MINUTES

UTAH SUPREME COURT ADVISORY COMMITTEE OF THE RULES OF CIVIL PROCEDURE

MARCH 27, 2013

PRESENT:	Francis M. Wikstrom, Chair, Trystan B. Smith, Terrie T. McIntosh, Barbara L. Townsend, Jonathan O. Hafen, Francis J. Carney, Honorable John L. Baxter, Honorable Kate Toomey, Professor Lincoln Davies, Honorable James T. Blanch
TELEPHONE:	Honorable Lyle R. Anderson, Honorable Derek Pullan, David W. Scofield, Lori Woffinden
STAFF:	Tim Shea, Sammi Anderson, Diane Abegglen
EXCUSED:	Honorable Todd M. Shaughnessy, Leslie W. Slaugh, Janet H. Smith, W. Cullen Battle
GUESTS:	Nathan Whittaker, Michael Jensen

I. APPROVAL OF MINUTES.

Mr. Wikstrom entertained comments from the committee concerning the February 27, 2013 minutes. The committee unanimously approved the minutes.

II. PROPOSED AMENDMENT TO RULE 13.

Nathan Whittaker joined the committee to request a revision to Rule 13, specifically Rule 13(e). Mr. Whittaker explained that Rule 3(e) is redundant of Rule 15(a) and presents the possibility for conflict. Mr. Carney wondered if the same logic would apply to Rule 13(d). The committee generally discussed the possibility of unintended consequences that could arise from deleting Rule 13(e). Mr. Whittaker noted that a conservative alternative could leave the Rule 13(e) provision, but strike the language that sets up an inconsistent standard with Rule 15. Mr. Smith noted that the concept set forth in Rule 13(e) appeared to track the language in Rule 60(b) and may therefore intentionally contemplate a different standard than that set forth in Rule 15. Mr. Wikstrom expressed a desire to table the issue for further review and discussion. The committee agreed and the proposed revision was tabled for further review and discussion.

III. POTENTIAL CONFLICTS BETWEEN RULE 106 AND SECTION 78B-12-201(8).

Mr. Whittaker discussed the conflict between Rule 106(a) and Section 78B-12-210(8) with respect to the procedural mechanism necessary to initiate a proceeding to modify child support orders. Mr. Whittaker took the committee through the legislative history on 78B-12- 210(8), showing what appears to be a clear legislative intent to use the words "move" and "motion", as opposed to the "petition" required under Rule 106. Mr. Whittaker explained that the earlier version of subsection 210(8) had used the word "petition", but was later changed by SB 182 to "move." Mr. Whittaker explained that the Office of Recovery Services ("ORS") frequently uses a "motion" to modify child support orders. The Board of District Court judges has also made available a form for these types of motions. The form contains some procedural safeguards, but not all. For example, it is not clear whether motions have to be served under Rule 4 or, since it is unclear what type of motion it is, what is the time period and evidentiary standard for responding. Mr. Wikstrom discussed the history behind changing Rule 106 to require "petitions". Mr. Wikstrom recalled that practitioners and parties were using Orders to Show Cause to modify child support orders and the judges did not appreciate this practice. Mr. Shea recalled that the primary use of the word "petition" was to ensure that the pleading was served under Rule 4.

Mr. Smith asked the judges on the committee whether responses to a Petition and Motion are treated the same conceptually. Judge Anderson opined that motions may push the tribunal away from evidence and toward a ruling on a legal motion as a matter of law. Judge Pullan expressed concerns as to service. Whatever the mechanism is called, it must be served under Rule 4. Judge Pullan explained that a great deal of time often passes between the divorce decree and these types of petitions/motions. Judge Pullan and Judge Anderson also both opined that these requests typically require courts to receive evidence. The committee agreed that personal service should be required. Previously, the evidence had shown that attorneys routinely withdraw once the divorce decree and initial final child support order are entered. Without an attorney of record, there is a real risk that service will not be effected by mail on the party at their last known address.

Mr. Wikstrom inquired whether changing Rule 106 to make it clear that Rule 4 service is required would be sufficient. Mr. Whittaker agreed, but stated that further guidance is required as to a time frame for responding, *e.g.*, 20 days for Petition or 10 days for Motion? Rule 7 or Rule 12 time limits? Mr. Whittaker opined that further guidance should also be given as to what type of motion it is, *e.g.*, Rule 12(b)(6) motion on the pleadings or a Rule 56 evidence-based motion? Plus, Mr. Whittaker stated, there must be some evidentiary disclosures required before a motion is heard so that parties can see whether there is any contested issue of fact. Judge Pullan opined that a motion to modify child support order should be a Rule 56-type motion because at least some evidentiary basis must be shown to grant the relief.

Mr. Wikstrom stated that we may need a procedure for addressing these statutory requests in the rules and suggested a subcommittee to work with Mr.

Whittaker to propose a procedure and some language addressing these issues. Mr. Leslie Slaugh was suggested as a person with the requisite expertise to chair the subcommittee. Judge Pullan suggested that the family law section may be interested in making a proposal and Mr. Carney suggested that ORS should be consulted as well. The committee will revisit the issue with the subcommittee next month.

IV. EFFECT OF DISCOVERY RULE CHANGES ON PROBATE PRACTICE.

Mr. Michael Jensen joined the committee to discuss the effects of the rule changes on probate practice. Mr. Jensen explained that the new discovery rules do not always make sense considering the procedure by which most probate matters are resolved. Mr. Jensen explained that probate matters are typically initiated by a Petition of some sort, which is generally filed with all the supporting documents attached, rendering the Initial Disclosures unnecessary, at least with respect to the initiating party. Probate cases are heard on a screening calendar on a weekly basis where the court asks if anyone objects to the particular relief sought. If a person enters any kind of objection, the matter is sent to a mediation and then to an assigning judge if necessary. The unique procedures raise several potential questions as to the practical applicability of the new discovery rules to probate practice. For example, it is often difficult to ascertain which of the parties is the plaintiff or the defendant, and whether initial disclosures are really necessary where the list of potential beneficiaries is typically established and provided in the initial petition. Moreover, the tier system may not be particularly helpful because most proceedings don't involve a dollar amount.

The committee and Mr. Jensen acknowledged that perhaps it would be appropriate to have a separate rule to define the procedures in this unique area of the law, either a separate practice-specific disclosure requirement or a completely separate series of rules. Mr. Wikstrom encouraged Mr. Jensen to look at the practice-specific disclosures in Rule 26.1 and 26.2, and to consult with his probate colleagues to see whether a proposal can be made as to a practice-specific disclosure or a new set of rules. Mr. Wikstrom explained that the proposal should be consistent with the philosophy of the rule changes, but that, otherwise, the committee will review and consider a proposal that is grounded in the probate practitioners' needs.

V. EFFECT OF DISCOVERY AND DISCLOSURE CHANGES ON FAMILY LAW PRACTICE.

Judge Pullan provided some feedback regarding the discovery rule changes from the family law practitioners. Judge Pullan explained that many family law practitioners take retainers on a staged basis, *eg*, a retainer to file a complaint, a new retainer to start discovery, etc. The waiting period allows parties to come up with the money to pursue their actions. The new system requiring immediate disclosures and significant case preparation up front has made the prior model employed by some family law practitioners untenable. Judge Pullan said he is

merely passing along the complaint, not making a recommendation for change. The committee discussed how this reported issue comports with the goal of the new rules to reduce discovery, speed up resolution of cases and increase access to the judicial system. The committee tabled the topic for future discussion after sufficient time for practitioners and parties to adjust to the changes required by the new rules.

VI. PROPOSED REVISIONS TO RULE 7.

Mr. Shea led a discussion concerning proposed revisions to Rule 7. The proposed changes include incorporating the expedited procedure for resolving discovery disputes, a request from the Supreme Court to consider finality of judgments, a suggestion from Judge Anderson that a motion to amend a judgment be served, a suggestion from Judge Shaughnessy to require a combined motion and memorandum, and a proposal by Judge West to eliminate the filing of proposed orders with a motion.

The committee agreed with Judge West's proposal to eliminate proposed orders at the time of filing motions. There was a motion to eliminate the sentence found on line 27, p. 20 of the materials. Mr. Hafen suggested making the language mandatory, as opposed to eliminating the sentence. Judge Pullan expressed a preference to indicate that a party "shall not" attach a proposed order to its initial memorandum. This substitute motion was seconded and approved by the committee.

The committee generally agreed with Judge Shaughnessy's proposal that Rule 7 should be changed to require a combined motion and memorandum. The committee also discussed reworking this entire section to set forth the core requirements of a motion and supporting memorandum. Mr. Hafen agreed to work with Mr. Shea to re-work the motion and memorandum requirements for presentation to the committee at the next meeting.

The Supreme Court issued an opinion in *Central Utah Water Conservancy District v. King*, which directed the committee to re-examine the issue of the finality of judgments. Mr. Shea observed that the Court has essentially asked the committee to review Rule 7(f)(2) and address the possibility of endlessly hanging appeals because no final judgment has been entered. There was much discussion regarding which change(s) should be imposed and which committee, this one or the Appellate Rules committee, should spearhead that revision(s). The committee tabled the issue for further review of the case and further consideration and discussion at the next meeting.

The committee discussed the incorporation of the expedited procedures for discovery motions in Rule 7. Mr. Shea emphasized that the procedure is not a prerequisite to a motion. The expedited procedure replaces the motion. Time frames are shorter. Written materials are shorter. Decisions should issue promptly. This is the full extent of the parties' relief. No further motion is allowed. The

committee discussed imposing a time requirement by which the motion would have to be decided. The committee decided to leave the wording that judges should decide the motions "promptly," as opposed to within a certain number of days. There was a motion to approve the revisions as proposed at ll. 87-123, p. 22-24 of the materials. The motion was seconded and approved by the full committee.

Remaining issues as to Rule 7 will be discussed at the next meeting.

VII. ADJOURNMENT.

The meeting adjourned at 6:03 pm. The next meeting will be held on April 24, 2013 at 4:00 p.m. at the Administrative Office of the Courts.