

**Appellate Rules Advisory Committee Meeting Minutes
December 13, 2016**

Present: Justice Roger Burdick, Chair; Judge Dave Gratton, Judge Monty Berezcz, Steve Kenyon, Clive Strong, Christopher Pooser, Justin Curtis, Lori Fleming, and Cathy Derden. Judge Stephen Dunn joined by phone.

Custody Appeals from Magistrate Court. Currently Rule 12.1, addresses when a permissive appeal in a custody case may be taken directly to the Supreme Court, and requires a motion to both the magistrate court and the Supreme Court. Since the standard is the best interest of the child, the motions granted by the magistrate court are usually granted by the Supreme Court as they involve custody situations that need a quick resolution and finality. The Committee discussed a process where the motion would only be made to the magistrate court and if the motion was granted the appeal would be filed with the Supreme Court without another motion. The proposal reviewed was to amend Rules 11.1, 12.1 and 12.1 as follows:

Repeal Rule 11.1 and adopt a new rule with the same title.

New Rule 11.1. Appealable Judgments and Orders from the Magistrate Court.

All appeals from the magistrate court are expedited pursuant to Rule 12.2 and include the following:

- (a) As a Matter of Right. An appeal from the following final judgments, as defined in Rule 54(a), must be taken from the magistrate court to the Supreme Court:
 - (1) a final judgment that grants or denies a petition for termination of parental rights, or
 - (2) a final judgment that grants or denies a petition for adoption.
- (b) By Permission. When permission has been granted pursuant to Rule 12.1, an appeal from the following may be taken to the Supreme Court:
 - (1) a final judgment, as defined in Rule 803 of the Idaho Rules of Family Law Procedure, or an order made after final judgment, involving the custody of a minor, or
 - (2) a final judgment or order after judgment in a Child Protective Act proceeding.

Repeal Rule 12.1. and adopt a new Rule 12.1 with the same title.

New Rule 12.1. Permissive Appeal in Custody Cases.

- (a) Motion for permission to appeal. Whenever the best interest of a child would be served by an immediate appeal to the Supreme Court, any party may move the magistrate court for permission to seek an immediate appeal to the Supreme Court from the following:
 - (1) a final judgment, as defined in Rule 803 of the Idaho Rules of Family Law Procedure, or an order entered after final judgment, involving the custody of a minor, or
 - (2) a final judgment or an order entered after final judgment in a Child Protective Act proceeding.

The motion must be made within fourteen days from the date evidenced by the filing stamp of the clerk on the final judgment or order the party seeks to appeal.

The motion shall be filed, served, noticed for hearing and processed in the same manner as any other motion. If a hearing is held on the motion, it shall be expedited. Within fourteen (14) days after the time for response has expired or within fourteen (14) days of a hearing, whichever is later, the magistrate court shall enter its written order on the motion. The filing of a motion for permissive appeal shall stay the time for appealing to the district court until the magistrate court enters an order making the determination. In the event a notice of appeal to the district court is filed prior to the motion for permissive appeal, the magistrate shall retain jurisdiction to rule on the motion and, in the event the motion is granted, the appeal to the district court shall be dismissed.

(b) Notice of appeal. If the magistrate court grants permission for an immediate appeal to the Supreme Court, the notice of appeal must be physically filed with the clerk of the district court within fourteen (14) days from the date file-stamped on the order granting permission. A notice of cross appeal must be filed within seven (7) days from the notice of appeal. The appeal shall be expedited as set forth in Rule 12.2.

Amend 12.2(a) as follows:

Rule 12.2 Expedited Review for Appeals in Custody Cases Brought Pursuant to Rule 11.1 or Rule 12.1.

This rule governs procedures for an expedited review of an appeal brought as a matter of right pursuant to Rule 11.1 or a permissive appeal granted pursuant to Rule 12.1.

(a) Procedure for filing Notice of appeal.

(1) Appeal from a judgment granting or denying a petition to terminate parental rights or a petition for adoption. An appeal from any final judgment, as defined in Rule 54(a) of the Idaho Rules of Civil Procedure, granting or denying a petition for termination of parental rights or granting or denying a petition for adoption shall be made only by physically filing a notice of appeal with the clerk of the district court within fourteen (14) days from the date ~~of issuance of file~~ stamped on the judgment. A notice of cross appeal must be filed within seven (7) days from the notice of appeal.

(2) Permissive appeals involving custody of a minor or a Child Protective Act proceeding. An appeal filed pursuant to ~~an~~ order of the ~~Supreme~~ ~~magistrate court~~ granting a motion for ~~permissive appeals~~ permission to appeal pursuant to Rule 12.1 shall be made only by physically filing a notice of appeal with the clerk of the district court within fourteen (14) days from the date ~~of issuance of file~~ stamped on the order granting the appeal. A notice of cross appeal must be filed within seven (7) days from the notice of appeal.

The Committee was in favor of eliminating the need for two motions, but noted the proposal did not include a provision should the magistrate deny permission in which case the party should be able to file a motion with the Supreme Court, That additional provision will need to be added.

The Committee also discussed whether appointment of guardians should be granted expedited appeal status as they are analogous to custody. This change, if implemented, would only apply to the appointment of the guardian and not anything having to do with administration of the guardianship itself. In a recent case where the appointment for the minor was disputed, a party wished to appeal based upon that analogy and was denied a permissive appeal by the magistrate but the Supreme Court granted the appeal. Justice Burdick stated he would take a straw poll of the court and report back to the committee on this issue.

The proposed amendments do not include the provision in the current rule that allows a magistrate court to recommend an immediate appeal to the Supreme Court. The Committee did not believe the court should be involved in making this decision.

Subsection (f) of Rule 12.2 provides that if oral argument is requested that it shall be held within 120 days of the filing of the notice of appeal. Steven Kenyon noted there are a number of times when the district clerk does not get the notice of appeal to the Supreme Court right away and suggested the 120 days run from the time the notice is received by the Supreme Court. The Supreme Court Clerk's office does stamp the notice with the date it is received. The Committee was in favor of this amendment. The rule does not set a date for when the opinion must be entered and there was discussion as to whether a date should be set when the case is submitted on the briefs. The consensus was that no amendment was needed as these decisions are released sooner than when there is argument and the opinions are being released quickly after argument.

The proposed amendments were approved on the condition a provision addressing a motion to the Supreme Court should the magistrate deny permission be included with the amendment to Rule 12.2 (f). A new draft of the rules will be circulated to the Committee for a vote.

Rule 25(d)(5). Standard transcript in criminal cases. Steve Kenyon reported that, despite the language of the rule as to what is included in a standard transcript, there is still confusion, especially when the appeal is from a probation revocation or some other post-judgment proceeding. The Committee recommended that the rule specify the standard transcript is only for appeals from a conviction and not a post-judgment proceeding and that it also specify more clearly just what is included. It was noted the SAPD files an amended notice of appeal and, if there was a trial, routinely asks for the voir dire examination of the jury, the opening statements and closing arguments of counsel, and the conference on requested instructions, with the objections of the parties to the instructions, and the court's ruling on any objections, all of which are not part of the standard transcript. Thus, it was recommended that the standard transcript include these three items to avoid delay. Amendments to the rule will be circulated after the meeting for a vote.

Rule 27. Clerk's or agency's record . . . — Waiver of clerk's fee. The current rule on waiver of fees refers to I.C. § 31-2220 but that provision does not directly address the standard for a fee waiver in a criminal case. The proposal was to include in subsection (f) a reference to the statutory standard for civil cases as follows:

(f) Waiver of Clerk's Fee. The payment of the clerk's record fee as required by this rule may be waived by the district court applying the same requirements as for a civil case as set forth in ~~pursuant to~~ section 31-3220, Idaho Code, if the

appellant is not a prisoner as defined in that statute. If the appellant is a prisoner, payment of the clerk's record fee as required by this rule may be waived by the district court applying the same requirements as for a civil case as set forth in section 31-3220A, Idaho Code ~~in accordance with the local rules of the judicial district court.~~

The Committee voted in favor of recommending this amendment.

Rule 28. Preparation of Clerk's or Agency's Record - Content and Arrangement. Subsection (a) on designation of the record contains a statement that parties are encouraged to designate a clerk's or agency's record more limited than the standard record and the Committee had received a suggestion that this line be eliminated. While most parties request at least a standard record, the Committee believed this statement served a purpose and voted not to recommend deleting it.

Rule 33. Stipulation for Dismissal. The Supreme Court recently voted to amend this rule by adding that the stipulation could be filed at any time before issuance of the opinion and to require an agreement as to attorney fees. The Committee noted the amendment referred to "the Court's opinion" and wanted to be sure it was clear this also applied to an opinion of the court of appeals, voting to recommend changing this reference to "an opinion". In addition, the Committee discussed and voted in favor of recommending Rule 32(b) on voluntary motions to dismiss use the same language as to the time limitation.

Rule 33. Stipulation for dismissal. At any point before the issuance of ~~an the~~ the Court's opinion, the affected parties may stipulate for the dismissal of the appeal or petition which stipulation shall contain an agreement as to the taxing of costs and attorney fees. Any such stipulation for dismissal signed by some but not all of the parties to an appeal shall be considered and processed as a motion for dismissal under Rule 32.

Rule 32. Motions- Time for filing- briefs.

(b) Voluntary Motions to Dismiss. At any point before issuance of an opinion, any ~~Any~~ appealing party may move the court to dismiss the party's appeal with prejudice ~~at any time, before or after oral argument.~~ The court may tax costs and attorney fees as though the non-appealing party had prevailed.

Rule 34.1 Electronic briefs (optional). This rule has become outdated in some respects; for example, it refers to submitting an electronic copy of a brief on a CD. The Committee agreed it needed to be updated and proposed amendments will be circulated for a vote.

Rule 40. Taxation of costs. The Committee was advised that the Supreme Court had recently voted to amend this rule as follows.

(a) Costs to Prevailing Party. With the exception of post-conviction appeals, costs ~~Costs~~ shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the Court.