~~(E)~~(5) as required by Utah Code §30-3-11.3 and Rule 4-907, a certificate of completion of a parenting class or a written statement that there are no dependent children of the marriage; and

~~(F)~~(6) as required by Utah Code §78-45-9, if public assistance has been or is being provided, proof of service upon the Office of Recovery Services of an invitation to join; and

~~(G)~~(7) as required by Utah Code §62A-11-501 through Utah Code §62A-11-504, universal income withholding forms and affidavits.

~~(4) (A)~~ (c)(1)If the requested amount of child support is not consistent with the child support guidelines, the statement regarding child support shall include facts sufficient to support a finding of good cause why the amount of child support should deviate from the guidelines.

~~(B)~~(2) If the application is for a divorce decree upon the failure of the respondent to answer, and if verification of earnings of the respondent are not available, the petitioner may, by affidavit based on the best available evidence, represent to the court the income of the respondent. The affidavit shall be served on the respondent. The court may permit the verification of income by this process in other cases governed by this rule upon a showing of diligent efforts to obtain verification of the income of the respondent.

~~(5)~~(d) The party applying for entry of the decree or counsel on behalf of the party shall file with the affidavit and accompanying documents a "~~notice~~ request to submit" that shall identify each document or statement required by this rule and note whether the document or statement is being filed concurrent with the ~~notice~~ request to submit. If the document or statement is not being filed concurrently, the ~~notice~~ request to submit shall state that the document or statement has already been filed with the court or shall explain why the document or statement is not required in the application of this rule to the facts of the particular case. The Administrative Office of the Courts shall develop a ~~notice~~ request to submit form that may be used.

~~(6)~~(e) A complaint for divorce alleging the insanity of the respondent shall not be granted under this rule, but shall proceed as provided in Utah Code §30-3-1.

Rule 6-401. Domestic relations commissioners.

Intent:

To identify the types of cases and matters ~~which~~ commissioners are authorized to hear, to identify the types of relief ~~which~~ commissioners may recommend and to identify the types of final orders ~~which may be issued by~~ commissioners may issue.

To establish a procedure for judicial review of commissioners' decisions.

Applicability:

This rule shall govern all domestic relations court commissioners serving in the District Courts.

Statement of the Rule:

(1) Types of cases and matters. All domestic relations matters filed in the district court in counties where court commissioners are appointed and serving, including all divorce, annulment, paternity and spouse abuse matters, orders to show cause, scheduling and settlement conferences, petitions to modify divorce decrees, scheduling conferences, and all other applications for relief, shall be referred to the commissioner upon filing with the clerk of the court unless otherwise ordered by the Presiding Judge of the District.

(2) Authority of court commissioner. Court commissioners shall have the following authority:

(A) Upon notice, require the personal appearance of parties and their counsel;

(B) Require the filing of financial disclosure statements and proposed settlement forms by the parties;

(C) Obtain child custody evaluations from the Division of Family Services pursuant to Utah Code Ann. Section 62A-4-106, or through the private sector;

(D) Make recommendations to the court regarding any issue, including a recommendation for entry of final judgment, in domestic relations or spouse abuse cases at any stage of the proceedings;

(E) Require counsel to file with the initial or responsive pleading, a certificate based upon the facts available at that time, stating whether there is a legal action pending or previously adjudicated in a district or juvenile court of any state regarding the minor child(ren) in the current case;

(F) At the commissioner's discretion, and after notice to all parties or their counsel, conduct evidentiary hearings consistent with paragraph (3)(C) below;

(G) Impose sanctions against any party who fails to comply with the commissioner's requirements of attendance or production of discovery;

(H) Impose sanctions against any person who acts contemptuously under Utah Code Ann. Section 78-32-10;

(I) Issue temporary or ex parte orders;

(J) Conduct settlement conferences with the parties and their counsel for the purpose of facilitating settlement of any or all issues in a domestic relations case. Issues which cannot be agreed upon by the parties at the settlement conference shall be certified to the district court for trial; and

(K) Conduct pretrial conferences with the parties and their counsel on all domestic relations matters unless otherwise ordered by the presiding judge. The commissioner shall make recommendations on all issues under consideration at the pretrial and submit those recommendations to the district court.

(3) Duties of court commissioner. Under the general supervision of the presiding judge, the court commissioner has the following duties prior to any domestic matter being heard by the district court:

(A) Review all pleadings in each case;

(B) Certify those cases directly to the district court that appear to require a hearing before the district court judge;

(C) Except in cases previously certified to the district court, conduct hearings with parties and their counsel for the purpose of submitting recommendations to the parties and the court;

(D) Coordinate information with the juvenile court regarding previous or pending proceedings involving children of the parties; and

(E) Refer appropriate cases to mediation programs if available.

~~(4) Objections. With the exception of pre-trial orders, the commissioner's recommendation is the order of the court until modified by the court. Any party objecting to the recommended order shall file a written objection to the recommendation with the clerk of the court and serve copies on the commissioner's office and opposing counsel. Objections shall be filed within ten days of the date the recommendation was made in open court or if taken under advisement, ten days after the date of the subsequent written recommendation made by the commissioner. Objections shall be to specific recommendations and shall set forth reasons for each objection.~~

~~(5) Judicial review. Cases not resolved at the settlement or pretrial conference shall be set for trial on all issues not resolved. All other matters shall be reviewed in accordance with Rule 4-501.~~

~~(6)~~(4) Prohibitions.

(A) Commissioners shall not make final adjudications of domestic relations matters.

(B) Commissioners shall not serve as pro tempore judges in any matter, except as provided by Rule of the Supreme Court.

~~Rule 6-403.~~ Rule 106. Shortening 90-day waiting period in domestic matters.

~~Intent:~~

~~To establish a procedure for shortening or waiving the 90-day waiting period in domestic cases.~~

~~Applicability:~~

~~This rule shall apply to the district courts.~~

~~Statement of the Rule:~~

~~(1) Proceedings on the merits of a divorce action shall not be heard by the district courts unless 90 days have elapsed from the time the petition was filed or unless the Court finds that there is good cause for shortening or eliminating the waiting period and enters a formal order to that effect prior to the hearing date.~~[3]

~~(2)~~ Application for a hearing less than 90 days from the date the petition was filed shall be made by motion and accompanied by an affidavit setting forth the factual matters constituting

[3] Governed by §30-3-18.

good cause. The affidavit shall also include the date on which the petition for divorce was filed. ~~The motion and supporting affidavit(s) shall be served on the opposing party at least five days prior to the scheduled hearing unless the party is in default.~~[4]

~~(3) In the event the Court finds that there is good cause for hearing in less than 90 days from the filing of the petition, the facts constituting such cause shall be included in the findings of fact and presented to the Court for signature.~~[5]

~~Rule 6-404.~~ Rule 107. Modification of divorce decrees.

~~Intent:~~

~~To establish procedures for modification of existing divorce decrees.~~

~~Applicability:~~

~~This rule shall apply to all district courts.~~

~~Statement of the Rule:~~

~~(1)~~(a) Proceedings to modify a divorce decree shall be commenced by ~~the~~ filing ~~of~~ a petition to modify in the original divorce action. Service of the petition and summons upon the opposing party shall be in accordance with the requirements of Rule 4 ~~of the Utah Rules of Civil Procedure~~. No request for a modification of an existing decree shall be raised by way of an order to show cause.

~~(2)~~ The responding party shall serve the ~~reply~~ answer within twenty days after service of the petition. ~~Either party may file a certificate of readiness for trial.~~[6] ~~Upon filing of the certificate, the matter shall be referred to the domestic relations commissioner prior to trial, or in those districts where there is not a domestic relations commissioner, placed on the trial calendar.~~[7]

~~(3) No petition for modification shall be placed on a law and motion or order to show cause calendar without the consent of the commissioner or the district judge.~~[8]

~~Rule 6-406.~~ Rule 108. Opening sealed adoption files.

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[4] Governed by URCP 6(d).

[5] Governed by §30-3-18.

[6] Certificate of readiness goes beyond petitions to modify a divorce decree. URCP 41 directs that the court will provide a method of placing matters on the trial calendar upon request of the parties. The committee note to URCP 26 contains a deadline for filing a certificate of readiness for trial, but the phrase is not used in the rule itself. CJA 4-103, which is not proposed for incorporation into the URCP provides for a penalty if a certificate is not filed within 330 days of the first answer.

[7] Governed by CJA 6-401, which is not proposed for incorporation in the URCP.

[8] Goes without saying.

~~Intent:~~

~~To establish uniform procedures for opening sealed adoption files and providing identifying information to adoptees and/or birth parents.~~

~~Applicability:~~

~~This rule shall apply to all district and juvenile courts.~~

~~Statement of the Rule:~~

~~(1)~~ (a) Except as set forth in paragraph ~~(3)~~ (c), all requests to open sealed adoption files to obtain identifying information of adoptee or birth parents shall be initiated by filing a ~~formal~~ petition with the clerk of the court in the county ~~where~~ in which the adoption was granted. The petition must set forth in detail the reasons the information is desired ~~and must be accompanied by the appropriate filing fee~~.

~~(2) If a petition to open a sealed adoption file is filed, the~~ (b) The petition shall be assigned to the judge who presided in the adoption case. If the judge who presided in the adoption case is not available, the case shall be assigned in the normal course.

~~(3)~~(c) An adoptive parent or adoptee may obtain a certified copy of the decree of adoption by filing a motion and affidavit stating the purpose for the request. Neither a hearing nor notice to the placement agency or the attorney who handled the private placement is required.

~~(4) In cases where~~ (d) If the petitioner is seeking specific medical information to aid in the preservation of the health of the petitioner, the petitioner ~~must contact~~ shall request from the Bureau of Vital Statistics and the adoption agency involved in the placement (if applicable) ~~and make a request for~~ all non-identifying information regarding the birth parents and other relatives. The petition must be accompanied by a letter from a licensed physician stating what the need is and whether the information is necessary for the preservation of the health of the petitioner.

~~(5) In cases where~~ (e) If the petitioner is requesting the information for reasons other than to acquire specific medical data needed to aid in the preservation of the health of the petitioner, the petitioner must register with the Voluntary Adoption Registry established by the Bureau of Vital Statistics in accordance with Utah Code ~~Ann.~~ § 78-30-18.

~~(6) Upon receipt of the formal petition, filing fee, and supporting documents, the~~ (f) The court shall set the matter for hearing~~. The court shall~~ and give notice of the hearing ~~date and~~

~~time~~ to the placement agency or the attorney who handled the private placement. The notice shall advise the placement agency or the attorney of the petition and request their attendance at the hearing or their written response to the petition.

~~(7)~~(g) After a hearing, the court shall make ~~specific~~ findings of fact that good cause exists and ~~that the adoption records shall be opened to petitioner. The findings shall~~ address ~~such issues as~~ whether the birth parents should be notified of the petition and given the opportunity to respond, and, if it is not possible to contact the birth parents, why the adoptee's need to know overrides the duty of confidentiality owed to the birth parents.[9]

~~(8)~~(h) Upon a finding of good cause to open the adoption records, the court shall specify which records or portions of records the petitioner may have access to. The court should be sensitive to the fact that some of the records may not be appropriate for release to the adoptee, including agency notes regarding the personal observations of the birth parents and the circumstances surrounding the birth, etc. The court shall carefully consider what effect the release of such information would have on the parties involved and may restrict access to such information in the court records as well as the records of the adoption agency.

~~(9)~~(i) The adoption records shall be opened only for the limited purpose contained in the court order and once the information is disseminated to the proper party or parties the court shall order the file sealed, only to be opened thereafter upon further order of the court.

~~Rule 6-407.~~ Rule 109. Adoptions.

~~Intent:~~

~~To establish a procedure for requesting or waiving an adoption investigation.~~

~~Applicability:~~

~~This rule shall apply to the District Courts.~~

~~Statement of the Rule:~~

~~(1) In adoption cases, the petitioner(s) shall, sixty days or more prior to the hearing on the adoption, unless such period is waived by the judge, file with the court a motion and order either~~

[9] Coming as it does as part of the order, it may be a little late to let the birth parents oppose the petition. The rule should be restructured to give notice to the birth parents as part of notice to the attorney/placement agency.

~~requesting that the Division of Family Services verify the petition and conduct an investigation into the adoption or waiving the investigation.~~[10]

~~(2) If a motion is filed to waive the investigation, an affidavit shall be filed by the petitioner(s) setting forth~~ A petition[11] for adoption shall contain the following information pertaining to the petitioner~~(s)~~:

~~(A)~~ (a) name;

~~(B)~~(b) place of residence for the last five years;

~~(C)~~(c) age;

~~(D)~~(d) marital status, including all prior marriages;

~~(E)~~(e) dependent children;

~~(F)~~(f) information on ownership of home;

~~(G)~~(g) employment within last five years;

~~(H)~~(h) average monthly income for the past year;

~~(I)~~(i) where and how the child was placed with petitioners;

~~(J)~~(j) information on natural parents; and

~~(K)~~(k) other pertinent information.

~~Rule 6-503.~~ Rule 90. Annual report of guardian.

~~Intent:~~

~~To assist the probate division of the district court in administering annual reports filed by guardians.~~

~~Applicability:~~

~~This rule applies to the filing of annual reports by the guardians except where the guardian is the parent or ward.~~

~~Statement of the Rule:~~

~~(1)~~ (a) Individual guardians.

[10] This investigation by DCFS is governed by §78-30-14 and appears to be distinct from the pre-placement and post-placement evaluations under §78-30-3.5. It is for the court, not the petitioner, to determine whether the investigation is needed.

[11] Without a waiver of the investigation, this information, if it is needed will have to be part of the petition.

~~(A)~~(1) Each individual guardian who possesses or controls the property of a ward valued at $50,000 or more shall file with the court an annual report and an accounting and a formal petition seeking approval of the report and accounting. The petition shall identify all interested persons who are entitled to notice under the Utah Uniform Probate Code and provide all other information necessary for the court to review and rule upon the guardian's report and accounting. The guardian shall also file a copy of the petition, the report and the accounting for each interested person who is to receive notice of the petition. In those jurisdictions where it is the local practice for the guardian to prepare the notice, the guardian shall prepare the notice and file the original notice with the court. The guardian shall also file one copy of the notice for each interested person who is to receive notice of the petition, report and accounting.

~~(i) The report and accounting shall be in the following form:~~[12]

~~THIS IS A REPORT OF _____, GUARDIAN FOR _____, A WARD. THIS REPORT HAS BEEN FILED WITH THE _____ DISTRICT COURT FOR _____ COUNTY. IF YOU HAVE AN OBJECTION TO THIS REPORT, YOU SHOULD FILE IT IN WRITING WITH THE COURT. YOU SHOULD CONSIDER SEEKING LEGAL ADVICE IF YOU HAVE ANY QUESTIONS REGARDING THIS MATTER.~~

~~YOU WILL ALSO RECEIVE A NOTICE THAT A FORMAL HEARING WILL BE HELD ON THIS REPORT. YOU HAVE THE RIGHT TO APPEAR IN COURT AT THE HEARING AND TO STATE ANY OBJECTIONS YOU HAVE TO THE REPORT AT THAT TIME. IF YOU FAIL TO APPEAR AT THE HEARING OR TO OBJECT TO THIS REPORT, THE DISTRICT COURT WILL CONSIDER THE REPORT WITHOUT ANY FURTHER NOTICE TO YOU AND WITHOUT ANY OPPORTUNITY FOR YOU TO MAKE ANY POINTS YOU WISH TO MAKE.~~

~~1. This report covers the period of time from _____ to _____, ___.~~

~~2. During this period, the guardian took the following actions on behalf of the ward: _____.~~

[12] The form should be removed from the rule and published with other forms.

~~3. During this period, the ward's condition was as follows: (Describe ward's physical and mental condition)~~

~~4. The ward is living at: _____.~~

~~5. The following persons are living with the ward at this address: _____.~~

~~6. The guardian has attached to this report an accounting. The accounting shows the beginning balance of property subject to the guardian's control, all receipts during this period, all expenditures during this period and the balance at the end of this period.~~

~~7. The guardian believes this is an accurate report of the guardian's actions and the ward's condition for this period.~~

~~(ii) Upon receipt of the petition, report and accounting, the clerk of the court shall set a date and time for hearing the guardian's petition and shall send a copy of the notice, the petition, the report and the accounting to each interested person (including the ward) and shall send a copy of the notice to the guardian and the guardian's attorney.~~

~~(iii) The guardian or the guardian's attorney shall appear at the hearing on the guardian's petition.~~

~~(iv) The court shall take appropriate action in the proceedings based on the court's review of the petition, report, accounting, any objections that are lodged by interested persons and any other relevant factors.~~

~~(B) Each individual guardian who possesses or controls the property of a ward valued at less than $50,000 shall prepare a report and accounting.~~

~~(i) The report and accounting shall be in the following form:~~[13]

~~THIS IS A REPORT OF _____, GUARDIAN FOR _____, A WARD. THIS REPORT HAS BEEN FILED WITH THE _____ DISTRICT COURT FOR _____ COUNTY. IF YOU HAVE AN OBJECTION TO THIS REPORT, YOU SHOULD FILE IT IN WRITING WITH THE COURT. YOU SHOULD CONSIDER SEEKING LEGAL ADVICE IF YOU HAVE ANY QUESTIONS REGARDING THIS MATTER.~~

[13] The form should be removed from the rule and published with other forms.

~~YOU HAVE FOURTEEN DAYS FROM THE DATE OF THIS REPORT TO FILE AN OBJECTION WITH THE _____ DISTRICT COURT. IF YOU FAIL TO OBJECT TO THIS REPORT, THE DISTRICT COURT WILL CONSIDER THE REPORT WITHOUT ANY FURTHER NOTICE TO YOU AND WITHOUT ANY OPPORTUNITY FOR YOU TO APPEAR BEFORE THE DISTRICT COURT JUDGE AND MAKE ANY POINTS YOU WISH TO MAKE.~~

~~1. This report covers the period of time from _____ to _____, ____.~~

~~2. During this period, the guardian took the following actions on behalf of the ward: _____.~~

~~3. During this period, the ward's condition was as follows: (Describe ward's physical and mental condition)~~

~~4. The ward is living at: _____.~~

~~5. The following persons are living with the ward at this address: _____.~~

~~6. The guardian has attached to this report an accounting. The accounting shows the beginning balance of property subject to the guardian's control, all receipts during this period, all expenditures during this period and the balance at the end of this period.~~

~~7. The guardian believes this is an accurate report of the guardian's actions and the ward's condition for this period.~~

~~(ii) The guardian shall date the report on the date the guardian delivers or mails a copy of the report to each interested person and the original report to the clerk of the court.~~

~~(iii) Fourteen days after the date of the report and accounting, if no objections have been filed with the clerk of the court, the court shall review the accounting and, if the report and accounting are in order, the court will approve the report and accounting. The court in its discretion may order a formal hearing on the report and accounting.~~

~~(iv) If an interested person objects to the report and accounting within fourteen days or if the court orders a formal hearing sua sponte, the clerk of the court shall set a date and time for hearing the guardian's report and accounting and shall send a notice of the date and time for~~

~~hearing to each interested person (including the ward) and to the guardian and the guardian's attorney.~~

~~(v) The guardian or the guardian's attorney shall appear at the hearing on the guardian's report and accounting.~~

~~(vi) The court shall call the guardian's report and accounting and take appropriate action in the proceedings, based on the court's review of the report, accounting, and any objections that are lodged by interested persons and any other relevant factors.~~

~~(2)~~(b) Corporate guardians.

~~(A)~~(1) Each corporate guardian shall prepare a report and accounting ~~in the form set forth in paragraph (1)(A)(i) above~~[14].

~~(i)~~(A) The guardian shall mail or deliver a copy of the report and accounting to each interested person and the original report and accounting to the clerk of the court.

~~(ii)~~(B) Fourteen days after the date of the report and accounting, if no objections have been filed with the clerk of the court, the court shall review the accounting and, if the report and accounting are in order, the court will approve the report and accounting. The court in its discretion may order a formal hearing on the report and accounting.

~~(iii)~~(C) If an interested person objects to the report and accounting within fourteen days or if the court orders a formal hearing sua sponte, the clerk of the court shall set a date and time for hearing the guardian's report and accounting and shall send a notice of the date and time for hearing to each interested person (including the ward) and to the guardian and the guardian's attorney.

~~(iv)~~(D) The guardian or the guardian's attorney shall appear at the hearing on the guardian's report and accounting.

~~(v)~~(E) The court shall take appropriate action in the proceedings, based on the court's review of the report, accounting, and any objections that are lodged by interested persons and any other relevant factors.

~~(3)~~(c) Summary of account. Every accounting shall include a Summary of Account ~~in the following form:~~[15]

[14] Form will not be part of the rule.

~~SUMMARY OF ACCOUNT~~

~~Accounting Period from _____, ____ to _____, ____~~

~~1. Assets on hand at end of Last Accounting Period. Schedule 1 attached. _____~~

~~(Value at fair market value on last day of Accounting Period.)~~

~~2. Receipts during accounting period Include only amounts received from sale of assets in excess of value See Schedule 2. _____~~

~~3. Total assets and receipts _____~~

~~4. Disbursements~~

~~Schedule 3 _____~~

~~5. Losses on sales~~

~~Schedule 4 _____~~

~~6. Total disbursements and losses on sales _____~~

~~7. Total assets on hand at end of this Accounting Period (line 3 less line 6) _____~~

~~(Value at fair market value on last day of Accounting Period)~~

~~Total assets by type:~~

~~Cash~~

~~Schedule 5 _____~~

~~Bonds~~

~~Schedule 6 _____~~

~~(Value at fair market value on~~

[15] The form should be removed from the rule and published with other forms

~~last day of Accounting Period)~~

~~Realty~~

~~Schedule 7~~

~~(Value at fair market value on~~

~~last day of Accounting Period)~~

~~Other property~~

~~Schedule 8~~

~~(Value at fair market value on~~

~~last day of Accounting Period)~~

~~8. Total assets on hand~~

~~at end of this Accounting~~

~~Period~~

~~(Value at fair market value on~~

~~last day of Accounting Period)~~

~~(This must equal line 7)~~

~~(4)~~(d) Supporting schedules. In lieu of filing supporting schedules and original checks and vouchers, corporate guardians may file copies of their internal reports. All other guardians shall file supporting schedules and original checks or vouchers in support of all expenditures and distributions. Where checks or vouchers are not available, the guardian shall file an affidavit in support of the affected expenditures or distributions.

~~(5)~~(e) Court orders restricting access to property. For purposes of this rule, if some or all of the ward's property cannot be used by the guardian except pursuant to a court order and if no court order has been entered during the accounting period allowing the guardian to use that property, then the guardian does not have possession or control of that property. In addition, for purposes of paragraph ~~(1) of this rule~~ (a), when determining the value of the ward's property pursuant to this rule, the guardian shall not include the value of the ward's residence; however, the guardian shall account for income from and expenses on the ward's residence, where applicable.

~~Rule 6-504.~~ Rule 91. Annual accounting of conservator.

~~Intent:~~

~~To assist the probate division of the district court in administering annual accountings filed by conservators.~~

~~Applicability:~~

~~This rule applies to the filing of annual accountings by conservators except where the conservator is the parent or ward.~~

~~Statement of the Rule:~~

~~(1)~~ (a) Individual conservators.

~~(A)~~(1) Each individual conservator who administers an estate for a protected person valued at $50,000 or more shall file with the court an annual accounting and a formal petition seeking approval of the accounting. The petition shall identify all interested persons who are entitled to notice under the Utah Uniform Probate Code and provide all other information necessary for the court to review and rule upon the conservator's accounting. The conservator shall also file a copy of the petition and the accounting for each interested person who is to receive notice of the petition. In those jurisdictions where it is the local practice for the conservator to prepare the notice, the conservator shall prepare the notice and file the original notice with the court. The conservator shall also file one copy of the notice for each interested person who is to receive notice of the petition and accounting.

~~(i) The accounting shall be in the following form:~~[16]

~~THIS IS AN ACCOUNTING OF _____ , CONSERVATOR FOR THE ESTATE OF _____ , A PROTECTED PERSON. THIS ACCOUNTING HAS BEEN FILED WITH THE _____ DISTRICT COURT FOR _____ COUNTY. IF YOU HAVE AN OBJECTION TO THIS ACCOUNTING, YOU SHOULD FILE IT IN WRITING WITH THE COURT. YOU SHOULD CONSIDER SEEKING LEGAL ADVICE IF YOU HAVE ANY QUESTIONS REGARDING THIS MATTER.~~

~~YOU WILL ALSO RECEIVE A NOTICE THAT A FORMAL HEARING WILL BE HELD ON THIS ACCOUNTING. YOU HAVE THE RIGHT TO APPEAR IN COURT AT THE HEARING AND TO STATE ANY OBJECTIONS YOU HAVE TO THE ACCOUNTING AT~~

[16] The form should be removed from the rule and published with other forms

~~THAT TIME. IF YOU FAIL TO APPEAR AT THE HEARING OR TO OBJECT TO THIS ACCOUNTING, THE DISTRICT COURT WILL CONSIDER THE ACCOUNTING WITHOUT ANY FURTHER NOTICE TO YOU AND WITHOUT ANY OPPORTUNITY FOR YOU TO MAKE ANY POINTS YOU WISH TO MAKE.~~

~~1. This accounting covers the period of time from _____ to _____ ,____.~~

~~2. The conservator's accounting for this period is attached.~~

~~3. The conservator believes this is an accurate accounting for this period.~~

~~(ii)~~(A) Upon receipt of the petition and accounting, the clerk of the court shall set a date and time for hearing the conservator's petition and shall send a copy of the notice, the petition and the accounting to each interested person (including the protected person) and shall send a copy of the notice to the conservator and the conservator's attorney.

~~(iii)~~(B) The conservator or the conservator's attorney shall appear at the hearing on the conservator's petition.

~~(iv)~~(C) The court shall take appropriate action in the proceedings, based on the court's review of the petition, accounting, any objections that are lodged by interested persons and any other relevant factors.

~~(B)~~(2) Each individual conservator who administers an estate for a protected person valued at less than $50,000 shall prepare an accounting.

~~(i) The accounting shall be in the following form:~~[17]

~~THIS IS AN ACCOUNTING OF _____ , CONSERVATOR FOR THE ESTATE OF _____ , A PROTECTED PERSON. THIS ACCOUNTING HAS BEEN FILED WITH THE _____ DISTRICT COURT FOR _____ COUNTY. IF YOU HAVE AN OBJECTION TO THIS ACCOUNTING, YOU SHOULD FILE IT IN WRITING WITH THE COURT. YOU SHOULD CONSIDER SEEKING LEGAL ADVICE IF YOU HAVE ANY QUESTIONS REGARDING THIS MATTER.~~

~~YOU HAVE FOURTEEN DAYS FROM THE DATE OF THIS ACCOUNTING TO FILE AN OBJECTION WITH THE _____ DISTRICT COURT. IF YOU FAIL TO~~

[17] The form should be removed from the rule and published with other forms

~~OBJECT TO THIS ACCOUNTING, THE DISTRICT COURT WILL CONSIDER THE ACCOUNTING WITHOUT ANY FURTHER NOTICE TO YOU AND WITHOUT ANY OPPORTUNITY FOR YOU TO APPEAR BEFORE THE DISTRICT COURT JUDGE AND MAKE ANY POINTS YOU WISH TO MAKE.~~

~~1. This accounting covers the period of time from _____ to _____, ____.~~

~~2. The conservator's accounting for this period is attached.~~

~~3. The conservator believes this is an accurate accounting for this period.~~

~~(ii)~~(B) The conservator shall date the accounting on the date the conservator delivers or mails a copy of the accounting to each interested person and the original accounting to the clerk of the court.

~~(iii)~~(C) Fourteen days after the date of the accounting, if no objections have been filed with the clerk of the court, the court shall review the accounting and, if the accounting is in order, the court will approve the report and accounting. The court in its discretion may order a formal hearing on the accounting.

~~(iv)~~(D) If an interested person objects to the accounting within fourteen days or if the court orders a formal hearing sua sponte, the clerk of the court shall set a date and time for hearing the conservator's accounting and shall send a notice of the date and time for hearing to each interested person (including the protected person) and to the conservator and the conservator's attorney.

~~(v)~~(E) The conservator or the conservator's attorney shall appear at the hearing on the conservator's accounting.

~~(vi)~~(F) The court shall take appropriate action in the proceedings, based on the court's review of the accounting, any objections that are lodged by interested persons and any other relevant factors.

~~(vii)~~(G) If all of the protected person's property cannot be used by the conservator except pursuant to court order and if no court order has been entered during the accounting period allowing the conservator to use that property, then the conservator shall not be required to file an accounting for that period. However, the conservator shall file a pleading with the court for that

period citing this rule and the court's order as explanation for the conservator's failure to file an accounting.

~~(2)~~(b) Corporate conservators.

~~(A)~~(1) Each corporate conservator shall prepare an accounting ~~in the form set forth in paragraph (1)(B)(i) above~~.[18]

~~(B)~~(2) The conservator shall mail or deliver a copy of the accounting to each interested person and the original accounting to the clerk of the court.

~~(C)~~(3) Fourteen days after the date of the accounting, if no objections have been filed with the clerk of the court, the court shall review the accounting and, if the accounting is in order, the court will approve the accounting. The court in its discretion may order a formal hearing on the accounting.

~~(D)~~(4) If an interested person objects to the accounting within fourteen days or if the court orders a formal hearing sua sponte, the clerk of the court shall set a date and time for hearing the conservator's accounting and shall send a notice of the date and time for hearing to each interested person (including the protected person) and to the conservator and the conservator's attorney.

~~(E)~~(5) The conservator or the conservator's attorney shall appear at the hearing on the conservator's accounting.

~~(F)~~(6) The court shall call the conservator's accounting and take appropriate action in the proceedings, based on the court's review of the accounting, any objections that are lodged by interested persons and any other relevant factors.

~~(3)~~(c) Summary of account. Every accounting shall include a Summary of Account ~~in the following form:~~[19]

~~SUMMARY OF ACCOUNT~~

~~Accounting Period from _____, ____ to _____, ____~~

~~1. Assets on hand at end of Last~~

~~Accounting Period. Schedule 1 attached.~~ _____

[18] The form should be removed from the rule and published with other forms.

[19] The form should be removed from the rule and published with other forms.

~~(Value at fair market value on~~
~~last day of Accounting Period)~~
~~2. Receipts during accounting period~~
~~Include only amounts received from~~
~~sale of assets in excess of value.~~
~~See Schedule 2~~ _____ _____
~~3. Total assets and receipts~~ _____ _____
~~4. Disbursements~~
~~Schedule 3~~ _____
~~5. Losses on sales~~
~~Schedule 4~~ _____
~~6. Total disbursements and losses on~~
~~sales~~ _____ _____
~~7. Total assets on hand at end of~~
~~this Accounting Period~~
~~(line 3 less line 6)~~ _____ _____
~~(Value at fair market value on~~
~~last day of Accounting Period)~~
~~Total assets by type:~~
~~Cash~~
~~Schedule 5~~ _____
~~Bonds~~
~~Schedule 6~~ _____
~~(Value at fair market value on~~
~~last day of Accounting Period)~~
~~Realty~~
~~Schedule 7~~ _____
~~(Value at fair market value on~~
~~last day of Accounting Period)~~

~~Other property~~

~~Schedule 8~~

~~(Value at fair market value on~~

~~last day of Accounting Period)~~

~~8. Total assets on hand~~

~~at end of this Accounting Period~~

~~(Value at fair market value on~~

~~last day of Accounting Period)~~

~~(This must equal line 7)~~

~~(4)~~(d) Supporting schedules. In lieu of filing supporting schedules and original checks and vouchers, corporate conservators may file copies of their internal reports. All other conservators shall file supporting schedules and original checks or vouchers in support of all expenditures and distributions. Where checks or vouchers are not available, the conservator shall file an affidavit in support of the affected expenditures or distributions.

~~(5)~~(e) Court orders restricting access to property. For purposes of this rule, if some of the protected person's property cannot be used by the conservator except pursuant to a court order and if no court order has been entered during the accounting period allowing the conservator to use that property, then the conservator is not required to account for that property. In addition, for purposes of paragraph ~~(1) of this rule~~ (a), when determining the value of the protected person's property pursuant to this rule, the conservator shall not include the value of the protected person's residence; however, the conservator shall account for income from and expenses on the protected person's residence, where applicable.

~~Rule 6-505.~~ Rule 92. Fiduciary accountings.

~~Intent:~~

~~To recognize standard accounting publications and forms as sufficient to meet the requirements of fiduciary accountings.~~

~~Applicability:~~

~~This rule shall apply to an accounting filed by a fiduciary in district court.~~

~~Statement of the Rule:~~

~~(1)~~ (a) A fiduciary accounting shall contain sufficient information to put interested persons on notice as to all significant transactions affecting administration during the accounting period. The accounting may be typewritten or prepared by automated data processing or trust accounting systems. The court may require the fiduciary to keep or produce vouchers or other evidence of payment.

~~(2)~~(b) An accounting substantially conforming to the Uniform Fiduciary Accounting Principles and accompanying Model Account Formats published as the Fiduciary Accounting Guide, 1990 Revision by ALI-ABA, as revised and republished,[20] is acceptable as to content and format for an accounting filed under the Utah Uniform Probate Code. An accounting substantially conforming to the Fiduciary Accounting Guide is acceptable as to content and format for an accounting filed under Utah Code §75-5-312 provided the accounting reports, as required by statute:

~~(A)~~(1) the status and physical condition of the ward;

~~(B)~~(2) the physical condition of the place of residence; and

~~(C)~~(3) a list of others living in the household.

~~(3)~~(c) An accounting substantially conforming to the Utah Uniform Probate Code forms of the Estate Planning Section of the Utah State Bar, as revised and republished, is acceptable as to content and format for an accounting filed under the Utah Uniform Probate Code.

~~(4)~~(d) An accounting substantially conforming to Rule ~~6-503~~ 90 or Rule ~~6-504~~ 91 is acceptable as to content and format for an accounting filed under Utah Code §75-5-312 or §75-5-417, respectively.

~~(5)~~(e) The court may direct an accounting be prepared with such content and in such format as it deems necessary.

Rule 5. Service and filing of pleadings and other papers.

(a) Service: When required.

(1) Except as otherwise provided in these rules or as otherwise directed by the court, every judgment, every order required by its terms to be served, every pleading subsequent to the original complaint, every paper relating to discovery, every written motion other than one ~~which~~

[20] Out of print.

~~may be~~ heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties.

(2) No service need be made on parties in default for failure to appear except as provided in Rule 55(a)(2)(default proceedings). Pleadings asserting new or additional claims for relief against a party in default shall be served in the manner provided for service of summons in Rule 4.

(3) In an action begun by seizure of property, whether through arrest, attachment, garnishment or similar process, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) Service: How made and by whom.

(1) Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy or by mailing a copy to the last known address or, if no address is known, by leaving it with the clerk of the court.

(A) Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at the person's office with a clerk or person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or, if consented to in writing by the person to be served, delivering a copy by electronic or other means.

(B) Service by mail is complete upon mailing. If the paper served is notice of a hearing and if the hearing is scheduled 5 days or less from the date of service, service shall be by delivery or other method of actual notice. Service by electronic means is complete on transmission if transmission is completed during normal business hours at the place receiving the service; otherwise, service is complete on the next business day.

(2) Unless otherwise directed by the court:

(A) an order signed by the court and required by its terms to be served or a judgment signed by the court shall be served by the party preparing it;

(B) every other pleading or paper required by this rule to be served shall be served by the party preparing it; and

(C) an order or judgment prepared by the court shall be served by the court.

(c) Service: Numerous defendants. In any action in which there is an unusually large number of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing. ~~Except where rules of judicial administration prohibit the filing of discovery requests and responses, all~~ All papers after the complaint required to be served upon a party shall be filed with the court either before or within a reasonable time after service. The papers shall be accompanied by a certificate of service showing the date and manner of service completed by the person effecting service. Rule 26(i) governs filing papers related to discovery.

(e) Filing with the court defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may accept the papers, note thereon the filing date and forthwith transmit them to the office of the clerk.

Rule 6. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day ~~which~~ that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or

allowed, without reference to any additional time provided under subsection (e), is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of the court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

(c) Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action ~~which~~ that has been pending before it.

(d) For motions - Affidavits. A written motion, other than one ~~which~~ that may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules~~, by CJA 4-501~~, or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) Additional time after service by mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the end of the prescribed period as calculated under subsection (a). Saturdays, Sundays and legal holidays shall be included in the computation of any 3-day period under this subsection, except that if the last day of the 3-day period is a Saturday, a Sunday, or a legal holiday, the

period shall run until the end of the next day ~~which~~ that is not a Saturday, Sunday, or a legal holiday.

Rule 7. Pleadings allowed; ~~form of~~ motions, memoranda, hearings, orders, objection to commissioner's order.

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim ~~denominated as such~~; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

~~(b) Motions, orders and other papers.~~

~~(1) Motions. An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.~~

~~(2) Orders. An order includes every direction of the court including a minute order made and entered in writing and not included in a judgment. An order for the payment of money may be enforced by execution in the same manner as if it were a judgment. Except as otherwise specifically provided by these rules, any order made without notice to the adverse party may be vacated or modified without notice by the judge who made it, or may be vacated or modified on notice.~~

~~(3) Hearings on motions or orders to show cause. When on the day fixed for the hearing of a motion or an order to show cause, the judge before whom such motion or order is to be heard is unable to hear the parties, the matter shall stand continued until the further order of the court, or it may be transferred by the court or judge to some other judge of the court for such hearing.~~

~~(4) Application of rules to motions, orders, and other papers. The rules applicable to captions, signings, and other matters of form of pleadings apply to all motions, orders, and other papers provided for by these rules.~~

~~(c) Demurrers, pleas, etc., abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.~~

(b) Motions. An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in accordance with this rule. A motion shall state succinctly and with particularity the relief sought, and the grounds for the relief sought.

(c) Memoranda.

(1) Memoranda required, exceptions, filing times. All motions, except uncontested or ex parte motions, shall be accompanied by a memorandum. Within ten days after service of the motion and supporting memorandum, a party opposing the motion shall file a memorandum. Within five days after service of the memorandum in opposition, the moving party may file a reply memorandum, which shall be limited to rebuttal of matters raised in the memorandum opposing the motion. No other memoranda will be considered without leave of court. A party may attach a proposed order to a principal memorandum.

(2) Length. Memoranda shall not exceed the following pages of argument without leave of the court:

(A) principal memorandum supporting or opposing a motion other than a motion for summary judgment: 10 pages;

(B) principal memorandum supporting or opposing a motion for summary judgment: 25 pages;

(C) reply to memorandum opposing a motion other than a motion for summary judgment: 5 pages; and

(D) reply to memorandum opposing a motion for summary judgment: 10 pages.

The court may permit a party to file an over-length memorandum upon ex parte application and a showing of good cause.

(3) Content.

(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits

or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

(B) A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials.

(C) A memorandum with more than 10 pages of argument shall contain a table of contents and a table of authorities with page references.

(D) A party may request a hearing in a memorandum.

(E) A party may attach to a memorandum exhibits of relevant portions of documents cited in the memorandum, such as affidavits or discovery materials.

(d) Request to submit for decision. When briefing is complete, either party may file a request to submit the motion for decision. The request shall be a separate pleading captioned "Request to Submit for Decision." The request to submit for decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision.[21]

(e) Hearings. The court may hold a hearing on any motion. The court shall grant a request for a hearing on a motion that would dispose of the action or any claim in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

(f) Orders.

(1) An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. An order for the payment of money may be enforced in the

[21] Advisory Committee Note. The practice for courtesy copies varies by judge and so is not regulated by rule. Each party should ascertain whether the judge wants a courtesy copy of that party's motion, memoranda and supporting documents and, if so when and where to deliver them.

same manner as if it were a judgment. Except as otherwise provided by these rules, any order made without notice to the adverse party may be vacated or modified by the judge who made it with or without notice. Orders shall state whether they are entered upon trial, stipulation, motion or the court's initiative.

(2) Unless the court approves the proposed order, if any, submitted with a principal memorandum, the prevailing party shall, within fifteen days after the court's decision or within such shorter time as the court directs, file proposed findings and order in conformity with the court's decision. Objections to the proposed findings and order shall be filed within five days after service.

(g) Objection to court commissioner's order. A recommended order of a court commissioner is the order of the court until modified by the court. A party may object to the recommended order of a court commissioner by filing an objection in the same manner as filing a motion within ten days after the recommended order is entered. A party may respond to the objection in the same manner as responding to a motion.

Rule 9. Pleading special matters.

(a) (1) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. ~~When a~~ A party ~~desires to~~ may raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity~~, he shall do so~~ by specific negative averment, which shall include ~~such supporting particulars as are peculiarly~~ facts within the pleader's knowledge~~, and on such~~. If raised as an issue, the party relying on such capacity, authority, or legal existence, shall establish the same on the trial.

(2) Designation of unknown defendant. When a party does not know the name of an adverse party, he may state that fact in the pleadings, and thereupon such adverse party may be designated in any pleading or proceeding by any name; provided, that when the true name of such adverse party is ascertained, the pleading or proceeding must be amended accordingly.

(3) Actions to quiet title; description of interest of unknown parties. In an action to quiet title wherein any of the parties are designated in the caption as "unknown," the pleadings may

describe such unknown persons as "all other persons unknown, claiming any right, title, estate or interest in, or lien upon the real property described in the pleading adverse to the complainant's ownership, or clouding his title thereto."

(b) Fraud, mistake, condition of the mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

(d) Official document or act. In pleading an official document or act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it. A denial of jurisdiction shall be made specifically and with particularity and when so made the party pleading the judgment or decision shall establish on the trial all controverted jurisdictional facts.

(f) Time and place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special damage. When items of special damage are claimed, they shall be specifically stated.

(h) Statute of limitations. In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the provisions of the statute relied on, referring to or describing such statute specifically and definitely by section number, subsection designation, if any, or otherwise designating the provision relied upon sufficiently clearly to identify it. If such allegation is controverted, the party pleading the statute must establish, on the trial, the facts showing that the cause of action is so barred.

(i) Private statutes; ordinances. In pleading a private statute of this state, or an ordinance of any political subdivision thereof, or a right derived from such statute or ordinance, it is sufficient to refer to such statute or ordinance by its title and the day of its passage or by its section number or other designation in any official publication of the statutes or ordinances. The court shall thereupon take judicial notice thereof.

(j) Libel and slander.

(1) Pleading defamatory matter. It is not necessary in an action for libel or slander to set forth any intrinsic facts showing the application to the plaintiff of the defamatory matter out of which the action arose; but it is sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the party alleging such defamatory matter must establish, on the trial, that it was so published or spoken.

(2) Pleading defense. In his answer to an action for libel or slander, the defendant may allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages, and, whether he proves the justification or not, he may give in evidence the mitigating circumstances.

(k) If a complaint seeks judgment on a written obligation to pay money and a judgment has previously been rendered upon the same written obligation, plaintiff shall describe the judgment in detail in the complaint or attach a copy of the judgment to the complaint.[22]

Rule 42. Consolidation; separate trials.

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(1) A motion to consolidate cases shall be heard by the judge assigned to the first case filed. Notice of a motion to consolidate cases shall be given to all parties in each case. The order denying or granting the motion shall be filed in each case.

(2) If a motion to consolidate is granted, the case number of the first case filed shall be used for all subsequent papers filed. If a motion to consolidate is granted, the case shall be heard by

[22] From CJA 4-504(8).

the judge assigned to the first case filed, except that for good cause the presiding judge may assign the case to another judge.[23]

(b) Separate trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

Rule 51. Instructions to jury; objections.

(a) Preliminary instructions. After the jury is sworn and before opening statements, the court may instruct the jury concerning the jurors' duties and conduct, the order of proceedings, the elements and burden of proof for the cause of action, and the definition of terms. The court may instruct the jury concerning any matter stipulated to by the parties and agreed to by the court and any matter the court in its discretion believes will assist the jurors in comprehending the case. Preliminary instructions shall be in writing and a copy provided to each juror. At the final pretrial conference or at such other time as the court directs, a party may file a written request that the court instruct the jury on the law as set forth in the request. The court shall inform the parties of its action upon a requested instruction prior to instructing the jury, and it shall furnish the parties with a copy of its proposed instructions, unless the parties waive this requirement.

(b) Interim written instructions. During the course of the trial, the court may instruct the jury on the law if the instruction will assist the jurors in comprehending the case. Prior to giving the written instruction, the court shall advise the parties of its intent to do so and of the content of the instruction. A party may request an interim written instruction.

(c) Final instructions. ~~At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in said requests.~~ Parties shall file requested jury instructions at the time and in the format directed by the court. If a party relies on statute, rule or case law to support or object to a requested instruction, the party shall provide a citation to or a copy of the precedent. The court shall inform counsel of its proposed action upon the requests prior to instructing the jury; and it shall furnish counsel with a copy of its proposed instructions, unless the parties waive this requirement. Final instructions shall be in writing and at least one copy provided to the jury. The

[23] From CJA 4-107.

court shall provide a copy to any juror who requests one and may, in its discretion, provide a copy to all jurors.

(d) Objections to instructions. Objections to written instructions shall be made before the instructions are given to the jury. Objections to oral instructions may be made after they are given to the jury, but before the jury retires to consider its verdict. The court shall provide an opportunity to make objections outside the hearing of the jury. Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice. In objecting to the giving of an instruction, a party shall identify the matter to which the objection is made and the grounds for the objection.

(e) Arguments. Arguments for the respective parties shall be made after the court has given the jury its final instructions. The court shall not comment on the evidence in the case, and if the court states any of the evidence, it must instruct the jurors that they are the exclusive judges of all questions of fact.

Rule 54. Judgments; costs.

(a) Definition; form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings. Judgments shall state whether they are entered upon trial, stipulation, motion or the court's initiative; and, unless otherwise directed by the court, a judgment shall not include any matter by reference.

(b) Judgment upon multiple claims and/or involving multiple parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, ~~which~~ that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment.

(1) Generally. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

(2) Judgment by default. A judgment by default shall not be different in kind from, or exceed in amount, that specifically prayed for in the demand for judgment.

(d) Costs.

(1) To whom awarded. Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; provided, however, where an appeal or other proceeding for review is taken, costs of the action, other than costs in connection with such appeal or other proceeding for review, shall abide the final determination of the cause. Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law.

(2) How assessed. The party who claims his costs must within five days after the entry of judgment serve upon the adverse party against whom costs are claimed, a copy of a memorandum of the items of his costs and necessary disbursements in the action, and file with the court a like memorandum thereof duly verified stating that to affiant's knowledge the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed may, within seven days after service of the memorandum of costs, file a motion to have the bill of costs taxed by the court ~~in which the judgment was rendered~~.

A memorandum of costs served and filed after the verdict, or at the time of or subsequent to the service and filing of the findings of fact and conclusions of law, but before the entry of judgment, shall nevertheless be considered as served and filed on the date judgment is entered.

~~(3) [Deleted.]~~

~~(4) [Deleted.]~~

(e) Interest and costs to be included in the judgment. The clerk must include in any judgment signed by him any interest on the verdict or decision from the time it was rendered, and the costs,

if the same have been taxed or ascertained. The clerk must, within two days after the costs have been taxed or ascertained, in any case where not included in the judgment, insert the amount thereof in a blank left in the judgment for that purpose, and make a similar notation thereof in the register of actions and in the judgment docket.

OFFER OF JUDGMENT IN SETTLEMENT OF CASES RESOLUTION

2003 GENERAL SESSION

STATE OF UTAH

Sponsor: John Dougall

LaVar Christensen | James A. Ferrin | Stephen H. Urquhart
Greg J. Curtis | Mike Thompson

This joint resolution modifies the Utah Rules of Civil Procedure by providing for attorneys' fees with costs that can be assessed in a civil action. It allows costs and attorneys' fees to be assessed if a final award is not more favorable than the offer of judgment. This act provides an effective date.

This resolution proposes to amend the Utah Rules of Civil Procedure as follows:

AMENDS:

Rule 68, Utah Rules of Civil Procedure

Be it resolved by the Legislature of the state of Utah, two-thirds of all members elected to each of the two houses voting in favor thereof:

As provided in Utah Constitution Article VIII, Section 4, the Legislature may amend rules of procedure and evidence adopted by the Utah Supreme Court upon a two-thirds vote of all members of both houses of the Legislature:

Section 1. **Rule 68**, Utah Rules of Civil Procedure is amended to read:

Rule 68. Offer of Judgment.

(a) Tender of money before suit. When in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which the plaintiff was entitled, and thereupon deposits in court for the plaintiff the amount so tendered, and the allegation is found to be true, the plaintiff cannot recover costs, but must pay costs to the defendant.

(b) Offer before trial. At any time more than 10 days before the trial begins, a party

defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs and attorneys' fees then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon judgment shall be entered. An offer not accepted shall be deemed withdrawn and evidence [~~thereof~~] of the offer and withdrawal is not admissible except in a proceeding to determine costs and attorneys' fees. [~~If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.~~] The fact that an offer is made but not accepted does not preclude a subsequent offer. If the adjusted award finally obtained by the offeree is not more favorable than the offer:

(i) the offeree must pay those costs and attorneys' fees of the offeror incurred after the making of the offer;

(ii) the offeror must pay those costs and, if allowed by statute or contract, attorneys' fees of the offeree incurred before the making of the offer; and

(iii) the offeror may not be liable to the offeree for costs and attorneys' fees incurred after the making of the offer.

After a comparison of the offer and the adjusted award, in appropriate cases, the court shall order an amount which either the offeror or the offeree must ultimately pay separate and apart from the amount owed under the verdict. A total judgment shall be entered taking into account both the verdict and the applicable costs and attorneys' fees.

(c) Adjusted award. Any costs and attorneys' fees awarded against the offeree shall be based upon a comparison of the offer under this rule and the adjusted award. The adjusted award is defined as the verdict in addition to the offeree's costs and attorneys' fees incurred before service of the offer of judgment. Provided, in contingent fee cases where attorneys' fees are awardable, the court shall pro rate the offeree's attorneys' fees to determine the amount incurred before the offer of judgment in reaching the adjusted award.

Section 2. **Effective date.**

As provided in Utah Constitution Article VIII, Section 4, this act takes effect upon approval by a constitutional two-thirds vote of all members elected to each house.

Legislative Review Note
as of 12-5-02 5:42 PM

A limited legal review of this legislation raises no obvious constitutional or statutory concerns.

Office of Legislative Research and General Counsel

Administrative Office of the Courts

Chief Justice Christine M. Durham
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Myron K. March
Deputy Court Administrator

MEMORANDUM

To: Civil Procedures Committee
From: Tim Shea
Date: February 14, 2003
Re: Notice to defendant of signature requirement

One of the clerks of the Third District Court observes that default judgments are being entered against defendants who have filed an unsigned answer. It appears the defendants intend to contest the claim, but the answers are not being given effect because they lack a signature. The defendants may in good faith believe they have done all that is necessary to answer. She suggests amending URCP 4(c) to require the summons to contain notice to the defendant that the answer must be signed. I've suggested some language below. The other suggested amendments are intended only to make the list of what's required of a summons a little easier to read. If the rule is amended to require notice that a signed answer is required, we would need to make conforming amendments to Civil Forms 2 and 3.

(c) Contents of summons. The summons shall be directed to the defendant. The summons shall contain:

(1) ~~The summons shall contain~~ the name, address and county of the court~~, the address of the court,~~ in which the action is filed;

(2) the names of the parties to the action~~, and the county in which it is brought. It shall be directed to the defendant, state~~;

(3) the name, address and telephone number of the plaintiff's attorney, if any, and otherwise the plaintiff's address and telephone number~~. It shall state~~;

(4) the time within which the defendant is required to answer the complaint;

(5) notice that the answer must be in writing and signed~~, and shall notify the defendant~~;

(6) notice that in case of failure to ~~do so~~ answer, judgment by default will be rendered against the defendant~~. It shall state~~; and

(7) notice either that the complaint is on file with the court or that the complaint will be filed with the court within ten days of service.

450 South State Street / P.O. Box 140241 / Salt Lake City, Utah 84114-0241 / 801-578-3808 / Fax: 801-578-3843 / email: tims@email.utcourts.gov

It is my opinion that if the court has accepted an answer without a signature, the court should not enter default until after notifying the defendant of the need for a signature. If the defendant fails to correct the oversight, the answer should be stricken and then default can be entered. URCP 11(a). If the committee agrees, I can advise the clerks of court.

Copy: Carol Holmes

D R A F T

FOR APPROVAL

UNIFORM CHILD WITNESS TESTIMONY BY ALTERNATIVE METHOD ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-ELEVENTH YEAR
TUCSON, ARIZONA

JULY 26 - AUGUST 2, 2002

UNIFORM CHILD WITNESS TESTIMONY BY ALTERNATIVE METHOD ACT

WITH PREFATORY NOTE AND REPORTER'S NOTES

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporters. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

DRAFTING COMMITTEE ON
UNIFORM CHILD WITNESS TESTIMONY BY ALTERNATIVE METHOD ACT

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Copies of this Act may be obtained from:
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
312/915-0195

UNIFORM CHILD WITNESS TESTIMONY BY ALTERNATIVE METHOD ACT

TABLE OF CONTENTS

UNIFORM CHILD WITNESS TESTIMONY BY ALTERNATIVE METHOD ACT

Prefatory Note

In the process of revising Rule 807 of the Uniform Rules of Evidence (1999), the statement of child victim exception to the hearsay rule, the Drafting Committee eliminated the provisions in then Subdivision (d) providing for alternative methods for taking the testimony of a child victim. Basically there were three reasons for this decision.

First, the Committee believed that detailed provisions providing for alternative methods of taking the testimony of a child were incompatible with a child victim or witness exception to the hearsay rule. It believed that this was an issue more effectively dealt with in a separate rule or act. Accordingly, Rule 807(a)(2) of the Uniform Rules of Evidence (1999) more generally provides that the child must either testify at the proceeding "[or pursuant to an applicable state procedure for the giving of testimony by a child]." Thus, the Uniform Rules of Evidence (1999) recognize that a statement of a child may be introduced through an alternative method recognized under applicable state procedure without unduly complicating the Rule 807 exception to the hearsay rule.

Second, the Committee also believed that the extreme diversity among the several state jurisdictions with respect to alternative methods for taking the testimony of a child warranted an attempt at drafting a uniform act on the subject. As such, the National Conference of Commissioners on Uniform State Laws might provide some leadership in an area where there is presently a noticeable lack of uniformity.

Third, the Committee also believed that this approach would provide the basis for dealing more sensitively with the decisional law in this area in both criminal and noncriminal proceedings.

This approach to alternative methods for taking the testimony of a child was presented to the Committee on Scope and Program. It then authorized the effort and, with the addition of new members, the Drafting Committee was continued as a Standby Committee to draft a Uniform Child Witness Testimony By Alternative Method Act. The following draft of the Act was approved by the Committee on March 23, 2002, at its meeting in St. Louis, Missouri, and is now submitted to the Conference, with appropriate Comments, for Final Reading at the Conference's Annual Meeting in Tucson, Arizona, July 26 to August 2, 2002.

UNIFORM CHILD WITNESS TESTIMONY BY ALTERNATIVE METHOD ACT

SECTION 1. SHORT TITLE. This [Act] may be cited as the Uniform Child Witness Testimony by Alternative Method Act.

SECTION 2. DEFINITIONS. In this [Act]:

(1) "Alternative method" means a method of presenting the testimony of a child witness other than by having the child appear in person, in an open forum, in the presence and full view of the finder of fact and the presiding officer, with the parties allowed to be present, to participate, and to view and be viewed by the child.

(2) "Child witness" means an individual under the age of [13] who is competent to testify and either has been or will be called to testify in a proceeding.

(3) "Criminal proceeding" means a trial or hearing before a court in a prosecution of a person changed with violating a criminal law of this State.

(4) "Noncriminal proceeding" means a trial or hearing before a court or an administrative agency of this State having judicial or quasi-judicial powers, other than a criminal proceeding.

COMMENT

In litigation to which the Act should apply, Sections 2(3) and (4) define criminal and noncriminal proceedings broadly. In these sections, the word "court" contemplates both jury and non-jury actions. The section 2(3) definition includes quasi-criminal or equivalent proceedings before juvenile, family or similar courts. See In re Gault, 387

U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) and In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). In noncriminal proceedings, the Act may be invoked: in civil cases generally; in juvenile proceedings; in family law proceedings subject to the provisions of Section 3; and in administrative hearings. In the context of physical or sexual abuse, the impact upon and risks to a child testifying in the courtroom in civil cases for damages, in juvenile proceedings and in family law proceedings are potentially as real as in criminal prosecutions. Similarly, the testimony of a child may be relevant in an administrative proceeding to revoke the license of a day care center. In such a proceeding the testimony of a child by an alternative method may be appropriate.

"Child witness" is defined in Section 2(2) as an individual under the age of a bracketed [13] who is competent to testify and is called to testify in the proceeding. The Act thereby accommodates the diverse approach to age currently recognized among the several states for taking the testimony of a child by an alternative method. For example, while in Georgia the taking of testimony by closed-circuit television applies to a child ten years of age or younger (Ga. Code Ann. § 17-8-55), in Florida the age is under sixteen years (Fla. Stat. Ann. ch. 92.54), and in Maryland the age is under eighteen (Md. Ann. Code of 1957, art. 27, § 774). The approach in the Act is based upon a policy decision that the minimum age should be thirteen.

The term "child witness" in Section 2(2) includes both a child who is a party to a proceeding and one who is merely called to testify as a witness.

Finally, as to the taking of the testimony of a child by an alternative method, the term is defined broadly in Section 2(1) to mean not only alternative methods currently recognized among the several states for taking the testimony of a child, such as audio visual recordings to be later presented in the courtroom, closed-circuit television which is transmitted directly to the courtroom, and room arrangements that avoid direct confrontation between a witness and a particular party or the finder of fact but also other similar methods either currently employed or, through technology, yet to be developed or recognized in the future.

SECTION 3. APPLICABILITY. This [Act] governs the testimony of child witnesses in all criminal and noncriminal proceedings. However, in a noncriminal

proceeding, the [Act] does not preclude other procedures permitted by law for presentation of the testimony of a child witness.

COMMENT

Section 3 provides that in noncriminal proceedings the Act does not preclude the use of other recognized state procedures in place for taking the testimony of a child by an alternative method. For example, in custody and visitation cases in Delaware the court is authorized to "interview the child in chambers to ascertain the child's wishes as to his or her custodian." Del. Code Ann. tit. 3, § 724. There are twenty states that have statutes similar to the Delaware statute. In addition, there are also a number of states in which a comparable procedure is authorized by court rule or decisional law. See, for example, the Davidson County Juvenile Court Rules in Tennessee and the North Dakota case of Ryan v. Flemming, 533 N.W.2d 920 (N.D. 1995), authorizing a trial judge to interview a child in chambers. Accordingly, the Act preserves the right to utilize other currently recognized alternative procedures in the adopting state for taking the testimony of a child, but, at the same time, does not prevent the use of the procedure set forth in the Act in any instance in any adopting state.

SECTION 4. HEARING WHETHER TO ALLOW TESTIMONY BY ALTERNATIVE METHOD.

(a) The presiding officer of a criminal or noncriminal proceeding may order a hearing to determine whether to allow presentation of the testimony of a child witness by an alternative method. The presiding officer, for good cause shown, shall order the hearing upon motion of a party, a child witness, or an individual determined by the presiding officer to have sufficient standing to act on behalf of the child.

(b) A hearing to determine whether to allow presentation of the testimony of a child witness by an alternative method must be conducted on the record after

reasonable notice to all parties, any nonparty movant, and any other person the presiding officer specifies. The child's presence is not required at the hearing unless ordered by the presiding officer. In conducting the hearing, the presiding officer is not bound by rules of evidence, except for the rules of privilege.

COMMENT

Sections 4(a) and (b) set forth the procedures for instituting and conducting the hearing to determine whether an alternative method for taking the testimony of the child should be authorized. The hearing authorized in Section 4 is in the nature of a preliminary hearing or a hearing on motion in limine held to determine only whether the testimony of the child should be taken by an alternative method. See also Unif. R. Evid. 104(d) and Fed. R. Evid. 104(c). It is a separate and distinct hearing from the proceeding defined in Sections 2(3) and (4) in which, upon order of the presiding officer, the testimony is actually presented by an alternative method. See also Sections 7 and 8, *infra*. The hearing under Section 4 may, in the discretion of the presiding officer, be conducted in an *in camera* proceeding.

The term "presiding officer" is used in this Act to broadly describe the person under whose supervision and jurisdiction the proceeding is being conducted. It includes a judge in whose court the case is being heard, a quasi-judicial officer, or an administrative law judge or hearing officer, depending upon the nature of the case and the type of proceeding in which the testimony of a child is sought or presented by an alternative method.

The hearing under Section 4 is initiated upon the motion of a party, the child witness, an interested individual with sufficient connection to the child to be a proper person to seek to protect the child's best interests, or the presiding officer *sua sponte*, all as set forth in Section 4(a).

It is also required under Section 4(b) that reasonable notice be given to all parties, a nonparty movant, or other appropriate person. The child's presence at the hearing is not required unless ordered by the presiding officer. The presiding officer should consider the factors enumerated in Section 6 of the Act, *infra*, in determining whether the child should be present at the hearing.

In conducting the hearing referred to in this section, the presiding officer is not bound by the rules of evidence except for the rules of privilege, for example, as set forth in Rule 104(a) of the Federal Rules of Evidence and Rule 104(a) of the Uniform Rules of Evidence (1999). At the same time, if, as provided in Rule 104(b) of the Uniform Rules "there is a factual basis to support a good faith belief that a review of the allegedly privileged material is necessary, the court [or presiding officer], in making its determination, may review the material outside the presence of any other person."

Finally, Section 4(b) also provides that the hearing to determine whether an alternative method for the taking of the testimony of the child is to be granted shall be conducted on the record. It is also expected that a transcript of the record of the hearing will be made available to the public and news media to the same extent as in similar motions in any other judicial or quasi-judicial proceeding, subject, of course, to the presiding officer's authority, as in any other case, to balance constitutional and privacy interests and seal from public view sensitive and protectible information. See Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986).

SECTION 5. STANDARDS FOR DETERMINING WHETHER CHILD WITNESS' TESTIMONY MAY BE PRESENTED BY ALTERNATIVE METHOD.

(a) In a criminal proceeding, the presiding officer may order the presentation of the testimony of a child witness by an alternative method only in the following situations:

(1) A child witness' testimony may be taken otherwise than in an open forum in the presence and full view of the finder of fact if the presiding officer finds by clear and convincing evidence that the child would suffer emotional trauma that would substantially impair the child's ability to communicate with the finder of fact if required to testify in the open forum.

(2) A child witness' testimony may be taken other than in a face-to-face confrontation between the child and a defendant against whom the child's testimony is offered if the presiding officer finds by clear and convincing evidence that the child would suffer serious emotional trauma that would substantially impair the child's ability to communicate with the finder of fact if required to be confronted face-to-face by the defendant.

(b) In a noncriminal proceeding, the presiding officer may order the presentation of the testimony of a child witness by an alterative method if the presiding officer finds by a preponderance of the evidence that presenting the testimony of the child by an alternative method is necessary to protect the best interests of the child or enable the child to communicate with the finder of fact. In making this finding, the presiding officer shall consider:

(1) the nature of the proceeding;

(2) the age and maturity of the child;

(3) the relationship of the child to the parties in the proceeding;

(4) the nature and degree of trauma that the child may suffer in testifying; and

(5) any other relevant factor.

COMMENT

Section 5 sets forth the three standards that must be applied by the presiding officer in determining whether to present the testimony of a child by an alternative

method. Sections 5(a)(1) and (2) prescribe the standards that must be applied in a criminal proceeding. Sections 5(a)(1) and (2) differentiate between the child whose ability to communicate with the finder of fact is limited by trauma suffered simply by exposure to the ambience of an open forum (i.e., the traditional open courtroom setting with judge, jury, parties, lawyers, witnesses and observers) and the child whose ability to communicate with the finder of fact is limited by trauma caused by face-to-face exposure to the criminal defendant. The essential distinction between the two standards is that the child who cannot testify in an open forum would need only to "suffer emotional trauma" while the child who cannot testify face-to-face with the defendant would need to "suffer *serious* emotional trauma."

In the case of face-to-face confrontation, the standard in Section 5(a)(2) comports with the essence of the holding of the Supreme Court of the United States in Maryland v. Craig, 497 U.S. 836, 857, 110 S. Ct. 3157, 3170, 111 L. Ed. 2d 666 (1990), that the taking of the testimony by an alternative method is necessary to protect the welfare of the child witness and that the child would suffer serious emotional stress and be traumatized to the extent the child could not reasonably be expected to communicate in the courtroom or the personal presence of a party. The Act does not attempt to define the method or methods by which face-to-face confrontation may be avoided. Closed-circuit television projected directly into the courtroom, video-taped testimony presented in the courtroom or room arrangements or equipment that shield the witness from the defendant (or the finder of fact in the case of section 5(a)(1)) have been used with varying degrees of approval by the courts. See Maryland v. Craig, 497 U.S. 836 (1990); Coy v. Iowa, 487 U.S. 1012, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988).

Section 5(b) sets forth the standards that must be applied in noncriminal proceedings to determine whether to permit an alternative method for taking the testimony of a child. In these proceedings the Act sets forth the alternative standards of "best interests of the child" or to "enable the child to communicate with the finder of fact." However, unlike criminal proceedings, the standard of persuasion is only that the presiding officer must find by a preponderance of the evidence (that it is more probably true than not) "that presenting the testimony of the child by an alternative method is necessary to protect the best interests of the child or enable the child to communicate with the finder of fact." Sections 5(b)(1) through (5) set forth a non-exclusive list of factors that the presiding officer may consider in making the determination.

Sections 5(a)(1) and (2) establish the standard of "clear and convincing evidence" (highly probably true) as the standard that must be met in granting the taking of testimony of a child by an alternative method. The standard of persuasion in criminal cases currently varies throughout the several states. However, there are at least four states that

apply the clear and convincing evidence standard of persuasion in determining whether to grant the taking of a child's testimony by an alternative method. These are: Alaska (Reutter v. State, 886 P.2d 1298 (Alaska Ct. App. 1994)); Arkansas (Ark. Code Ann. 16-43-1001); California (Ca. Penal Code § 1347); Connecticut (Conn. Gen. Stat. § 54-86g); and New York (N.Y. Crim. Proc. Law § 65.10). Of these, the Alaska decision in Reutter seems most persuasive because of the court's reliance on Maryland v. Craig. In Craig, the Supreme Court did not address the issue other than to require specific evidence and an express finding that the probable effect of the defendant's presence on the child witness would significantly impair the ability of the child to testify accurately. 497 U.S. at 855-56, 110 S. Ct. at 3169. In Reutter, the court held that the preponderance of evidence standard was insufficient to meet the requirements of Craig. 886 P.2d at 1308. Therefore, given the criminal nature of the proceeding under Sections 5(a)(1) and (2) and the persuasiveness of Reutter, it seems appropriate that any state adopting the Act should conform to the clear and convincing evidence standard of persuasion even though there are at least two jurisdictions which follow the preponderance of evidence standard of persuasion. See Thomas v. People, 803 P.2d 144 (Colo. 1990); United States v. Carrier, 9 F.3d 867 (10th Cir. 1993).

Section 5(b) requires only the preponderance of evidence (more probably true than not) standard of persuasion in determining whether to take the testimony of a child witness by an alternative method. However, given the civil nature of these proceedings and the fact that the preponderance of evidence standard generally applies to civil proceedings, this lesser standard of persuasion is appropriate for noncriminal proceedings.

SECTION 6. FACTORS FOR DETERMINING WHETHER TO PERMIT ALTERNATIVE METHOD. If the presiding officer determines that a standard under Section 5 has been met, the presiding officer shall determine whether to allow the presentation of the testimony of a child witness by an alternative method and in doing so shall consider:

(1) alternative methods reasonably available;

(2) available means for protecting the interests of or reducing emotional trauma to the child without resort to an alternative method;

(3) the relative rights of the parties;

(4) the importance of the proposed testimony of the child;

(5) the nature and degree of emotional trauma that the child may suffer if an alternative method is not used; and

(6) any other relevant factor.

COMMENT

If the presiding officer determines under Section 5 that the standards for granting an alternative method for taking the testimony of a child witness have been met, then the presiding officer shall consider the factors set forth in Section 6 in deciding whether to allow the presentation of a child witness' testimony by an alternative method.

SECTION 7. ORDER REGARDING TESTIMONY BY ALTERNATIVE METHOD.

(a) An order allowing or disallowing the presentation of the testimony of a child witness by an alternative method must state the findings of fact and conclusions of law that support the presiding officer's determination.

(b) An order allowing the presentation of the testimony of a child witness by an alternative method must state:

(1) the method by which the testimony is to be presented;

(2) a list, individually or by category, of the persons either allowed to be present or required to be excluded during the taking of the testimony of the child;

(3) any special conditions necessary to facilitate a party's right to examine or cross-examine the child;

(4) any condition or limitation upon the participation of persons present during the taking of the testimony of the child; and

(5) any other condition necessary for taking or presenting the testimony.

(c) The alternative method ordered by the presiding officer must be no more restrictive of the rights of the parties than is necessary under the circumstances to serve the purposes of the order.

COMMENT

Section 7 provides expressly for the issuance of an order either allowing or disallowing the taking of the testimony of a child witness by an alternative method. First, Section 7(a) requires a statement of the findings of fact and conclusions of law that support the presiding officer's determination. Second, Section 7(b) specifies the conditions under which the testimony is to be taken if an alternative method is ordered. Third, Section 7(c) requires that the alternative method be no more restrictive of the rights of the parties than is necessary to serve the purposes of taking the testimony by an alternative method.

SECTION 8. RIGHT OF PARTIES TO EXAMINE CHILD WITNESS. An alternative method ordered by the presiding officer must permit a full and fair opportunity for examination and cross-examination of the child witness.

COMMENT

Section 8 ensures that the requirements of the Sixth Amendment right of confrontation will be met in criminal proceedings and, when applicable, preserves the right of examination and cross-examination of the child witness in noncriminal proceedings. However, Section 8 does not impact other state noncriminal proceedings where limitations are placed upon the right to examine or cross-examine the child witness through the interviewing of a child in chambers, or some other recognized *in camera* examination of the child witness. See Section 3 Comment, *supra*. When the testimony of a child is presented by an alternative method as permitted under this Act, such testimony becomes part of the trial or hearing record like any other evidence presented to the trier of fact.

[SECTION 9. SEVERABILITY CLAUSE. If any provision of this [Act] or the application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.]

COMMENT

Because most states have generally applicable severability laws, the Conference often omits a severability clause in individual acts. We have included severability language in this Act, but in brackets to indicate that the clause should be omitted when unnecessary.

SECTION 10. EFFECTIVE DATE. This [Act] takes effect [ ].

SECTION 11. REPEALS. The following acts and parts of acts are repealed:

(1) . . .

(2) . . .

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January 22, 2003

Frances M. Wikstrom
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Re: New judge after successful appeal

Dear Fran:

In October, a survey was e-mailed to members of the Utah Trial Lawyers Association. It asked:

> Would you favor or oppose the adoption of a rule which would give a successful appellant the right, exercisable at his or her discretion, to have the remanded case assigned to a new judge rather than the judge whose judgment or order was reversed, for the handling of the new trial or evidentiary hearing?

27 attorneys responded in favor, only one responded in opposition. The accompanying comments were illuminating and insightful. With that kind of response, we thought it made sense to see how other litigating lawyers felt about the matter. We asked the executive committee of the Bar's Litigation Section for permission to send out an e-mail survey to its members. On November 13, that request was denied. I was told the executive committee members "had no real position on the need for the rule but felt that the request should come from the advisory committee itself, rather than a proponent of a rule change".

Thereafter, we decided to seek input from a class of people with the most first-hand experience. We turned to the Pacific Reporter and extracted the names of **all attorneys who won reversals in Utah cases within a recent three year period** beginning May 19, 2000 and ending March 7, 2002. Those dates were not arbitrary - they represent the first and last opinions handed down by Utah appellate courts in

Volumes 2 P.3d through 44 P.3d. Attached is a copy of the exact survey sent to each of these attorneys on January 6 of this year. **The results** to date have been: **35 in favor and 4 opposed**. The survey allowed five responses: strongly favor; favor; strongly oppose; oppose; take no position one way or the other. **Of the 35 who favored the rule change, 22 did so "strongly". Of the 4 who opposed the rule change, only 2 did so "strongly"**. No one "neutral" responded.

Last August, U. S. District Judge Dale Kimball voluntarily recused himself from continuing to preside over a case after the 10th Circuit Court of Appeals reversed his decision to dismiss it. The *Trib* reported :

> Kimball's unusual decision was not required by law. He stepped aside under a personal philosophy first adopted by his role model, senior U.S. District Judge David Winder, who recuses himself from cases when he is overturned by a higher court. "Somebody's a winner and somebody's a loser," Winder noted. "Certainly the party who has reversed me [on appeal] might think I have some antagonism."

The Salt Lake Tribune, August 4, 2002, Page B-1.

The obvious question is this: **If the judge universally regarded as the best trial judge in at least a generation of Utah judges** (Judge Winder) **regularly recuses himself whenever he is reversed on appeal, just on principle, how can one seriously contend allowing successful appellants the option of getting a new judge is a bad idea and besmirches the integrity of the judiciary**?

It seems to me your committee ought to be listening most closely to the lawyers and litigants who have won appeals and feel both justice and the appearance of justice would be better served by a rule change. Respectfully, I request that your committee reconsider the matter and allow interested parties with first-hand experience to be heard.

Very truly yours,

Douglas G. Mortensen

DGM/ab

c: Senator Gregory S. Bell
Richard D. Burbidge
Rich A. Humphreys
Robert R. Wallace
Michael N. Zundel

January 6, 2003

Dear Successful Appellant:

According to the Pacific Reporter, you appealed and won a reversal in a Utah case within the last 3 years. For that reason, your view is being solicited by a group of Utah attorneys who are interested in exploring support for a possible rule change. Thank you for taking a moment to answer the following question:

Would you favor, oppose or feel neutral about the adoption of a rule change which would give a successful appellant the right, exercisable at his or her discretion, to have the remanded case assigned to a new judge rather than the judge whose judgment or order was reversed, for the handling of the new trial or evidentiary hearing?

22 Strongly favor

13 Favor

2 Strongly oppose

2 Oppose

0 Take no position one way or the other

Comments, if any (including reasons for view):

Thank you.

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January 29, 2003

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Re: New Trial Judge Assigned after Reversal on Appeal

Dear Fran:

I received a copy of a letter to you dated January 22, 2003 from Douglas Mortensen regarding a proposal to have a new trial judge assigned to a case that has been reversed on appeal. I wish to add my support to this general proposition, though I would qualify it to apply only to reversals on non-procedural grounds. For example, I would not support a reassignment if the reversal was based on the failure to provide necessary findings or conclusions and the case is reversed for the trial court to prepare such findings or conclusions.

The psychology of being reversed on appeal is a curious phenomenon. I have never met a judge who did not have an adverse reaction to being reversed on appeal. The theory is, however, that the reversed judge will be able to put his/her personal feelings aside and fairly address the case as set forth in the reversing opinion. In response to this, I have seen the following kinds of situations:

1) Some judges who have been reversed harbor feelings that the appellate court didn't properly understand the situation or for some other reason reversed improperly and so the trial court simply continues the quest for the same result in spite of the reversal, but goes about it in a different way so as to avoid a violation of the appellate court's opinion. As you know, there are numerous ways a trial court can address issues in a case to achieve an outcome. This would include reshaping discovery, exercising discretionary rulings on evidence, etc. Though it hasn't been my experience that all trial judges do this, I have certainly seen some who are convinced for personal reasons that a claim or defense should not proceed, despite a reversal of summary judgment/dismissal or other ruling. In

these circumstances, the trial judge then begins to craft future rulings (particularly discretionary rulings) to favor the judge's prior position. As you know, a trial court has immense discretionary power to shape how evidence is admitted and/or used. Furthermore, jurors can intuitively sense a judge's feeling toward an issue or position, and this never shows up in the record. I readily concede that there are good trial judges who rise above personal feelings, however, the opposite occurs often enough that I am quite concerned. Even if it occurs only on occasion, it is too many times.

2) On the other side of the spectrum, there are trial judges who want to appear so unbiased after being reversed that he/she begins to favor the party who reversed him/her on appeal. In other words, some judges appear to have such a strong desire to appear uninfluenced by the reversal on appeal, that there is a tendency to give more deference to the appealing party so as to demonstrate the lack of bias. For the same reasons as No. 1 above, this should not happen either.

3) A newly assigned judge would have little, if any, personal investment or history which may influence any ruling thereafter, particularly discretionary rulings. The new judge would carry no excess baggage such as the often thought, "If I had just done this or made this part of the ruling, I wouldn't have been reversed," or something similar to this. It is truly a great judge that can fairly set aside such kinds of personal feelings and start fresh after being reversed. I believe we have many such good judges, however, given past experience, I am also convinced that there are many who have a very difficult time not allowing the prior history to influence what they do after being reversed.

4) The appearance of being biased can do much to undermine the faith and trust in our judicial system. For obvious reasons, one side or the other will likely believe that a judge who has been reversed will likely be unreasonably influenced (directly or indirectly) by such experience. These situations are fertile ground for criticism of the judiciary. The appearance factor certainly is not controlling, however, it is a legitimate consideration. As a wise jurist once said, "Justice must not only be done, it should also appear to be done."

Though there are many other reasons, I wanted to express my strong support for such a proposal. There is nothing about the reassignment of a case that can reasonably raise an issue of bias. Such is not true, however, if the reversed judge continues to preside over the case.

Please understand that these comments are not applicable to all judges, for my experience has been that many try hard and succeed in not allowing an appeal to affect their subsequent rulings.

Thank you for your consideration.

Very truly,

CHRISTENSEN & JENSEN, P.C.

L. Rich Humpherys

LRH/mg