Agenda

Advisory Committee on Rules of Appellate Procedure

June 7, 2018

12:00 p.m. to 2:00 p.m.

Scott M. Matheson Courthouse

450 State Street

Judicial Council Room, Administrative Office of Courts, Suite N31

ACTION: Welcome, and approval of May 10, 2018 minutes	Tab 1	Paul C. Burke, Chairman
ACTION: URAP 23B and 2013 Supreme Court Order. Discuss need to amend rule 23B and adopt Supreme Court Standing Order	Tab 2	Clark Sabey
DISCUSSION: Rule 22(d) Timing	Tab 3	Alan S. Mouritsen
DISCUSSION: Inquiry by Utah Supreme Court regarding URAP 4(b)(1)(f) and URCP 58A(f) as interpreted by McQuarrie v. McQuarrie, 2017	Tab 4	Paul C. Burke
ACTION: URAP 50 Response; reply; statement of amicus curiae.	Tab 5	Clark Sabey

Committee Webpage: https://www.utcourts.gov/utc/appellate-procedure/

Meeting schedule:

September 6, 2018

October 4, 2018

November 1, 2018

December 6, 2018

Tab 1

MINUTES

SUPREME COURT'S ADVISORY COMMITTEE ON THE
UTAH RULES OF APPELLATE PROCEDURE

Administrative Office of the Courts
450 South State Street
Salt Lake City, Utah 84114

Judicial Council Room
Thursday, May 10, 2018
12:00 p.m. to 1:30 p.m.

PRESENT	**EXCUSED**
Christopher Ballard	Lisa Collins
Troy Booher	Mary Westby
Paul Burke- Chair	
Cathy Dupont-Staff	
R. Shawn Gunnarson	
Alan Mouritsen	
Judge Gregory Orme	
Judge Jill Pohlman	
Adam Pace – Recording Secretary	
Rodney Parker	
Bridget Romano	
Clark Sabey	
Lori Seppi	
Ann Marie Taliaferro	

1. Welcome and approval of minutes **Paul Burke**

Mr. Burke welcomed the committee to the meeting and asked Mr. Ballard, Ms. Seppi, and Ms. Taliaferro to disclose a brief summary of their practice area in accordance with Rule 11-101(4) of the Supreme Court Rules of Professional Practice. They each did so. Mr. Burke then invited a motion to approve the minutes from the January and March meetings.

Judge Pohlman moved to approve the minutes from the January and March meetings. Mr. Gunnarson seconded the motion and it passed unanimously.

2. URAP 23B and 2013 Supreme Court Order. **Clark Sabey**
Cathy Dupont

The committee deferred discussion of this item until the next meeting due to technical difficulties with the internet.

3. Reducing brief word to page ratio; briefing attorney fees. Bridget Romano
Rules 24 and 24A. Survey of mid-level Appellate Courts

Ms. Romano summarized the committee's prior discussion on this topic, which is reflected in the minutes from the January 2018 meeting. She then presented a 50-state survey summarizing her research on the word and page limits for appellate briefs in each state. Ms. Romano noted that most jurisdictions have either higher word/page limits for the state's highest court, or the same limits in both the intermediate and highest court. The exceptions are Arizona, California, Texas, Virginia, and Wisconsin, which have lower word/page limits for the state's highest court.

Ms. Romano is still concerned about reducing the word limit in the Supreme Court given the high level of briefing required there and the difficulty in getting permission to file an over-length brief.

Mr. Booher proposed reducing the word limits as suggested, but changing the rule to allow parties to have the additional words they are allowed under the current rule, without the need for a court order, if the signing attorney certifies that the additional words are necessary. This will allow parties the flexibility to use the additional words when they are needed without increasing the court's administrative burden in having to respond to an increased number of motions for permission to file an over-length brief. Mr. Booher suggested trying this approach for a year to see if it has the desired effect of reducing the overall word count of appellate briefs.

Ms. Seppi asked what the policing mechanism will be for this approach and if parties will have to defend their decision to use the extra words. Mr. Ballard said that he didn't think an appellee would waste its words arguing about the appellant's decision to use additional words. Mr. Burke agreed that parties are unlikely to make those arguments.

Mr. Burke asked if the proposed word reduction creates due process concerns for criminal defense appeals. Ms. Seppi said she is very concerned about this because a criminal appellant must brief all issues in order to preserve them. She is worried that a limited word count will interfere with her ability to do that. She is also concerned about the frequency with which appeals are dismissed without reaching the merits due to inadequate briefing. She thinks that reducing the word limits will exacerbate this problem. She also thinks that reducing the word limits will make briefing more difficult and more expensive for the attorneys.

Ms. Romano noted that several other states allow more words for criminal appeals than for civil appeals. She asked if the committee should follow this approach. Mr. Booher said he thinks that the appellate courts will not see the difference in briefs that they are hoping to see by reducing the word limits because a poorly written brief will still be poorly written at 12,500 words.

Ms. Romano asked Judge Orme how often briefing in criminal appeals is longer than in civil cases. Judge Orme said that he doesn't agree that criminal briefing is necessarily longer. He has seen plenty of complicated civil cases which need extra briefing. In his experience, the vast

majority of briefs in both criminal and civil appeals are well-below the word limit. He doesn't share the concern of some his colleagues about word limits—he feels that he can police it himself by skimming over redundancy.

Judge Orme suggested that the changes that have recently been made to Rule 24 to streamline briefing may address the Supreme Court's concerns about briefs being too long. He would join in Mr. Booher's recommendation, or in an alternate recommendation to simply wait a year and see if the new Rule 24 solves the perceived problem. Judge Pohlman agreed that the current word limits are not a problem for her in the court of appeals.

Ms. Romano asked if Judge Orme's suggestion would be well-received by the Supreme Court. Mr. Sabey said it would be better received if Judge Orme were there in person to deliver it, and said that if the committee is going to recommend against reducing the word limits, it needs to explain why.

Mr. Booher commented that the reason why briefs are redundant is because judges read them differently, and start at different places. With the changes to Rule 24, practitioners can now be assured that judges will begin by reading the introduction. This should reduce the need for repetition in the brief.

Mr. Booher asked if the Supreme Court's objective in reducing word limits is to encourage more streamlining in briefs or to address a perceived mismatch between word and page limits. Mr. Sabey said that he thinks it is a little bit of both.

Mr. Parker agreed with Mr. Booher's comment about redundancy in briefs resulting from practitioners writing different sections of the briefs to be freestanding. He also said that appellate courts include "malpractice alerts" in their opinions, commenting that the lawyers failed to include an argument in their brief that would have persuaded the court if it had been made. These comments lead lawyers to feel that they need to argue every issue in their brief, or else they will be criticized for not doing so. He is not comfortable with reducing the word limit, and does not think that it is necessary. He thinks it should be left alone for now.

Mr. Burke agreed that he notices the "malpractice alerts" in appellate opinions, but he doesn't remember ever seeing the court compliment attorneys in the opinion for shorter, more effective briefing. Ms. Seppi commented that in criminal cases, the malpractice alert becomes the basis for the ineffective assistance of counsel claim.

Mr. Burke summarized the general consensus reached by the committee as follows: the committee will report to the Supreme Court that it recommends, for the time being, that any changes in word limits be deferred, and that when taken up again it be considered in conjunction with rules about granting over-length briefs. The committee recommends review and study over the next year of the size and subject matters of submitted briefs, so that in a year the committee can make an informed recommendation to the Supreme Court about how to proceed based on facts, feedback, and perception. The committee also recommends monitoring whether the recent changes to Rule 24 have had the intended effect of streamlining briefs and making them shorter. The committee also recommends educating practitioners on how to write better, shorter briefs.

Ms. Taliaferro moved to adopt the recommendation as summarized by Mr. Burke. Mr. Parker seconded the motion and it passed unanimously.

4. Rule of Professional Practice 11-401 and URAP 38b **Cathy Dupont**

Ms. Dupont summarized the committee's prior discussion on this topic, which is reflected in the minutes from the March 2018 meeting. She reported that Judge Jones is the chair of the new committee that has been formed to recommend names to be included on the appellate roster, and the criteria for appellate attorneys to be included on the roster. The committee will be meeting the first week of June to select its other members. It should be up and running soon. Ms. Dupont is coordinating with staff for the juvenile and criminal rules committees. They are going to work together to propose a uniform approach and language across all of the rules to address this new procedure for appointing appellate counsel. Ms. Dupont recommended delaying further action on Appellate Rule 38B until these other pieces are in place. The committee agreed with this approach.

5. URAP 25, 46, 49, 50, and 51 regarding writs of certiorari **Clark Sabey**

Mr. Sabey introduced proposed changes to Rules 25, 46, 49, 50, and 51 regarding writs of certiorari.

Rule 25

There were no objections to the conforming amendment to Rule 25.

Rule 46

Mr. Burke said he did not like adding the sentence in subpart (a): "[t]he possibility of an error in the Court of Appeals' or other tribunal's decision, without more, ordinarily will not justify review." The committee discussed this language further and generally agreed that it should be included, and that it accurately reflects the court's practice when evaluating certiorari petitions.

The committee discussed and agreed that

- subpart (a)(1) should be amended to say: "The petition presents a question regarding the proper interpretation of, or ambiguity in, a constitutional or statutory provision that is likely to affect future cases;"
- subpart (a)(2) should be amended to say: "The petition presents a legal question of first impression in Utah that is likely to recur in future cases;" and
- subpart (a)(3) should be amended to say "The petition provides an opportunity to resolve confusion or inconsistency in a legal standard set forth in a decision of the Court of Appeals, or in a prior decision of the Supreme Court, that is likely to affect future cases."

Mr. Mouritsen moved to recommend adoption of the proposed changes to Rule 46 with these changes. Ms. Romano seconded the motion and it passed unanimously.

Rule 49

Mr. Mouritsen suggested replacing the term "pleading" where it is used in subpart (c) with "filing." Mr. Parker suggested using the term "memorandum" instead of "pleading" in both places. The committee agreed with that suggestion.

Mr. Booher suggested deleting the reference to "nature of the case" in subpart (a)(8), because that term is no longer used in Rule 24.

Mr. Gunnarson moved to adopt the proposed changes to Rule 49 with these two changes. Judge Pohlman seconded the motion and it passed unanimously.

Rule 50

Ms. Romano moved to approve the suggested changes to subparts (a) through (d), and to table further discussion and final adoption of Rule 50 pending discussion of subpart (e). Ms. Romano incorporated into her motion, for now, Judge Orme's suggestion to change the title of Rule 50 to "Response; reply; amicus curiae." Mr. Mouritsen seconded the motion and it passed unanimously.

6. Rule 22(d) Timing. **Alan S. Mouritsen**

The committee deferred discussion of this item until the next meeting.

7. Adjourn

The meeting was adjourned at 1:30 p.m. The next meeting will be held on June 7, 2018.

Tab 2

IN THE SUPREME COURT OF THE STATE OF UTAH

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REVISED ORDER PERTAINING TO RULE 23B

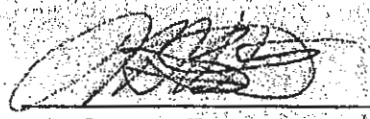
Pursuant to Rule 2 of the Rules of Appellate Procedure, the provisions of Rule 23B of the Rules of Appellate Procedure are modified in the following manner. Specifically, in the interest of expediting the final disposition of criminal appeals, the requirements that a motion for remand under Rule 23B of the Utah Rules of Appellate Procedure be filed "prior to the filing of the appellant's brief" and that any response be filed within 20 days are suspended. Instead, a motion to remand pursuant to Rule 23B may be filed according to the existing provisions of that rule, or it may be filed at the same time as Appellant's opening brief. If the motion is filed prior to the submission of Appellant's brief, the appellate court will notify Appellee whether its response should be filed prior to the submission of its brief or at the same time as its brief. If a response is to be filed prior to briefing, it shall be filed within 20 days of the date of the court's notice unless another deadline is specified by court. If the motion is filed at the same time as Appellant's opening brief, Appellee's response to the motion shall be filed at the same time as Appellee's brief. The Appellate Court may elect to adjudicate the motion separately or in conjunction with its treatment of the merits of other issues presented on appeal. Until further notice, this revised order shall apply to any Rule 23B motion filed in this Court or in the Court of Appeals on or after October 1, 2013.

The Rule 23B motion and response, as well as any extra-record attachments thereto, shall be filed separately from the briefs. If the motion is adjudicated in conjunction with the briefing, the briefs may reference the arguments in the motion and response, and the motion and response may reference the fact statement and arguments in the briefs. Affidavits submitted in support of Rule 23B motions are not part of the record on appeal and will be considered only to determine whether the grant or deny the motion.

If a remand is granted after briefing has been completed, Appellant's supplemental brief shall be filed within 30 days after the trial court's written findings and conclusions are filed with this Court. Appellee's supplemental response shall be filed within thirty days of service of Appellant's supplemental brief. Appellant's supplemental reply, if any, shall be filed within twenty days of service of Appellee's response. The argument presented by any supplemental pleadings shall be limited to the issues addressed in the Rule 23B remand. Appellant's supplemental brief and Appellee's supplemental response shall be limited to fifteen (15) pages. Appellant's supplemental reply shall be limited to seven (7) pages. All supplemental pleadings shall comply with Supreme Court Standing Order No. 8, with rule 27 of the Rules of Appellate Procedure as to size, margins, typeface and contents of cover, and with rule 26(b) as to the number of copies filed and served. They also may include a separate table of authorities limited to the citations provided by the supplemental analysis. Compliance with other formatting and content provisions of the appellate rules, including the binding and color cover requirements described by subparts (c) and (d) of rule 27, will not be required.

FOR THE COURT:

9.25.13
Date



Matthew B. Durrant
Chief Justice

Rule 23B. Motion to remand for findings necessary to determination of ineffective assistance of counsel claim.

(a) Grounds for motion; time. A party to an appeal in a criminal case may move the court to remand the case to the trial court for entry of findings of fact and conclusions of law, necessary for the appellate court's determination of a claim of ineffective assistance of counsel. The motion ~~shall~~ will be available only upon a nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective.

The motion ~~shall~~ must be filed ~~prior to~~ before or at the time of the filing of the appellant's brief. Upon a showing of good cause, the court may permit a motion to be filed after the filing of the appellant's brief. ~~In no event shall the court permit a motion to be filed after oral argument. Nothing in this rule shall prohibit the court from remanding the case under this rule~~ After the appeal is taken under advisement, a remand pursuant to this rule is available only on the court's own motion ~~at any time~~ and only if the claim has been raised and the motion would have been available to a party.

(b) Content of motion~~; response; reply~~. The content of the motion ~~shall~~ must conform to the requirements of Rule 23. The motion ~~shall~~ must include or be accompanied by affidavits alleging facts not fully appearing in the record on appeal that show the claimed deficient performance of the attorney. The affidavits ~~shall~~ must also allege facts that show the claimed prejudice suffered by the appellant as a result of the claimed deficient performance. ~~The motion shall also be accompanied by a proposed order or remand that identifies the ineffectiveness claims and specifies the factual issues relevant to each such claim to be addressed on remand.~~

~~A response shall be filed within 20 days after the motion is filed. The response shall include a proposed order of remand that identifies the ineffectiveness claims and specifies the factual issues relevant to each such claim to be addressed by the trial court in the event remand is granted, unless the responding party accepts that proposed by the moving party. Any reply shall be filed within 10 days after the response is served.~~

(c) Order~~s~~ of the court; response; reply. If a motion under this rule is filed at the same time as appellant's principal brief, any response and reply must be filed within the time for the filing of the parties' respective briefs on the merits, unless otherwise specified by the court. If a motion is filed before appellant's brief, the

court may elect to defer ruling on the motion or decide the motion prior to briefing.
(c)(1) If the court defers the motion, the time for filing any response or reply will be the same as for a motion filed at the same time as appellant's brief, unless otherwise specified by the court.
(c)(2) If the court elects to decide the motion prior to briefing, it will issue a notice that any response must be filed within 30 days of the notice or within such other time as the court may specify. Any reply in support of the motion must be filed within 20 days after the response is served or within such other time as the court may specify.
(c)(3) If the requirements of parts (a) and (b) of this rule have been met, the court may order that the case be temporarily remanded to the trial court ~~for the purpose of entry of~~ to enter findings of fact and conclusions of law relevant to a claim of ineffective assistance of counsel. The order of remand ~~shall~~ will identify the ineffectiveness claims and specify the factual issues relevant to each such claim to be addressed by the trial court. The order ~~shall~~ will also direct the trial court to complete the proceedings on remand within 90 days of issuance of the order of remand, absent a finding by the trial court of good cause for a delay of reasonable length.
(c)(4) If it appears to the appellate court that the appellant's attorney of record on the appeal faces a conflict of interest upon remand, the court ~~shall~~ will direct that counsel withdraw and that new counsel for the appellant be appointed or retained.

(d) Effect on appeal. ~~Oral argument and the deadlines for briefs shall be vacated upon the filing of a motion to remand under this rule.~~ If a motion is filed at the same time as appellant's brief, ~~Other procedural steps required by these rules shall~~ the briefing schedule will not be stayed ~~by a motion for remand,~~ unless ~~a stay is~~ ordered by the court ~~upon stipulation or motion of the parties or upon the court's motion~~. If a motion is filed before appellant's brief, the briefing schedule will be automatically stayed until the court issues notice of whether it will defer the motion or decide the motion before briefing.

(e) Proceedings before the trial court. Upon remand the trial court ~~shall~~ will promptly conduct hearings and take evidence as necessary to enter the findings of fact and conclusions of law necessary to determine the claim of ineffective assistance of counsel. Both the defendant and the State are entitled to present evidence. Any claims of ineffectiveness not identified in the order of remand ~~shall~~ will not be considered by the trial court on remand, unless the trial court determines that the interests of justice or judicial efficiency require consideration

of issues not specifically identified in the order of remand. Evidentiary hearings ~~shall~~ will be conducted without a jury and as soon as practicable after remand. The burden of proving a fact ~~shall~~ will be upon the proponent of the fact. The standard of proof ~~shall~~ will be a preponderance of the evidence. The trial court ~~shall~~ will enter written findings of fact and conclusions of law concerning the claimed deficient performance by counsel and the claimed prejudice suffered by appellant as a result, in accordance with the order of remand. Proceedings on remand ~~shall~~ must be completed within 90 days of entry of the order of remand, unless the trial court finds good cause for a delay of reasonable length.

(f) Preparation and transmittal of the record. At the conclusion of all proceedings before the trial court, the clerk of the trial court ~~and the court reporter shall~~ will immediately prepare the record of the supplemental proceedings as required by these rules. If the record of the original proceedings before the trial court has been transmitted to the appellate court, the clerk of the trial court ~~shall~~ will immediately transmit the record of the supplemental proceedings upon preparation of the supplemental record. If the record of the original proceedings before the trial court has not been transmitted to the appellate court, the clerk of the court ~~shall~~ will transmit the record of the supplemental proceedings upon the preparation of the entire record.

(g) Appellate court determination. ~~Upon receipt of the record from the trial court, the clerk of the court shall notify the parties of the new schedule for briefing or oral argument under these rules.~~ Errors claimed to have been made during the trial court proceedings conducted pursuant to this rule are reviewable under the same standards as the review of errors in other appeals. The findings of fact and conclusions of law entered pursuant to this rule are reviewable under the same standards as the review of findings of fact in other appeals.

Tab 3

Rule 22. Computation and enlargement of time.

(a) Computation of time. In computing any period of time prescribed by these rules, by an order of the 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 shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period extends until the end of the next day 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 under subsection (d), is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes days designated as holidays by the state or federal governments.

(b) Enlargement of time.

(b)(1) Motions for an enlargement of time for filing briefs beyond the time permitted by stipulation of the parties under Rule 26(a) are not favored.

(b)(2) The court for good cause shown may upon motion extend the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of time. This rule does not authorize the court to extend the jurisdictional deadlines specified by any of the rules listed in Rule 2. For the purpose of this rule, good cause includes, but is not limited to, the complexity of the case on appeal, engagement in other litigation, and extreme hardship to counsel.

(b)(3) A motion for an enlargement of time shall be filed prior to the expiration of the time for which the enlargement is sought.

(b)(4) A motion for enlargement of time shall state:

(b)(4)(A) with particularity the good cause for granting the motion;

(b)(4)(B) whether the movant has previously been granted an enlargement of time and, if so, the number and duration of such enlargements;

(b)(4)(C) when the time will expire for doing the act for which the enlargement of time is sought; and

(b)(4)(D) the date on which the act for which the enlargement of time is sought will be completed.

(b)(5)(A) If the good cause relied upon is engagement in other litigation, the motion shall:

(b)(5)(A)(i) identify such litigation by caption, number and court;

(b)(5)(A)(ii) describe the action of the court in the other litigation on a motion for continuance;

(b)(5)(A)(iii) state the reasons why the other litigation should take precedence over the subject appeal;

(b)(5)(A)(iv) state the reasons why associated counsel cannot prepare the brief for timely filing or relieve the movant in the other litigation; and

(b)(5)(A)(v) identify any other relevant circumstances.

(b)(5)(B) If the good cause relied upon is the complexity of the appeal, the movant shall state the reasons why the appeal is so complex that an adequate brief cannot reasonably be prepared by the due date.

(b)(5)(C) If the good cause relied upon is extreme hardship to counsel, the movant shall state in detail the nature of the hardship.

(b)(5)(D) All facts supporting good cause shall be stated with specificity. Generalities, such as "the motion is not for the purpose of delay" or "counsel is engaged in other litigation," are insufficient.

(c) Ex parte motion. Except as to enlargements of time for filing and service of briefs under Rule 26(a), a party may file one ex parte motion for enlargement of time not to exceed 14 days if no enlargement of time has been previously granted, if the time has not already expired for doing the act for which the enlargement is sought, and if the motion otherwise complies with the requirements and limitations of paragraph (b) of this rule.

(d) Additional time after service by mail. Whenever a party is required or permitted to do an act within a prescribed period after service of a paper and the paper is served by mail, 3 days shall be added to the prescribed period.

Effective date: November 14, 2016

Tab 4

Rule 4. Appeal as of right: when taken.

(a) Appeal from final judgment and order. In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) Time for appeal extended by certain motions.

(b)(1) If a party timely files in the trial court any of the following, the time for all parties to appeal from the judgment runs from the entry of the dispositive order:

(b)(1)(A) A motion for judgment under Rule 50(b) of the Utah Rules of Civil Procedure;

(b)(1)(B) A motion to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted, under Rule 52(b) of the Utah Rules of Civil Procedure;

(b)(1)(C) A motion to alter or amend the judgment under Rule 59 of the Utah Rules of Civil Procedure;

(b)(1)(D) A motion for a new trial under Rule 59 of the Utah Rules of Civil Procedure;

(b)(1)(E) A motion for relief under Rule 60(b) of the Utah Rules of Civil Procedure if the motion is filed no later than 28 days after the judgment is entered;

(b)(1)(F) A motion or claim for attorney fees under Rule 73 of the Utah Rules of Civil Procedure; or

(b)(1)(G) A motion for a new trial under Rule 24 of the Utah Rules of Criminal Procedure.

(b)(2) A notice of appeal filed after announcement or entry of judgment, but before entry of an order disposing of any motion listed in paragraph (b), shall be treated as filed after entry of the order and on the day thereof, except that such a notice of appeal is effective to appeal only from the underlying judgment. To appeal from a final order disposing of any motion listed in paragraph (b), a party must file a notice of appeal or an amended notice of appeal within the prescribed time measured from the entry of the order.

(c) Filing prior to entry of judgment or order. A notice of appeal filed after the announcement of a decision, judgment, or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(d) Additional or cross-appeal. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraphs (a) and (b) of this rule, whichever period last expires.

(e) Motion for extension of time.

(e)(1) The trial court, upon a showing of good cause, may extend the time for filing a notice of appeal upon motion filed before the expiration of the time prescribed by paragraphs (a) and (b) of this rule. Responses to such motions for an extension of time are disfavored and the court may rule at any time after the filing of the motion. No extension shall exceed 30 days beyond the prescribed time or 14 days beyond the date of entry of the order granting the motion, whichever occurs later.

(e)(2) The trial court, upon a showing of good cause or excusable neglect, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraphs (a) and (b) of this rule. The court may rule at any time after the filing of the motion. That a movant did not file a notice of appeal to which paragraph (c) would apply is not relevant to the determination of good cause or excusable neglect. No extension shall exceed 30 days beyond the prescribed time or 14 days beyond the date of entry of the order granting the motion, whichever occurs later.

(f) Motion to reinstate period for filing a direct appeal in criminal cases. Upon a showing that a criminal defendant was deprived of the right to appeal, the trial court shall reinstate the thirty-day period for filing a direct appeal. A defendant seeking such reinstatement shall file a written motion in the sentencing court and serve the prosecuting entity. If the defendant is not represented and is indigent, the court shall appoint counsel. The prosecutor shall have 30 days after service of the motion to file a written response. If the prosecutor opposes the motion, the trial court shall set a hearing at which the parties may present evidence. If the trial court finds by a preponderance of the evidence that the defendant has demonstrated that the defendant was deprived of the right to appeal, it shall enter an order reinstating the time for appeal. The defendant's notice of appeal must be filed with the clerk of the trial court within 30 days after the date of entry of the order.

(g) Motion to reinstate period for filing a direct appeal in civil cases.

(g)(1) The trial court shall reinstate the thirty-day period for filing a direct appeal if the trial court finds by a preponderance of the evidence that:

(g)(1)(A) The party seeking to appeal lacked actual notice of the entry of judgment at a time that would have allowed the party to file a timely motion under paragraph (e) of this rule;

(g)(1)(B) The party seeking to appeal exercised reasonable diligence in monitoring the proceedings; and

(g)(1)(C) The party, if any, responsible for serving the judgment under Rule 58A(d) of the Utah Rules of Civil Procedure did not promptly serve a copy of the signed judgment on the party seeking to appeal.

(g)(2) A party seeking such reinstatement shall file a written motion in the trial court within one year from the entry of judgment. The party shall comply with Rule 7 of the Utah Rules of Civil Procedure and shall serve each of the parties in accordance with Rule 5 of the Utah Rules of Civil Procedure.

(g)(3) If the trial court enters an order reinstating the time for filing a direct appeal, a notice of appeal must be filed within 30 days after the date of entry of the order.

Advisory Committee Note

Paragraph (f) was adopted to implement the holding and procedure outlined in Manning v. State, 2005 UT 61, 122 P.3d 628.

Effective November 1, 2016.

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 attorney fees. A motion or claim for attorney fees does not affect the finality of a judgment for any purpose, but under Rule of Appellate Procedure 4, the time in which to file the notice of appeal runs from the disposition of the motion or claim.

(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.

Advisory Committee Note

Effective November 1, 2016.

THE UTAH COURT OF APPEALS

MELVIN MCQUARRIE,
Appellant,
v.
JANETTE COLLEDGE MCQUARRIE,
Appellee.

Per Curiam Opinion
No. 20170720-CA
Filed November 16, 2017

Third District Court, Salt Lake Department
The Honorable Robert P. Faust
No. 084904419

James A. McIntyre and Richard R. Golden, Attorneys for Appellant

Douglas B. Thayer, Andrew V. Wright, and Cole L. Bingham, Attorneys for Appellee

Before JUDGES GREGORY K. ORME, MICHELE M. CHRISTIANSEN, and DAVID N. MORTENSEN.

PER CURIAM:

¶1 Melvin McQuarrie (Husband) appeals the August 9, 2017 order dismissing the parties' respective petitions to modify their divorce decree. This matter is before the court on Janette Colledge McQuarrie's (Wife) motion for summary disposition based upon lack of jurisdiction due to the absence of a final, appealable order. Specifically, she argues that the August 9, 2017 order is not final because it awarded Wife attorney fees in an amount to be determined at a later date.

¶2 This court does not have jurisdiction to consider an appeal unless it is taken from a final judgment or order. *See Loffredo v. Holt*, 2001 UT 97, ¶¶ 10, 15, 37 P.3d 1070. An order is

final only if it disposes of the case as to all parties and "finally dispose[s] of the subject-matter of the litigation on the merits of the case." *Bradbury v. Valencia*, 2000 UT 50, ¶ 9, 5 P.3d 649 (citation and internal quotation marks omitted); *see also* Utah R. Civ. P. 54(b).

¶3 Wife argues that the August 9, 2017 order is not final because the issue of attorney fees has not fully been resolved. *See ProMax Dev. Corp. v. Raile*, 2000 UT 4, ¶ 15, 998 P.2d. 254 ("[A] trial court must determine the amount of attorney fees awardable to a party before the judgment becomes final for the purposes of an appeal under Utah Rule of Appellate Procedure 3."). Husband responds that *ProMax* was effectively overruled by a recent amendment to rule 58A of the Utah Rules of Civil Procedure. Specifically, rule 58A(f) states: "A motion or claim for attorney fees does not affect the finality of a judgment for any purpose, but under Rule of Appellate Procedure 4, the time in which to file the notice of appeal runs from the disposition of the motion or claim." Utah R. Civ. P. 58A(f). The advisory committee note to the rule states that the changes to the rule "are part of a coordinated effort to . . . change the effect of a motion for attorney fees on the appealability of a judgment. The combined amendments of this rule and Rule of Appellate Procedure 4 effectively overturn *ProMax Development Corp. v. Raile*, 2000 UT 4, 998 P.2d 254." *Id.* R. 58A advisory committee note.

¶4 Contrary to Husband's arguments, the changes in rule 58A did not affect the appealability of the order in this case. Rule 4(b)(1)(F) of the Utah Rules of Appellate Procedure states: "If a party timely files in the trial court any of the following, the time for all the parties to appeal from the judgment runs from the entry of the dispositive order: . . . a motion or claim for attorney fees under rule 73 of the Utah Rules of Civil Procedure." Utah R. App. P. 4(b)(1)(F). Rule 73, like rule 4(b), is addressed to post-judgment motions. *See* Utah R. Civ. P. 73(b)(1) ("The motion must: . . . specify the judgment and the statute, rule, contract, or other basis entitling the party to the award . . . ."). Under subsection 4(b)(2), if a notice of appeal is filed after entry of a

judgment but before entry of an order resolving the post-judgment motion for attorney fees, then the notice of appeal will relate forward to the date the motion for attorney fees is resolved. *See* Utah Rule App. P. 4(b)(2). However, rule 4(b)(1)(F) is not applicable to this case because no post-judgment motion for attorney fees was ever filed. In its August 9, 2017 order, the district court awarded attorney fees in an amount to be determined at a later date. Thus, the order, by its own terms, contemplated additional actions by the parties in order to resolve issues still in dispute. Accordingly, because rule 4(b)(1)(F) applies only to post-judgment motions for attorney fees and no such motion was filed in this case, traditional case law concerning the finality of judgment for purposes of appeal still applies.

¶5 Rule 58A(f) of the Utah Rules of Civil Procedure does not alter this court's analysis. While rule 58A(f) does not reference rule 73 of the Utah Rules of Civil Procedure, it mirrors the language of rule 4(b)(1)(F) of the Utah Rules of Appellate Procedure in stating that a "motion or claim for attorney fees" does not affect the finality of a judgment. *Compare* Utah R. Civ. P. 58A(f) *with* Utah R. App. P. 4(b)(1)(F). Rule 58A(f) expressly references rule 4 of the Rules of Appellate Procedure for determining the "time in which to file the notice of appeal." Utah R. Civ. P. 58A(f). As noted above, rule 4(b)(1)(F) sets forth the time to file a notice of appeal only when a post-judgment motion for attorney fees has been filed. Thus, it is clear that rule 58A(f) is meant to address those situations in which a party files a motion for attorney fees *after* entry of a judgment that otherwise would be final for purposes of appeal.[1] It does not

1. The advisory committee note to rule 58A also supports this conclusion. The note specifically states that the rule, in connection with changes to rule 4 of the Utah Rules of Appellate Procedure, is meant to "change the effect of *a motion for attorney fees* on the appealability of a judgment." Utah R. Civ. P. 58A advisory committee note (emphasis added). The advisory (continued...)

affect the appealability issue in this case in which the district court's order was never final because it contemplated additional actions by the parties.[2]

¶6 Accordingly, because the August 9, 2017 order was not final for purposes of appeal this court lacks jurisdiction to hear the appeal. When this court lacks jurisdiction, it must dismiss the appeal. *See Loffredo*, 2001 UT 97, ¶ 11. The appeal is, therefore, dismissed without prejudice to the filing of a timely appeal after the district court enters a final, appealable order.

(...continued)
committee note makes no mention of district court orders that themselves contain language awarding attorney fees but that defer determination of the amount.

2. We address the rules only as they relate to the issue of finality for purposes of appeal. We do not address whether the new rules impact the issue of finality as it relates to the enforceability of a judgment.

Tab 5

Rule 50. ~~Brief in opposition~~ Response; reply ~~brief~~; ~~brief of~~ amicus curiae.

~~(f)~~ (e) ~~Brief of~~ Amicus curiae. A brief of an amicus curiae concerning a petition for certiorari may be filed only after a petition is granted. ~~be filed only by leave of the Supreme Court granted on motion or at the request of the Supreme Court. The motion for leave shall be accompanied by a proposed amicus brief, not to exceed 20 pages, excluding the subject index, the table of authorities, any verbatim quotations required by Rule 49(a)(7), and the appendix. The proposed amicus brief shall comply with Rule 27, and, as applicable, Rule 49. The number of copies of the proposed amicus brief submitted to the Supreme Court shall be the same as dictated by Rule 48(f). A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. The motion for leave shall be filed on or before the date of the filing of the timely petition or response of the party whose position the amicus curiae will support, unless the Supreme Court for cause shown otherwise orders. Parties to the proceeding in the Court of Appeals may indicate their support for, or opposition to, the motion. Any response of a party to a motion for leave shall be filed within seven days of service of the motion. If leave is granted, the proposed amicus brief will be accepted as filed and, unless the order granting leave otherwise indicates, amicus curiae also will be permitted to submit a brief on the merits, provided it is submitted in compliance with the briefing schedule of the party the amicus curiae supports. Denial of a motion for leave to file brief of an amicus curiae concerning a petition for certiorari shall not preclude a subsequent amicus motion relating to the merits after a grant of certiorari~~ All motions for leave to file a brief of an amicus curiae on the merits after a grant of certiorari are governed by Rule 25.