UTAH SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Meeting Minutes – September 26, 2018

PRESENT: Chair Jonathan Hafen, Judge Andrew Stone, Trevor Lee, Larissa Lee, Judge Laura Scott, James Hunnicutt, Rod Andreason, Susan Vogel, Barbara Townsend, Michael Petrogeorge, Leslie Slaugh, Lincoln Davies, Justin Toth, Dawn Hautamaki (remote), Judge Amber Mettler, Trystan Smith, Judge James Blanch, Judge Laura Scott, Katy Strand (Recorder)

EXCUSED: Heather Sneddon, Judge Kent Holmberg, Judge Clay Stucki, Lauren DiFrancesco, Paul Stancil, Timothy Pack

STAFF: Nancy Sylvester

GUESTS: Patricia Owen, Commissioner Michelle Blomquist

---

(1) WELCOME, PRINCIPLES OF RULE MAKING, APPROVAL OF MINUTES.

Jonathan Hafen introduced new members (Larissa Lee and Trevor Lee) to the committee and had the members introduce themselves. Mr. Hafen then turned to a recent letter from the Supreme Court, in which the Court wrote about its concerns regarding the impact of the rules on unrepresented parties. The Court also requested that advisory committee notes remain up to date and only be used if necessary to clarify the rule or provide historical context. Mr. Hafen proposed taking half an hour each meeting to address these notes. Trystan Smith suggested dividing up rules by topic and taking a few at a time. Mr. Hafen and Nancy Sylvester plan to divide up the rules and assign them to subcommittees. Judge James Blanch stated that most of the notes were well thought out, and that perhaps cases should not be referenced as they can become obsolete. Judge Andrew Stone questioned if these notes will have to be put out for comment. Ms. Sylvester stated that she believed they should be sent out with notice of the changes.

Mr. Hafen asked for amendments to the June minutes. Susan Vogel wanted to clarify the section on follow-up calls to the Self-Help Center regarding garnishments by adding the words "from employers." Rod Andreason moved to approve the minutes as amended, Justin Toth seconded, and the motion passed unanimously. Michael Petrogeorge moved to adopt the principles of rulemaking amendments that were made in response to the Supreme Court's letter, and Mr. Andreason seconded. The motion passed unanimously.

(2) RULES 5 AND 109. REVIEW OF COMMENTS.

Ms. Sylvester introduced the comments to Rule 109. Commissioner Blomquist addressed the comments asking for more specificity on relocation. She said an original draft included more detail on relocation but had been edited down because the Rule creates an automatic order and more detail comes when the specific case is before the court on that question. The second comment questioned

when the injunction should be effective upon the respondent, implying a potential need for clarification. There was also a comment regarding a requirement for Rule 4 service. There was concern that the injunction could be in place when the petition has not been served on the respondent. Mr. Slaugh pointed out that the committee had considered this and decided against requiring Rule 4 Service. A further question was raised, asking if necessities of life included attorney fees. Commissioner Blombquist reported that the subcommittee wouldn't hold this to be a necessity of life, there are other rules relating to fees. The term "necessities of life" is not defined in the Rule. The committee did not believe this required clarification. Additional questions regarded using a minor child's image on social media and fundraising sites, which Commissioner Blomquist thought was overly specific for an automatic order. The committee agreed it was too specific.

Additional questions addressed the mechanisms for implementing the order. Mr. Slaugh had concerns with paragraph (a) stating the injunction "automatically enters," which implies that the order is not signed. Ms. Sylvester stated that this might also answer questions about when the injunction goes into effect. Judge Stone stated that the system needs to recognize that when a petition is filed, the system should produce a signed order. Trystan Smith questioned how other standing orders generally work. Mr. Slaugh stated that standing orders are often not placed in the file but exist for the court. Mr. Slaugh proposed amending the Rule at line 3 to state, "the court will enter." He believed this implied a signature would be required but would allow the court to determine the mechanics of the process. Mr. Slaugh stated that he believed this will be done through the system, but that the court must do something to create this order. Ms. Vogel continued to express concern that protective orders would stop the injunction from being delivered in a timely manner.

Another comment questioned whether this Rule created substantive law, rather than procedural. Mr. Slaugh believed this to be procedural, because the judge can change it. Lincoln Davies argued that this rule, in particular lines 9 and 10, could be substantive, although the rest might not be. He thought all of (b)(1) might be substantive. Mr. Slaugh argued it had substantive effect, but because a judge may overrule it, the Rule becomes procedural. Mr. Andreason did not believe that this was substantive. Judge Blanch questioned if keeping the status quo would be procedural. Ms. Blomquist pointed out that Colorado had evaluated this rule for constitutionality, and it was acceptable because it was a temporary order. Mr. Davies thought that the constitutionality was a separate question from the substantive nature of the rule. Judge Stone was also concerned that this may be substantive, and was not sure this is a fixable problem. He questioned if the issue should be sent to the Legislature. Mr. Davies agreed. Mr. Slaugh questioned if the Legislature could dictate an order; he believed they could only create an automatic stay. This would be less clear to pro se litigants. He does believe that, although it has a substantive effect, the rules are allowed to state how an order shall be entered. Mr. Davies stated that if a judge must sign it, then the substantive nature may be more acceptable. Judge Stone stated the Legislature could not require a standing order, but it could permit the standard order. He stated that he believed that this proposed rule changes the landscape of what a divorce means, and that automating this limits the discretion of the judges, and feels like legislating. He proposed the committee should study this question and evaluate where other states have done. Mr. Hunnicutt stated that California has an automatic stay that was done by a statute. Commissioner Blomquist stated that many people are expressing a need for this. Mr. Davies said he believes this would be acceptable if it were an order issued by a court, but not if it was a rule. Judge Stone proposed this be placed on the list of questions for the Legislature. Mr. Slaugh proposed adding a line, stating "unless the court otherwise orders." Mr.

Davies stated that he believes this would fix the problem because the judges would still be making the decision. Ms. Vogel questioned if a request would change it. Judge Stone continued to be concerned and requested that the court's Liaison Committee look into the question. Judge Stone mentioned that the Court could make this decision, so long as we mention the concern. Mr. Hafen asked if it was possible to create a rule to recommend while mentioning the concerns.

The same commenter also requested a clawback provision. Mr. Slaugh said he was uncomfortable adding a clawback to one small portion, because there is an inherent ability of the Court to remedy and the committee cannot limit this, so no list should be created.

Several comments asked to include house payments in the injunction. Mr. Hunnicutt said that any rent or mortgage would be substantive. The committee declined to add this topic.

The committee discussed editing (b)(2) to add "through electronic means," but Mr. Hunnicutt and Mr. Hafen stated that this would be overly specific, so it was amended to say "through electronic or other means." Mr. Hunnicutt also said that the comments on domestic violence were not relevant because protective orders are still available and would control over this order. Judge Stone proposed that paragraph (d) state, "as entered by the court" rather than "signed." Mr. Hafen thought this might also address the question of substantive language.

There were also comments that were not particularly relevant to the Rule itself, but expressed concerns about high-conflict divorces.

Ms. Vogel moved to recommend the Rule as it reads below but note the substantive versus procedural concerns to the Court. Mr. Anderason seconded. The motion passed unanimously.

Rule 109. Automatic injunction in certain domestic relations cases.

(a) Actions in which an automatic domestic injunction enters. Unless the court orders otherwise, in an action for divorce, annulment, temporary separation, custody, parent time, support, or paternity, the court will enter an injunction automatically enters when the initial petition is filed. The injunction will contains the applicable provisions of this rule.

(b) General provisions.

(b)(1) If the action concerns the division of property then neither party may transfer, encumber, conceal, or dispose of any property of either party without the written consent of the other party or an order of the court, except in the usual course of business or to provide for the necessities of life.

(b)(2) Neither party may, through electronic or other means, disturb the peace of, or harass, or intimidate the other party.

(b)(3) Neither party may commit domestic violence or abuse against the other party or a child.

(b)(4) Neither party may use the other party's name, likeness, image, or identification to obtain credit, open an account for service, or obtain a service.

(b)(5) Neither party may cancel or interfere with telephone, utility, or other services used by the other party.

(b)(6) Neither party may cancel, modify, terminate, change the beneficiary, or allow to lapse for voluntary nonpayment of premiums, any policy of health insurance, homeowner's or renter's insurance, automobile insurance, or life insurance without the written consent of the other party or pursuant to further order of the court.

(c) Provisions regarding a minor child. The following provisions apply when a minor child is a subject of the petition.

(c)(1) Neither party may engage in non-routine travel with the child without the written consent of the other party or an order of the court unless the following information has been provided to the other party:

(c)(1)(A) an itinerary of travel dates and destinations;

(c)(1)(B) how to contact the child or traveling party; and

(c)(1)(C) the name and telephone number of an available third person who will know the Child's location.

(c)(2) Neither party may do the following in the presence or hearing of the child:

(c)(2)(A) demean or disparage the other party;

(c)(2)(B) attempt to influence a child's preference regarding custody or parent time; or

(c)(2)(C) say or do anything that would tend to diminish the love and affection of the child for the other party, or involve the child in the issues of the petition.

(c)(3) Neither party may make parent time arrangements through the child.

(c)(4) When the child is under the party's care, the party has a duty to use best efforts to prevent third parties from doing what the parties are prohibited from doing under this order or the party must remove the child from those third parties.

(d) When the injunction is binding. The injunction is binding

(d)(1) on the petitioner upon filing the initial petition; and

(d)(2) on the respondent after filing of the initial petition and upon receipt of a signed copy of the injunction as entered by the court.

(e) When the injunction terminates. The injunction remains in effect until the final decree is entered, the petition is dismissed, the parties otherwise agree in a writing signed by all parties, or further order of the court.

(f) Modifying or dissolving the injunction. A party may move to modify or dissolve the injunction.

(f)(1) Prior to a responsive pleading being filed, the court shall determine a motion to modify or dissolve the injunction as expeditiously as possible. The moving party must serve the nonmoving party at least 48 hours before a hearing.

(f)(2) After a responsive pleading is filed, a motion to modify or to dissolve the injunction is governed by Rule 7 or Rule 101, as applicable.

(g) Separate conflicting order. Any separate order governing the parties or their minor children will control over conflicting provisions of this injunction.

(h) Applicability. This rule applies to all parties other than the Office of Recovery Services.

Ms. Sylvester then introduced the comments to Rule 5. The first comment was a concern regarding parties using incorrect email to serve. Ms. Sylvester explained that this was a misunderstanding of the Rule, as the email in question is provided by the party being served. The language proposed in

the comment clarified this issue. Others were concerned that this service would not be verified, and would allow for abuse. Mr. Hafen stated that verification would be unreasonable. The verification occurs when it is provided. Judge Stone believed that many of the comments were based upon a confusion between Rules 4 and 5. Ms. Vogel pointed out not all pro se litigants have or provide emails, but those who create OCAP accounts are required to provide emails. She proposed adding to the form to include a notice that the court will use the email to contact the litigant.

Additional comments requested that this Rule not reference additional rules. Mr. Petrogeorge preferred that the rules be referenced and the committee agreed.

Final comments related to a concern about the amount of email. The committee believed that this would not impact the volume of email.

Mr. Andreason moved to recommend the rule as it is written below to the Supreme Court. Trevor Lee seconded. The motion passed unanimously.

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

(a) When service is required.

(a)(1) Papers that must be served. Except as otherwise provided in these rules or as otherwise directed by the court, the following papers must be served on every party:

(a)(1)(A) a judgment;

(a)(1)(B) an order that states it must be served;

(a)(1)(C) a pleading after the original complaint;

(a)(1)(D) a paper relating to disclosure or discovery;

(a)(1)(E) a paper filed with the court other than a motion that may be heard ex parte; and

(a)(1)(F) a written notice, appearance, demand, offer of judgment, or similar paper.

(a)(2) Serving parties in default. No service is required on a party who is in default except that:

(a)(2)(A) a party in default must be served as ordered by the court;

(a)(2)(B) a party in default for any reason other than for failure to appear must be served as provided in paragraph (a)(1);

(a)(2)(C) a party in default for any reason must be served with notice of any hearing to determine the amount of damages to be entered against the defaulting party;

(a)(2)(D) a party in default for any reason must be served with notice of entry of judgment under Rule 58A(d); and

(a)(2)(E) a party in default for any reason must be served under Rule 4 with pleadings asserting new or additional claims for relief against the party.

(a)(3) Service in actions begun by seizing property. If an action is begun by seizing property and no person is or need be named as defendant, any service required before the filing of an answer, claim or appearance must be made upon the person who had custody or possession of the property when it was seized.

(b) How service is made.

(b)(1) Whom to serve. If a party is represented by an attorney, a paper served under this rule must be served upon the attorney unless the court orders service upon the party. Service must be made upon the attorney and the party if:

(b)(1)(A) an attorney has filed a Notice of Limited Appearance under Rule 75 and the papers being served relate to a matter within the scope of the Notice; or

(b)(1)(B) a final judgment has been entered in the action and more than 90 days has elapsed from the date a paper was last served on the attorney.

(b)(2) When to serve. If a hearing is scheduled 7 days or less from the date of service, a party must serve a paper related to the hearing by the method most likely to be promptly received. Otherwise, a paper that is filed with the court must be served before or on the same day that it is filed.

(b)(3) Methods of service. A paper is served under this rule by:

(b)(3)(A) except in the juvenile court, submitting it for electronic filing, or the court submitting it to the electronic filing service provider, if the person being served has an electronic filing account;

(b)(3)(B) emailing it to

(b)(3)(B)(i) the most recent email address provided by the person to the court under Rule 10(a)(3) or Rule 76, or

(b)(3)(B)(ii) to the email address on file with the Utah State Bar, if the person has agreed to accept service by email or has an electronic filing account;

(b)(3)(C) mailing it to the person's last known address;

(b)(3)(D) handing it to the person;

(b)(3)(E) leaving it at the person's office with a person in charge or, if no one is in charge, leaving it in a receptacle intended for receiving deliveries or in a conspicuous place;

(b)(3)(F) leaving it at the person's dwelling house or usual place of abode with a person of suitable age and discretion who resides there; or

(b)(3)(G) any other method agreed to in writing by the parties.

(b)(4) When service is effective. Service by mail or electronic means is complete upon sending.

(b)(5) Who serves. Unless otherwise directed by the court:

(b)(5)(A) every paper required to be served must be served by the party preparing it; and

(b)(5)(B) every paper prepared by the court will be served by the court.

(c) Serving numerous defendants. If an action involves an unusually large number of defendants, the court, upon motion or its own initiative, may order that:

(c)(1) a defendant's pleadings and replies to them do not need to be served on the other defendants;

(c)(2) any cross-claim, counterclaim avoidance or affirmative defense in a defendant's pleadings and replies to them are deemed denied or avoided by all other parties;

(c)(3) filing a defendant's pleadings and serving them on the plaintiff constitutes notice of them to all other parties; and

(c)(4) a copy of the order must be served upon the parties.

(d) Certificate of service. A paper required by this rule to be served, including electronically filed papers, must include a signed certificate of service showing the name of the document served, the date and manner of service and on whom it was served. Except in the juvenile court, this paragraph does not apply to papers required to be served under paragraph (b)(5)(B**)** when service to all parties is made under paragraph (b)(3)(A).

(e) Filing. Except as provided in Rule 7(j) and Rule 26(f), all papers after the complaint that are required to be served must be filed with the court. Parties with an electronic filing account must file a paper electronically. A party without an electronic filing account may file a paper by delivering it to the clerk of the court or to a judge of the court. Filing is complete upon the earliest of acceptance by the electronic filing system, the clerk of court or the judge.

(f) Filing an affidavit or declaration. If a person files an affidavit or declaration, the filer may:

(f)(1) electronically file the original affidavit with a notary acknowledgment as provided by Utah Code Section 46-1-16(7);

(f)(2) electronically file a scanned image of the affidavit or declaration;

(f)(3) electronically file the affidavit or declaration with a conformed signature; or

(f)(4) if the filer does not have an electronic filing account, present the original affidavit or declaration to the clerk of the court, and the clerk will electronically file a scanned image and return the original to the filer.

The filer must keep an original affidavit or declaration of anyone other than the filer safe and available for inspection upon request until the action is concluded, including any appeal or until the time in which to appeal has expired.

(3) RULE 73. ATTORNEY FEES. REVIEW OF CLERK OF COURT COMMENTS.

Ms. Sylvester introduced this history of Rule 73's amendments. The day that the rule was adopted by the Court, the clerks of the court pointed out potential issues with paragraph (f)(3). They requested clarifying language regarding filing a motion under Rule 7. Mr. Slaugh did not think this was necessary. The clerks were also concerned about the term "augment," as judges sometimes get requests for automatic augmentation. The clerks suggested "amended" or "modified" instead. Mr. Slaugh noted that the language clearly does not permit automatic augmentation. Mr. Hunnicutt stated that "augment" is a term that is still used as a term of art. The committee elected not to make the change. Judge Stone pointed out that line 53 includes the word "shall," and "may" would be better to avoid any automatic increases. Mr. Andreason added that the clerk or the court could authorize the fees, which would be problematic as well. Judge Mettler stated that "the court shall" appears many times. Ms. Vogel noted that the other "shalls" were about the fees in the Rule, and "may" would be better there. Katy Strand believed that the "shall" was to allow the request, not to approve the request. Judge Stone was concerned that the "shall" avoided the clerks being given discretion, or adding to the judges' work load. He said (f)(5) also changed his view on the word "shall." The committee elected not to change this rule.

(4) RULE 58A AND UTAH RULE OF APPELLATE PROCEDURE 4.

Judge Mettler reported that the Finality Subcommittee had met several times and was proposing changes to these two rules to match the federal rules. Mr. Slaugh explained that he understood Rule 58A differently from the subcommittee's view, and that the judgement was final only if the judge extended the time to appeal attorney fees. That is different from the federal rules. Judge Mettler stated this was the same as the federal rule, although there are no cases to support this understanding. The Appellate Rules Committee will meet next week to discuss this rule as well. Ms. Vogel was concerned about the use of the word "ordinarily." Mr. Andreason agreed this was problematic. He proposed combining the two sentences in which that word appeared. Ms. Vogel agreed. Ms. Sylvester was concerned about the length of the sentence. She proposed making it into two sentences. Judge Blanch pointed out that the point of this change was to reverse the cases, so perhaps the committee should reference these cases in the advisory notes. Mr. Andreason agreed this would be required. Mr. Slaugh proposed keeping the Rule parallel to the federal rule. Ms. Vogel then said she was concerned about the word "acting" on line 55. Judge Mettler believed it was referencing "by extending the time for appeal" which would be redundant. Mr. Andreason continued to support the combination of the sentences as be believed it was more clear and specific, and could remove the "by acting" addressing Ms. Vogel's concern. Judge Mettler supported this change. Ms. Sylvester proposed a joint advisory note on both rules. Mr. Hafen proposed that the

advisory note could be created after the comment period. Ms. Sylvester said she thought the committee note needed to be included in the comment period and could be approved by acclamation over email. Larissa Lee moved to approve the Rule as follows, with the understanding that the note will be created and circulated via email. Mr. Toth seconded. The motion passed unanimously.

Rule 58A. Entry of judgment; abstract of judgment.

(a) Separate document required. Every judgment and amended judgment must be set out in a separate document ordinarily titled "Judgment"—or, as appropriate, "Decree."

(b) Separate document not required. A separate document is not required for an order disposing of a post-judgment motion:

(b)(1) for judgment under Rule 50(b);
(b)(2) to amend or make additional findings under Rule 52(b);
(b)(3) for a new trial, or to alter or amend the judgment, under Rule 59;
(b)(4) for relief under Rule 60; or
(b)(5) for attorney fees under Rule 73.

(c) Preparing a judgment.

(c)(1) Preparing and serving a proposed judgment. The prevailing party or a party directed by the court must prepare and serve on the other parties a proposed judgment for review and approval as to form. The proposed judgment shall be served within 14 days after the jury verdict or after the court's decision. If the prevailing party or party directed by the court fails to timely serve a proposed judgment, any other party may prepare a proposed judgment and serve it on the other parties for review and approval as to form.

(c)(2) Effect of approval as to form. A party's approval as to form of a proposed judgment certifies that the proposed judgment accurately reflects the verdict or the court's decision. Approval as to form does not waive objections to the substance of the judgment.

(c)(3) Objecting to a proposed judgment. A party may object to the form of the proposed judgment by filing an objection within 7 days after the judgment is served.

(c)(4) Filing proposed judgment. The party preparing a proposed judgment must file it:

(c)(4)(A) after all other parties have approved the form of the judgment; (The party preparing the proposed judgment must indicate the means by which approval was received: in person; by telephone; by signature; by email; etc.)

(c)(4)(B) after the time to object to the form of the judgment has expired; (The party preparing the proposed judgment must also file a certificate of service of the proposed judgment.) or

(c)(4)(C) within 7 days after a party has objected to the form of the judgment. (The party preparing the proposed judgment may also file a response to the objection.)

(d) Judge's signature; judgment filed with the clerk. Except as provided in paragraph (h) and Rule 55(b)(1) all judgments must be signed by the judge and filed with the clerk. The clerk must promptly record all judgments in the docket.

(e) Time of entry of judgment.

(e)(1) If a separate document is not required, a judgment is complete and is entered when it is signed by the judge and recorded in the docket.

(e)(2) If a separate document is required, a judgment is complete and is entered at the earlier of these events:

(e)(2)(A) the judgment is set out in a separate document signed by the judge and recorded in the docket; or

(e)(2)(B) 150 days have run from the clerk recording the decision, however designated, that provides the basis for the entry of judgment.

(f) Award of costs or attorney fees. The entry of judgment is not delayed, nor is the time for appeal extended, by a claim for costs or motion for attorney fees unless the court, upon motion or its own initiative, extends the time for appeal pursuant to Rule 4(b)(1)(F) of the Utah Rules of Appellate Procedure before a notice of appeal has been filed and becomes effective.

(g) Notice of judgment. The party preparing the judgment shall promptly serve a copy of the signed judgment on the other parties in the manner provided in Rule 5 and promptly file proof of service with the court. Except as provided in Rule of Appellate Procedure 4(g), the time for filing a notice of appeal is not affected by this requirement.

(h) Judgment after death of a party. If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be entered.

(i) Judgment by confession. If a judgment by confession is authorized by statute, the party seeking the judgment must file with the clerk a statement, verified by the defendant, as follows:

(i)(1) If the judgment is for money due or to become due, the statement must concisely state the claim and that the specified sum is due or to become due.

(i)(2) If the judgment is for the purpose of securing the plaintiff against a contingent liability, the statement must state concisely the claim and that the specified sum does not exceed the liability.

(i)(3) The statement must authorize the entry of judgment for the specified sum.

The clerk must sign the judgment for the specified sum.

(j) Abstract of judgment. The clerk may abstract a judgment by a signed writing under seal of the court that:

(j)(1) identifies the court, the case name, the case number, the judge or clerk that signed the judgment, the date the judgment was signed, and the date the judgment was recorded in the registry of actions and the registry of judgments;

(j)(2) states whether the time for appeal has passed and whether an appeal has been filed;

(j)(3) states whether the judgment has been stayed and when the stay will expire; and

(j)(4) if the language of the judgment is known to the clerk, quotes verbatim the operative language of the judgment or attaches a copy of the judgment.

(5) ADJOURNMENT.

The remaining matters were deferred, and the committee adjourned at 6:00 pm. The next meeting will be held on October 24, 2018 at 5:00 pm, with the location to be determined.