

IN THE UTAH COURT OF APPEALS

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Gail Kirk,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Petitioner and Appellee,	)	
	)	Case No. 20080104-CA
v.	)	
	)	F I L E D
Jeffery Kirk,	)	(May 1, 2008)
	)	
Respondent and Appellant.	)	<span style="border: 1px solid black; padding: 2px;">2008 UT App 157</span>

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Third District, Salt Lake Department, 044904040  
The Honorable Robert P. Faust

Attorneys: Wendy J. Lems, Midvale, for Appellant  
          Tineke Van Dijk, Midvale, for Appellee

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Before Judges Greenwood, Billings, and McHugh.

PER CURIAM:

Appellant Jeffrey Kirk (Husband) appeals (1) the district court's order denying his motion to alter or amend the decree, findings, and conclusions, or in the alternative, motion for new trial (post-judgment motion) and (2) the divorce decree. This case is before the court on cross-motions for summary disposition.

The district court entered its Findings of Fact and Conclusions of Law and Decree of Divorce on March 22, 2007. Husband attests that he mailed the pro se post-judgment motion to the trial court judge and to opposing counsel on April 5, 2007. Attorney Wendy Lems appeared on behalf of Husband on April 11, 2007. After determining that Husband's pro se post-judgment motion had not been docketed in the trial court, Lems filed a "notice of lodging" on May 15, 2007, seeking to have the post-judgment motion deemed timely filed. On January 3, 2008, the district court entered its Order on Respondent's Motion to Alter or Amend the Decree of Divorce and Findings of Fact and Conclusions of Law or Alternatively Motion for New Trial, in which the court ruled that the post-judgment motion was "not filed timely" and denied the motion on that basis. Husband filed a notice of appeal and a belated request for an extension of the time to appeal from the divorce decree.

Rule 59(b) of the Utah Rules of Civil Procedure states that "[a] motion for new trial shall be served not later than 10 days after the entry of the judgment." Utah R. Civ. P. 59(b). Similarly, rule 59(e) states that "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." Id. R. 59(e). Appellee Gail Kirk (Wife) does not dispute that Husband timely served the motion on her attorney within ten days after entry of the divorce decree. She argues, however, that Husband did not file the motion with the court within a reasonable time after service, as required by rule 5(d) of the Utah Rules of Civil Procedure. The district court docket does not indicate that the post-judgment motion was filed in the district court. However, if the motion is deemed to have been filed on May 15, 2007, through the "notice of lodging," that date was forty days after the date of service.

In Putvin v. Thompson, 878 P.2d 1178 (Utah Ct. App. 1994), we applied rule 5(d) of the Utah Rules of Civil Procedure to a rule 59 motion that was timely served. Rule 5(d) provides that papers "required to be served upon a party shall be filed with the court either before or within a reasonable time after service." Utah R. Civ. P. 5(d). In Putvin, we stated:

The Rule 59 motion may have been served prior to filing and within the 10 day period required by Rule 59. If so, filing the motion with the court some two days later is a reasonable time within the meaning of Rule 5(d), Utah Rules of Civil Procedure.

878 P.2d at 1181. In Dehm v. Dehm, 545 P.2d 525 (Utah 1976), the Utah Supreme Court concluded that a motion "filed within two days after service . . . comports with the reasonable time requirement of rule 5(d)." Id. at 529. We conclude that the forty-day period between service of Husband's motion on opposing counsel and the purported lodging of the motion does not comport with the reasonable time requirement of rule 5(d). Id.

Husband's post-judgment motion filed under rule 59 must have been filed with the district court as well as served on the opposing party. Husband's claim that his service of the motion on the district court judge by mailing also constituted filing in the district court is without merit. Filing a paper by delivering it to a judge is complete upon "acceptance" by the judge, who then shall note the filing date on the paper. See Utah R. Civ. P. 5(e) (stating that filing is "complete upon acceptance by . . . the judge" and that "[t]he filing date shall

be noted on the paper").<sup>1</sup> The district court judge did not receive Husband's post-judgment motion. Therefore, the judge did not accept it or note the time of filing on it. The motion was not docketed in the district court. Thus, even assuming that the purported lodging date was considered to be the filing date, the post-judgment motion was not filed within a reasonable time after its service on Wife's attorney.

The district court did not err in denying Husband's post-judgment motion as not timely filed, and we affirm the January 3, 2008 order. Furthermore, because the post-judgment motion was not timely filed, it did not toll the time for filing an appeal from the divorce decree under rule 4(b) of the Utah Rules of Appellate Procedure, see Utah R. App. P. 4(b), and we lack jurisdiction to consider an appeal from the March 22, 2007 Findings of Fact and Conclusions of Law and Divorce Decree. Finally, Husband's request that we rule on an untimely motion for an extension of the time to appeal from the divorce decree, which was filed in the district court, is procedurally inappropriate. Only the district court has the authority to consider a motion to extend the time for appeal under rule 4(e) of the Utah Rules of Appellate Procedure. See Utah R. App. P. 2 (precluding appellate courts from suspending or modifying rule 4(e)).

Consistent with the attorney fee award made in the divorce decree, Wife is awarded one-half of her attorney fees reasonably incurred in bringing the motion for summary disposition in an amount to be determined by the district court.

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Pamela T. Greenwood,  
Presiding Judge

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Judith M. Billings, Judge

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Carolyn B. McHugh, Judge

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1. Rule 5(e) of the Utah Rules of Civil Procedure, as it read prior to the 2008 amendment, does not support a different analysis. The former rule stated: "The filing of pleadings and other papers with the court . . . shall be made by filing them with the clerk of the court, except that the judge may accept the papers, note thereon the filing date and forthwith transmit them to the office of clerk." Utah R. Civ. P. 5(e).