

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

Summary Minutes – April 27, 2022

**DUE TO THE COVID-19 PANDEMIC AND PUBLIC HEALTH EMERGENCY
THIS MEETING WAS CONDUCTED ELECTRONICALLY VIA WEBEX**

Committee members	Present	Excused	Guests/Staff Present
Robert Adler		X	Stacy Haacke, Staff
Rod N. Andreason	X		Crystal Powell, Recording Secretary
Judge James T. Blanch		X	Keri Sargent
Lauren DiFrancesco, Chair	X		Kelly Miles
Judge Kent Holmberg		X	Cameron Sabin
James Hunnicutt		X	Steve Dixon
Judge Linda Jones		X	Jacqueline Carlton
Trevor Lee	X		Chris Williams
Ash McMurray	X		
Judge Amber M. Mettler		X	
Kim Neville		X	
Timothy Pack		X	
Loni Page	X		
Bryan Pattison	X		
James Peterson		X	
Judge Laura Scott	X		
Leslie W. Slaugh	X		
Paul Stancil		X	
Judge Clay Stucki	X		
Judge Andrew H. Stone	X		
Justin T. Toth	X		
Susan Vogel	X		
Tonya Wright	X		

(1) INTRODUCTIONS

The meeting started at 4:04 p.m. after forming a quorum. Ms. Lauren DiFrancesco welcomed the Committee and guests to the meeting. Ms. DiFrancesco and other Committee members

recognized and honored Mr. Leslie Slauch who was attending his last meeting after over two decades of service.

(2) APPROVAL OF MINUTES

Ms. Lauren DiFrancesco asked for approval of the Minutes subject to minor amendments noted by the Minutes subcommittee. Judge Andrew Stone moved to adopt the minutes as amended. Mr. Justin Toth seconded. The minutes were unanimously approved.

(3) RULE 81 AND HB367

Ms. DiFrancesco turned the floor over to Representative Kelly Miles to present on HB367 that proposes to amend the Utah Probate Code as it relates to notice. Rep. Miles explained that he held off on running the bill and decided to approach the Committee first. He introduced fellow guests Mr. Chris Williams from Legislative Research and Counsel, Mr. Cameron Sabin, and Mr. Steve Dixon who have worked on the draft. Mr. Williams explained that the main thrust was to clarify when exactly the rules of civil procedure apply. He explained that the uniform probate code carries its own specific rules of procedure and dictates when certain actions begin and how and when interested parties receive notice. The Bill seeks to amend Utah Code 75-1-401 and 75-7-109. He further explained that after making the draft Bill public, they received feedback to reference Rule 81 (b) that dictates when the civil rules apply in probate and guardianship issues. Their main concern is that Rule 81(b) does not settle the issue the Bill was seeking to resolve—that it is unclear when exactly a probate matter is deemed as being contested.

Mr. Cameron Sabin explained that he is one of a few litigation attorneys who have raised the issue and has had the issue come up in his cases. He further explained that as background, the issue comes up because in the existing code, when you file a petition for probate with the court, the procedure is to list all the potential interested parties, then the clerk of court sends a notice to all interested parties informing them of their rights to appear, object, and speak regarding the petition. Once an objection is filed, the case is referred to mediation and the matter becomes, under the probate code, a contested matter for purposes of litigation and the rule of civil procedure apply. He explained that this problem arises where no one objects to a petition and then sometimes even a year later a potential party objects, seeking to unwind the court's order because service of the original petition was not done in accordance with Rule 4. He explained that most probate petitions are not served under Rule 4, where you do not know every potential interested party who may live all over the United States and that most petitions are filed without any contact to the potential beneficiaries. Sections 75-1-401 and 75-7-109 create confusion where only section 75-7-109 refers to the rules of civil procedure. The draft Bill proposes to remove the inconsistency by saying that it is at the point of an objection that the rules of civil procedure begin to apply.

Judge Laura Scott informed that there is a Probate Subcommittee of the Committee that has been working on revisions to the probate code to address the inconsistencies between the rules of civil procedure and the probate code. She described the work that has been done with that project and

invited Rep. Miles’ team to meet with the Subcommittee to collaborate. Judge Scott also explained that the other related issue that the subcommittee has been addressing is the expected wave of pro se guardianship and estate filings that is coming and how to make our rules more friendly for these specific types of issues; and whether to address that as part of the probate code or another code or set of rules.

Ms. Susan Vogel added that, at the Self- Help Center, it is very difficult to translate the probate law to plain language for pro se litigants. She highlighted one additional potential issue where HB320 and SB 155 (Bill of Rights for Protected People under Adult Guardianship) requires for example a 14-day notice of the time to respond but the probate code allows for a 30-day right to object. She expressed that she hopes there will be a wholistic fix to iron out the various issues with the code and that she would be happy to be a part of the subcommittee.

Mr. Slauch stated that the concept makes sense but worries that the terminology that the rules of civil procedure only apply once a party files an objection where the current wording would eliminate Rule 26.4. Mr. Sabin agreed but explained that typically when a petition is filed, no one objects and typically at the hearing the judge will ask if there is anyone that is there to object to the petition; and the judge will note if it is contested and then either sign the order or take the matter under advisement. Mr. Sabin expressed that Rule 26.4 is helpful where it requires a written description of the objection. Mr. Slauch noted that his concern is that lines 80–81 of the proposed amendment eliminate the need for a written objection. Mr. Sabin notes that the section could be amended to say once the party “raises” an objection. Rep. Miles noted a concern that a change in the law or rules that does not require service would run afoul of the Supreme Court’s due process requirement and asked Mr. Sabin to clarify if the law would indeed run afoul of due process. Mr. Sabin explained that this procedure is intended both to protect due process and memorialize what happens when someone does not file an objection.

Mr. Dixon noted that he was on the committee when Utah adopted the Uniform Probate Code in 1996 and then in 2004 when Utah adopted the Uniform Trust Code. He added that in his years of practicing he has only had about two or three contested matters and so he is hoping we are not turning over the proverbial apple cart where most cases are concerned. Mr. Sabin agreed that there is a balancing act in protecting the rights of those who do contest the issue.

Ms. Vogel asked why the process is so different in probate cases as well as what is expected to be the effect of the Guardianship Bills of Rights on the probate practice. Mr. Sabin explained that the specific statute being amended does not relate to guardianship which is governed by a different statute. He explained that from his practice knowledge, the reality is that probate is dealing with matters that are largely uncontested unlike in guardianship or conservatorship cases where a contestation of a party’s rights and interests are normally at issue and tend to follow a litigation practice.

Judge Scott noted that these concerns are issues that are important to be addressed through the subcommittee on probate rules of civil procedure. Ms. DiFrancesco thanked everyone for their input and agreed that a meeting with Judge Scott’s subcommittee is the best way forward and asked them

to include a redline memo to the subcommittee. Judge Scott suggested that they set up a call in the next week or so to ensure coordination of efforts.

(4) RULE 5

Ms. Keri Sargent raised the question of who sends out the notice under Rule 5(b)(5) where every paper prepared by the court must be served by the court. Ms. Sargent raised the specific question: If a divorce decree is submitted by an attorney through e-filing and the judge signs it; does it then become a paper prepared by the court, requiring the court to send out notice of that signed document and not simply rely on e-filing as the notice of acceptance and signature of the decree? Ms. Sargent invited the Committee to provide feedback based on their understanding and expertise.

Ms. Stacy Haacke added that the issue has been discussed by the Committee before with no changes made but wanted to raise it again if anyone has any recollection of the intent or history regarding the specific line in the rule. Ms. DiFrancesco noted that she recalls the discussion but perhaps the Rule needs to be amended if the Administrative Office of the Court is seeing ambiguity or lack of clarity. Mr. Slauch noted that it makes sense to say that any record prepared or signed by the court will be served by the court. Ms. DiFrancesco noted that her recollection was that that was proposed but the court expressed concern over the great human resource and financial burden in being able to comply with such a rule and it was eventually abandoned.

Ms. Loni Page asked whether attorneys are sending out signed orders to pro se litigants or just the proposed order that they send to the court. Ms. Vogel added an example of one case where the proposed pretrial order was sent to the pro se litigant but not the final order which the judge had changed significantly. She added that she believes that parties must receive copies of orders that they are expected to follow. She added that MyCase does take care of a lot those issues; but in the instances where it does not, the court should be sending them out. She proposed some changes to Rule 5(a)(3) (A) (Methods of service) to include MyCase as a method of electronic filing. Ms. DiFrancesco noted that it sounds like a problem that is on its way to a solution as MyCase gets fully rolled out but still may not satisfy the requirements of service and so a different solution may be needed. Ms. DiFrancesco noted that one of the reasons discussed previously for not amending the section was regarding expanding the work of the court, for example with minute entries. Ms. Vogel added that sometimes minute entries are extremely important when they are the only on-the-record orders of the court for a specific issue and the parties need to follow them.

The Committee discussed other related issues such as the effect of judgments and the jurisdictional limitation on seeking to overturn judgments, the effect on motions for alternative service, and the effects of the burden on the court vs the burden and responsibility of parties to stay informed of their cases. Ms. DiFrancesco asked that the issue be more carefully considered by a subcommittee. Ms. Vogel, Ms. Page, Ms. Sargent, and Mr. Toth will serve on the subcommittee. Ms. Haacke suggested asking whether someone from the IT department should be invited to join the subcommittee.

(5) RULES 26(a)(1)(C)

Judge Stone expressed that the issue Judge Holmberg was going to address under Rule 26 was regarding the need for a party to provide a calculation of noneconomic damages in disclosure even though everyone agrees that there is no practical way to calculate noneconomic damages. He proposed simple adding in “economic” in Rule 26(a)(1)(C). Ms. DiFrancesco added that the issue is finding the right word to qualify what sort of damages are being referred to in the Rule such as economic or special. Judge Stone explained that the jury instructions specify economic and non-economic damages, and he would suggest we use that distinction. Mr. Toth wondered whether to include whether the party is seeking noneconomic damages even if that cannot be computed. Judge Stone noted that that fact is apparent from the filing of the case as a tier three case. After a little more discussion, Judge Stone moved to add “economic” in Rule 26(a)(1)(C). Mr. Toth seconded. Mr. Pattison opposed the motion and suggested that the amendment be added in Rule 26.2 (Disclosures in personal injury actions). The motion passed by majority.

(6) Rule 30(b)(6)

Ms. DiFrancesco explained that Judge Holmberg wanted to raise whether the Committee should make any corresponding changes to Rule 30(b)(6) considering the recent changes to the federal rule 30(b)(6). The issue is on whether to obligate the parties to meet and confer under rule 30(b)(6). Judges Stone and Scott added that they don’t usually get a lot of disputes on the issue. Ms. Kim Neville, Mr. Toth, Ms. Tonya Wright, and Mr. Rod Andreason will join a subcommittee to analyze and report.

(7) ADJOURNMENT

The next meeting will be on May 25, 2022. The Chair encouraged Committee members to reach out to her and Ms. Haacke if the pipeline issues will not be ready for next Committee meeting and thanked everyone for their time and effort and wished everyone a great month. The meeting adjourned at 5:56 p.m.