STATE OF VERMONT
VERMONT SUPREME COURT
OCTOBER TERM, 2006

Order Promulgating Amendments to the Vermont Rules of Civil Procedure

Pursuant to Chapter II, Section 37, of the Vermont Constitution and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 3(a), (b)(1), of the Vermont Rules of Civil Procedure be amended to read as follows (new matter underlined):

RULE 3.1. PROCEEDINGS IN FORMA PAUPERIS

(a) **Application.** Any person who intends to bring an action or is a party to a pending action may, without fee, file an application in the court in which such action is to be brought or is pending for leave to proceed in forma pauperis. Such application shall be accompanied by an affidavit setting forth (i) the source and monthly amount of any public assistance which is received by the person or a cohabiting family member of the person, (ii) the amount of monthly income received from any other source by the person or a cohabiting family member, (iii) any nonexempt assets owned by the person and (iv) the monthly expenses necessarily incurred for the support of the person and all persons who are dependent upon that person. The application and affidavit shall be made on forms furnished by the court administrator.

(b) **Waiver of Fee and Payment of Costs.** The determination whether a person is unable to pay the filing fee or costs of service of process shall be made by the clerk of court or the clerk's designee.

(1) If the affidavit sets forth that the applicant is a recipient of any kind of welfare aid which constitutes a major portion of subsistence or is a person whose gross income is at or below 150% of the poverty income guidelines for nonfarm families established under the Community Services Act of 1974, the entire fee and costs of service shall be waived. For purposes of this paragraph, income of the applicant's cohabiting family members shall be deemed to be income of the applicant.

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Reporter's Notes–2006 Amendment

Rules 3.1(a) and (b)(1) are amended to clarify the original intent of the rule and its 1996 amendment as evidenced by prior practice. The amendment to Rule 3.1(a) makes clear that the affidavit filed with the application for

leave to proceed in forma pauperis must set forth all income from public and other sources not only of the person applying but of any family member cohabiting with that person. The amendment to Rule 3.1(b)(1) makes clear that the clerk or designee is to consider all public assistance or other income of cohabiting family members in determining the ability of the applicant to pay the filing fee or costs.

The phrase "cohabiting family members" is taken from 13 V.S.A. § 5238(b) and Administrative Order No. 4, § 5(d), which require inclusion of the income of "cohabiting family members" in calculating whether a co-payment or reimbursement for the cost of public defender services is necessary. "Family member" is not defined in the statute or administrative order, or by judicial interpretation of either. The updated U.S. Department of Health and Human Services poverty income guidelines, incorporated in A.O. No. 4 as Appendix B, set the poverty line according to family size, but do not define "family" because of the variations among the different programs that use the guidelines. DHHS, "Annual Update of Poverty Guidelines," January 24, 2006, 71 Fed. Reg. 3848-01, at 3849, 2006 WL 160155 (F.R.). In *Embree v. Balfanz*, 174 Vt. 560, 817 A.2d 6 (2002) (mem.), the Court held that brothers-in-law were not "family members" within the meaning of the abuse prevention statute, 15 V.S.A. § 1103(a). In the absence of a statutory definition of the term, the Court looked to its "plain and commonly accepted meaning," 174 Vt. at 561, 817 A.2d at 8, which was defined in Black's Law Dictionary 620 (7th ed. 1999) as "[a] group consisting of parents and their children" or "[a] group of persons connected by blood, by affinity [i.e., blood relations of a spouse], or by law." The legislative history of § 1103(a) did not suggest a contrary intention on the Legislature's part. Given the purpose of amended Rule 3.1 to assess the real resources available to an applicant for in forma pauperis status, the courts should interpret "cohabiting family members" broadly to include persons living with the applicant and related to her or him by blood, marriage or civil union, adoption, affinity, or other legal status. Cf. *State v. Morgan*, 173 Vt. 533, 789 A.2d 928 (2001) (mem.) (mother, stepfather, grandparents, uncle, treated, without discussion, as "cohabiting family members" under 13 V.S.A. § 5238(b) and A.O. No. 4, § 5(d)).

2. That Rule 55(b)(5) of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter overstruck; new matter underlined):

RULE 55. DEFAULT

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(b) **Judgment.** Judgment by default may be entered as follows:

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(5) *Affidavit Required.* Notwithstanding the foregoing, no judgment by default shall be entered until the filing of an affidavit ~~made by the plaintiff or plaintiff's attorney, on the affiant's own knowledge, setting forth facts showing that the defendant is not a person in military service as defined in Article I of the "Soldiers' and Sailors'" Civil Relief Act" of 1940, as amended, except upon order of the court in accordance with that Act~~ as required by section 201(b)(1) of the Servicemembers Civil Relief Act, 50 U.S.C. app. 521, stating whether or not the defendant is in military service and showing necessary facts to support the affidavit or, if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service. If it appears that the defendant is in military service, the court shall take appropriate action as provided in that Act.

Reporter's Notes—2006 Amendment

Rule 55(b)(5) is amended for conformity with the Servicemembers Civil Relief Act, § 201, 50 U.S.C. app. 521, enacted by Congress in 2003 to replace the Soldiers' and Sailors' Civil Relief Act of 1940. The new Act addresses procedures regarding matters such as default judgments, landlord-tenant matters, and collections. It does not specifically require that the plaintiff's affidavit be that of the plaintiff or plaintiff's attorney or be on the affiant's own knowledge. Accordingly, those elements have been omitted from the amended rule. The amended rule is consistent with current practice, permitted and encouraged by the statute, under which plaintiff's attorney at the time of consideration of the motion makes affidavit that he or she has conducted a search of the Department of Defense Internet Services web site and has obtained a current DOD certificate as to defendant's military status. This practice avoids the risk that an affidavit prepared earlier by plaintiff personally may be less persuasive or may be stale.

> The "appropriate action" provided by § 201 of the Act includes appointment of an attorney to represent the defendant, requiring a bond from plaintiff if the defendant's status cannot be determined, a 90-day stay if there may be a defense requiring defendant's presence, and setting aside a default if a returning defendant has a defense. Section 602 of the Act, 50 U.S.C. app. 582, further provides that either party or the court may apply for a certificate from the Secretary of Defense stating that defendant is or is not in military service. This certificate is deemed prima facie evidence of the facts as to service but does not substitute for the required affidavit.

3. That these rules, as amended, are prescribed and promulgated to become effective on December 11, 2006. The Reporter's Notes are advisory.

4. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this 11th day of October, 2006.

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice