

**UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE**

Meeting Minutes March 28, 2018

PRESENT: Leslie Slauch (Chair Pro Tem), Judge Kate Toomey, Rod Andreason, Trystan Smith, Michael Petrogeorge, Susan Vogel, Katy Strand (Recording Secretary), Barbara Townsend, James Hunnicutt, Lauren DiFrancesco, Judge Andrew Stone, Heather Sneddon, Paul Stancil, , Timothy Pack, Judge Laura Scott, Justin Toth

EXCUSED: Jonathan Hafen, Lincoln Davies, Dawn Hautamaki, Judge Clay Stucki, Judge James Blanch, Judge Kent Holmberg

GUESTS: Commissioner Michelle Blomquist, Shane Bahr, Katie Gregory

STAFF: Nancy Sylvester

(1) WELCOME, APPROVAL OF MINUTES

Leslie Slauch welcomed everyone to the meeting and requested a motion on February minutes. Judge Kate Toomey moved to approve the minutes; Susan Vogel seconded the motion. The motion carried unanimously.

(2) RULE 109. AUTOMATIC TEMPORARY DOMESTIC ORDERS. NEW.

Commissioner Blomquist reported that the Divorce Procedures Subcommittee reviewed this committee's proposed amendments and made further amendments in conformity. She said as long as there are no additional substantive (versus stylistic) changes, the subcommittee would approve them.

Susan Vogel expressed concern that the term "service" is not clear in terms of whether it falls under Rules 4 or 5. She proposed changing (d)(2) to state "on the respondent upon service, under rule 4, of the petition and summons or upon the respondent's signing of an acceptance of service or stipulation to the petition. A copy of the domestic injunction shall be served with the petition and summons served under rule 4, and referenced in any acceptance of service or stipulation." Mr. Slauch asked if this would mean any acceptance of service that does not reference the injunction would make it not binding. Judge Stone pointed out that there should be the same rule for all injunctions. Susan Vogel thought that service was important, but Judge Stone argued that notice would be proven by service, and that this would protect pro se litigants from having to pay for service.

Judge Stone proposed having the injunction go into effect upon Rule 65A notice. Commissioner Blomquist was concerned that a party should know about something before they can be held in contempt of court. Michael Petrogeorge was concerned that Rule 65A does not cover the correct parties. He proposed that the rule itself state notice of the injunction and not be tied to Rule 65A.

Susan Vogel was concerned about making sure that the parties understood what they had to do, and that notice and service may be confusing. Commissioner Blomquist proposed having a form or standing order signed by the judge which would provide notice. Judge Stone pointed out that notice does not have to be the actual document. A text stating what the injunction said would be enough. Heather Sneddon proposed requiring a copy of the rule similar to Rule 45.

Judge Toomey and Judge Stone argued that in order to hold someone in contempt there must be a hearing showing they knew of the order. Judge Toomey said notice alone would be sufficient. The law already governs what is notice. Judge Stone was concerned that there should be actual notice, not simply the fact that the rule exists, although judges will likely make decisions on a case-by-case basis. Jim Hunnicutt said in other states the injunction is in effect upon Rule 4 service. This concerned Judge Stone since, he said, people could attempt to avoid service because they know of the injunction. Heather Sneddon proposed using “actual notice of the injunction.” Judge Stone thought Rule 65A notice worked well, but that the injunction should be served with the summons and complaint. Judge Toomey and Michael Petrogeorge proposed adding a paragraph (e) so that the service would be separate from the effectiveness of the injunction. Judge Scott was concerned that there would be litigation about what notice was given; she proposed a requirement that a copy of the injunction be included for notice. Leslie Slaugh proposed that notice of the content be used in the rule. The committee was concerned about creating additional litigation based upon arguments over adequacy of notice.

Mr. Timothy Pack proposed adding a committee note. Michael Petrogeorge proposed that a committee note state that the most effective way to give notice of the terms is by supplying a copy of the injunction. Judge Scott questioned why a copy of the injunction should not be given to show notice was given.

Leslie Slaugh proposed that a copy of the injunction be sent with the complaint as well as allowing the injunction to be in effect upon notice. Based upon a straw poll, the majority of the committee approved of this idea. Rod Andreason proposed that the rule state “notice of the terms of the injunction, in person, through counsel, or otherwise.”

Mr. Andreason moved to approve his proposed language in (d)(2), Barbara Townsend seconded the motion. The motion passed, with two votes dissenting.

Judge Stone pointed out that a party could serve without filing, and that there would not be an injunction then. This would then bind the respondent but not the petitioner. Michael Petrogeorge proposed changing paragraph (d)(2) to state “after filing of the petition and upon notice.” Judge Stone proposed adding “a copy of the injunction or this rule.” Lauren DiFrancesco and Heather Sneddon noted that all instances of “petition” in the rule should be modified by “initial.” Mr. Andreason moved to approve paragraphs (e) and (d). James Hunnicutt seconded. The motion passed.

Commissioner Blomquist mentioned that ORS was concerned that they would be required to serve this kind of notice, too, so the subcommittee proposed adding “this rule applies to all parties other than the Office of Recovery Services.”

Timothy Pack proposed a concern about paragraph (g) with respect to modifying or dissolving the injunction within a certain time frame. He said there may be no need for an additional hearing. Commissioner Blomquist pointed out that the expedited hearing provision was based upon constitutional concerns. Judge Stone requested that the rule go to the Board of District Court Judges for purposes of hearing from judges in districts without domestic commissioners on the timing of the hearing. Commissioner Blomquist proposed changing the language to copy Rule 65A. Mr. Hunnicutt questioned if a hearing should be required. Trystan Smith proposed the language, “the Court shall determine a motion to modify as expeditiously as possible.”

Ms. Vogel pointed out that the language regarding speaking about the issues of the petition may be overly broad. Judge Stone was concerned that this blocks people from talking to their teenagers about reasonable things. Judge Stone proposed eliminating (c)(2)(B) and adding “or unduly involve the child in the issues in the petition” to (c)(2)(C). Mr. Andreason was concerned that this would not practically bind them to anything. Mr. Hunnicutt expressed concern that the qualifier “unduly” would invite abuses and pointed out that domestic orders proscribed parents from involving children in divorce issues without such qualifying language. The committee was slightly in favor of keeping in the word “unduly.”

Ms. Sneddon moved to approve the rule as stated below. Ms. DiFrancesco seconded. The motion passed with Mr. Hunnicutt opposing. Mr. Hunnicutt expressed support for Rule 109, but opposed it based on the inclusion of “unduly.”

Rule 109. Automatic injunction in certain domestic relations cases.

(a) **Actions in which an automatic domestic injunction enters.** In an action for divorce, annulment, temporary separation, custody, parent time, support, or paternity, an injunction automatically enters when the initial petition is filed. The injunction 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 disturb the peace of the other party or harass, annoy, or bother 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 unduly 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 notice of the terms of the injunction in person, through counsel, or otherwise.

(e) **Copy of the injunction or this rule.** A copy of the injunction or this rule shall be served on the respondent and all joined parties with the initial petition.

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

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

(g)(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.

(g)(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.

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

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

(3) RULES 101 AND 105 AND SB 25.

Ms. Sylvester explained that the Legislature had reduced the divorce waiting period from 90 to 30 days in SB 25. This affected Rules 101 and 105. Mr. Andreason moved to amend the rules to reflect the changes below. Ms. Vogel seconded. The motion passed unanimously

Rule 105. Shortening ~~90~~ 30 day waiting period in domestic matters.

A motion for a hearing less than ~~90~~ 30 days from the date the petition was filed shall be accompanied by an affidavit setting forth the date on which the petition for divorce was filed and the facts constituting extraordinary circumstances.

Rule 101. Motion practice before court commissioners.

(a) Written motion required. An application to a court commissioner for an order must be by motion which, unless made during a hearing, must be made in accordance with this rule. A motion must be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought. Any evidence necessary to support the moving party's position must be presented by way of one or more affidavits or declarations or other admissible evidence. The moving party may also file a supporting memorandum.

(b) Time to file and serve. The moving party must file the motion and any supporting papers with the clerk of the court and obtain a hearing date and time. The moving party must serve the responding party with the motion and supporting papers, together with notice of the hearing at least 28 days before the hearing. If service is more than 90 days after the date of entry of the most recent appealable order, service may not be made through counsel.

(c) Response. Any other party may file a response, consisting of any responsive memorandum, affidavit(s) or declaration(s). The response must be served on the moving party at least 14 days before the hearing.

(d) Reply. The moving party may file a reply, consisting of any reply memorandum, affidavit(s) or declaration(s). The reply must be served on the responding party at least 7 days before the hearing. The contents of the reply must be limited to rebuttal of new matters raised in the response to the motion.

(e) Counter motion. Responding to a motion is not sufficient to grant relief to the responding party. A responding party may request affirmative relief by way of a counter motion. A counter motion need not be limited to the subject matter of the original motion. All of the provisions of this rule apply to counter motions except that a counter motion must be served with the response. Any response to the counter motion must be served no later than the reply to the motion. Any reply to the response to the counter motion must be served at least 3 business days before the hearing. The reply must be served in a manner that will cause the reply to be actually received by the party responding to the counter motion (i.e. hand-delivery, fax or other electronic delivery as allowed by rule or agreed by the parties) at least 3 business days before the hearing. A separate notice of hearing on counter motions is not required.

(f) Necessary documentation. Motions and responses regarding temporary orders concerning alimony, child support, division of debts, possession or disposition of assets, or litigation expenses, must be accompanied by verified financial declarations with documentary income verification attached as exhibits, unless financial declarations and documentation are already in the court's file and remain current. Attachments for motions and responses regarding child support and child custody must also include a child support worksheet.

(g) No other papers. No moving or responding papers other than those specified in this rule are permitted.

(h) Exhibits; objection to failure to attach.

(h)(1) Except as provided in paragraph (h)(3) of this rule, any documents such as tax returns, bank statements, receipts, photographs, correspondence, calendars, medical records, forms, or photographs must be supplied to the court as exhibits to one or more affidavits (as appropriate) establishing the necessary foundational requirements. Copies of court papers such as decrees, orders, minute entries, motions, or affidavits, already in the court's case file, may not be filed as exhibits. Court papers from cases other than that before the court, such as protective orders, prior divorce decrees, criminal orders, information or dockets, and juvenile court orders (to the extent the law does not prohibit their filing), may be submitted as exhibits.

(h)(2) If papers or exhibits referred to in a motion or necessary to support the moving party's position are not served with the motion, the responding party may file and serve an objection to the defect with the response. If papers or exhibits referred to in the response or necessary to support the responding party's position are not served with the response, the moving party may file and serve an objection to the defect with the reply. The defect must be cured within 2 business days after notice of the defect or at least 3 business days before the hearing, whichever is earlier.

(h)(3) Voluminous exhibits which cannot conveniently be examined in court may not be filed as exhibits, but the contents of such documents may be presented in the form of a summary, chart or calculation under Rule 1006 of the Utah Rules of Evidence. Unless they have been previously supplied through discovery or otherwise and are readily identifiable, copies of any such voluminous documents must be supplied to the other parties at the time of the filing of the summary, chart or calculation. The originals or duplicates of the documents must be available at the hearing for examination by the parties and the commissioner. Collections of documents, such as bank statements, checks, receipts, medical records, photographs, e-mails, calendars and journal entries, that collectively exceed ten pages in length must be presented in summary form. Individual documents with specific legal significance, such as tax returns, appraisals, financial statements and reports prepared by an accountant, wills, trust documents, contracts, or settlement agreements must be submitted in their entirety.

(i) Length. Initial and responding memoranda may not exceed 10 pages of argument without leave of the court. Reply memoranda may not exceed 5 pages of argument without leave of the court. The total number of pages submitted to the court by each party may not exceed 25 pages, including affidavits, attachments and summaries, but excluding financial declarations and income verification. The court commissioner may permit the party to file an over-length memorandum upon ex parte application and showing of good cause.

(j) Late filings; sanctions. If a party files or serves papers beyond the time required in this rule, the court commissioner may hold or continue the hearing, reject the papers, impose costs and attorney fees caused by the failure and by the continuance, and impose other sanctions as appropriate.

(k) Limit on order to show cause. An application to the court for an order to show cause may be made only for enforcement of an existing order or for sanctions for violating an existing order. An application for an order to show cause must be supported by affidavit or other evidence sufficient to show cause to believe a party has violated a court order.

(l) Hearings.

(1)(1) The court commissioner may not hold a hearing on a motion for temporary orders before the deadline for an appearance by the respondent under Rule 12.

(1)(2) Unless the court commissioner specifically requires otherwise, when the statement of a person is set forth in an affidavit, declaration or other document accepted by the commissioner, that person need not be present at the hearing. The statements of any person not set forth in an affidavit, declaration or other acceptable document may not be presented by proffer unless the person is present at the hearing and the commissioner finds that fairness requires its admission.

(m) Motions to judge. The following motions must be to the judge to whom the case is assigned: motion for alternative service; motion to waive ~~90~~30-day waiting period; motion to waive divorce education class; motion for leave to withdraw after a case has been certified as ready for trial; and motions in limine. A court may provide that other motions be considered by the judge.

(4) RULE 4. STANDARDS FOR ELECTRONIC ACCEPTANCE OF SERVICE: ASSIGNMENT OF SUBCOMMITTEE.

Mr. Hafen appointed Justin Toth as chair of the subcommittee on electronic acceptance of service. The Board of District Court judges had requested that there be some standards created for electronic acceptance of service. The subcommittee will meet with the providers separately to discuss the technology capabilities. Judge Stone reported that the judges are concerned about knowing that the correct person is accepting service. Susan Vogel had concerns about process servers mimicking court notices. Susan Vogel, Judge Scott and Lauren DiFrancesco volunteered for the subcommittee.

(5) RULE 26(A)(5). PRETRIAL DISCLOSURES.

Mr. Slaugh reported that Judge Holmberg proposed adding objections to witnesses in lines 108 and 109 of Rule 26. Mr. Andreason believed that this was left out accidentally. Judge Stone expressed concerns that you cannot waive objections if you do not know what witnesses are going to say. Mr. Hunnicutt stated the reason for the rule was an objection to the appearance of certain witnesses in one of his cases before Judge Holmberg. Judge Stone proposed waiting until the committee heard from Judge Holmberg on the proposed change.

(6) ADJOURNMENT

The meeting adjourned at 6 p.m. The next meeting will be held on April 25, 2018 at 4 p.m.