

STATE OF VERMONT  
VERMONT SUPREME COURT  
JUNE TERM, 2020

**Order Promulgating Amendments to Rule 3.1 of the Vermont Rules of Civil Procedure and  
Rule 24 of the Vermont Rules of Appellate Procedure**

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

1. That Rule 3.1 of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

**RULE 3.1. PROCEEDINGS IN FORMA PAUPERIS WAIVER OF FILING FEE AND  
SERVICE COSTS**

(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~~ waiver of the filing fee and service costs. ~~Such~~ The application shall be accompanied by an affidavit setting forth (i) the source and monthly amount of any public assistance which is received by the applicant ~~person or a cohabiting family member of the person~~, (ii) the amount of monthly income received from any other source by the applicant ~~person or a cohabiting family member~~, (iii) any nonexempt assets owned by the applicant ~~person~~ and (iv) the monthly expenses necessarily incurred for the support of the applicant ~~person~~ and all persons who are dependent upon the applicant ~~that person~~. The application and affidavit shall be made on forms furnished by the court administrator.

(b) **Waiver of Filing Fee and Payment of Service Costs.** The determination whether an applicant ~~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~~ public assistance 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 filing 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.~~

(2) If the affidavit sets forth that the applicant ~~clerk or designee~~ finds that the movant is unable to pay either the entry filing fee or the costs of service without expending household income or liquid resources necessary for the maintenance of the ~~movant~~ applicant and all dependents, the entire entry filing fee or costs of service or both shall be waived.

~~(3) If the clerk or designee finds that the movant is unable to pay the costs of service without expending income or liquid resources necessary for the maintenance of the movant and all dependents, the costs of service shall be waived.~~

(4 ~~3~~) The method of service shall be in the discretion of the clerk, who shall order service to be made by the appropriate method provided in Rule 4.

~~(5 4)~~ Within seven days of issuance of the decision on the application to ~~proceed in forma pauperis~~ waive the filing fee and costs of service, the applicant may appeal the decision to the presiding judge of the court.

(c) **Costs; Reimbursement.** If the ~~indigent party~~ applicant prevails in the action, all fees or service costs paid under subdivision (b) of this rule may be taxed as costs against the opposing party in favor of the state, if the court finds that that party is able to pay such fees or costs. Before accepting a complaint for filing with the fee waived or disbursing funds for service costs, the clerk shall cause the ~~indigent party~~ applicant to sign an agreement to reimburse all fees or service costs so waived or paid, if at any time during the pendency of the action the ~~indigent party~~ applicant becomes or is discovered to be financially able to make such reimbursement according to the standards applied in determining inability to pay under subdivision (b) of this rule. The several clerks are authorized to proceed by execution or action to recover all fees or costs which defendant or plaintiff becomes liable to pay or reimburse under this paragraph, if such payment or reimbursement is not made voluntarily upon demand.

(d) **Denial of Application.** If a ~~motion to proceed in forma pauperis~~ an application to waive the filing fee and service costs is denied, the clerk shall forthwith serve a notice of ~~entry of the denial, together with notice of the right to appeal to the presiding judge within 7 days,~~ and a statement that the ~~entry~~ filing fee must be paid within thirty days or the action will be subject to dismissal. Failure to pay the ~~entry~~ filing fee within thirty days of the date the denial is entered shall be ground for dismissal of the action by the court or on motion of a party.

### **Reporter's Notes—2020 Amendment**

Rule 3.1 is amended to eliminate ambiguous, inconsistent, or obsolete language, including the time-honored but unspecific label “in forma pauperis,” and to simplify the process. Simultaneous conforming amendments are being made to V.R.A.P. 24 and V.R.P.P. 3.1.

The inclusion of the income of the applicant’s “cohabiting family members” in determining the applicant’s income is eliminated from both subdivisions (a) and (b). The phrase is ambiguous and overbroad. In the calculation of the applicant’s need for a waiver, it is not appropriate to consider the income of someone who may have no obligation to support the applicant or no stake in the outcome of the

litigation. To the extent that paragraph (b)(2), covering an applicant who is not an aid recipient, requires consideration of more than the applicant's resources, "household income" is a more specific phrase. The language in paragraph (b)(1) limiting qualifying public assistance to that constituting "a major portion of subsistence" has been eliminated because of its breadth and ambiguity and the burden of calculation that it imposes on the clerk or designee.

Because the first sentence of Rule 3.1(b) makes clear that the waiver eligibility determination is made by the clerk or designee, the remainder of the subdivision is simplified and made uniform in style, by eliminating the reference to the clerk or designee from paragraph (2) and combining that paragraph with former paragraph (3). Former paragraphs (4) and (5) are renumbered (3) and (4).

Rule 3.1(d) is amended to require the clerk to give notice to the applicant of the right to appeal the denial of an application provided by amended Rule 3.1(b)(4).

2. That Rule 24 of the Vermont Rules of Appellate Procedure be amended to read as follows (deleted matter struck through; new matter underlined)

**VI. PROCEEDINGS IN FORMA PAUPERIS WAIVER OF FILING FEE AND SERVICE COSTS**

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**RULE 24. PROCEEDINGS IN FORMA PAUPERIS WAIVER OF FILING FEE AND SERVICE COSTS**

**(a) ~~Leave to Proceed In Forma Pauperis~~ Waiver of Filing Fee and Service Costs.**

*(1) ~~Motion~~ Application in the Superior Court.*

(A) A party to an action in the superior court who desires to ~~proceed~~ waive the filing fee and service costs on appeal ~~in forma pauperis~~ must file an application in the superior court, including an affidavit that:

- (i) contains the information required by V.R.C.P 3.1(a);
- (ii) claims an entitlement to redress; and
- (iii) states the issues that the party intends to present on appeal.

(B) A party may proceed without further application to the Supreme Court and without prepayment of filing fees or service costs in either court or the giving of security, except as provided below, if the affidavit sets forth, and the superior court clerk finds, that:

(i) the applicant receives any kind of ~~welfare aid that constitutes a major part of subsistence~~ public assistance 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; or

(ii) ~~the superior clerk or the clerk's designee makes the finding provided in V.R.C.P. 3.1(b)(1)-(3)~~ the applicant is unable to pay either the filing fee or service costs without expending household income or liquid resources necessary for the maintenance of the applicant and all dependents,

(C) If the superior court clerk denies the ~~motion~~ application, ~~the applicant may appeal the denial to the presiding judge of the superior court in accordance with V.R.C.P. 3.1(b)(4).~~ The clerk must serve on the applicant notice of the denial and of the right to appeal. The notice must state the reasons for that denial in writing. The applicant may appeal the denial to the presiding judge of the superior court in accordance with V.R.C.P. 3.1(b)(5).

(2) *Prior Approval in Superior Court.* Notwithstanding the provisions above, a party who was permitted to ~~proceed in forma pauperis~~ waive the filing fee and service costs in the superior court in accordance with V.R.C.P. 3.1(b)(1)-(3), or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal ~~in forma pauperis~~ with the filing fee and service costs waived without further authorization, unless the superior court—before or after the notice of appeal is filed—certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to ~~proceed in forma pauperis~~ waive the filing fee and service costs and states in writing its reasons for the certification or finding.

(3) *Notification.* The superior court clerk must immediately notify the parties and the Supreme Court when the presiding judge of the superior court:

(iA) ~~denies a motion to proceed on appeal in forma pauperis~~ an application for waiver of the filing fee and service costs;

(iiB) certifies that the appeal is not taken in good faith; or

(iiiC) finds that the party is not otherwise entitled to ~~proceed in forma pauperis~~ waive the filing fee and service costs.

(4) *Motion in Supreme Court.*

(A) The notification provided under paragraph (a)(3) must include the nature of, and the reasons for, the action of the presiding judge and the right of the applicant to move for review by the Supreme Court.

(B) ~~A party~~ The applicant may file a motion in the Supreme Court to ~~proceed on appeal in forma pauperis~~ waive the filing fee and service costs within 30 days after service of the notice required by paragraph (a)(3). The motion must include a copy of the affidavit filed in the superior court and the court's statement of reasons for its action. If no affidavit was filed in the superior court, the ~~party~~ applicant must include the affidavit prescribed by paragraph (a)(1).

**(b) ~~Leave To Proceed In Forma Pauperis~~ Application To Waive the Filing Fee and Service Costs on Appeal or Review of a Probate Division or Administrative Agency Proceeding.** When an appeal or review of a proceeding before the Probate Division, an administrative agency, board, commission, or officer proceeds directly in the Supreme Court, a party may file in the Supreme Court ~~a motion for leave to proceed on appeal in forma pauperis~~ an application to waive the filing fee and service costs with ~~an~~ the affidavit prescribed by subparagraph (a)(1)(A).

**(c) Form of Briefs and Leave To Use Original Record.** A party allowed to ~~proceed on appeal in forma pauperis~~ waive the filing fee and service costs may file briefs, the printed case, and other papers in typewritten form, and may request that the appeal be heard on the original record without reproducing any part.

**(d) Transcript.** If an appellant is ~~proceeding in forma pauperis~~ permitted to waive the filing fee and service costs on appeal:

(1) the state will pay the costs of preparing all or part of the transcript only when required by law;

(2) the procedure of Rule 10(b) will be followed; and

(3) any other parties who ~~are proceeding in forma pauperis~~ have been permitted to waive the filing fee and service costs on appeal may receive a copy of the transcript at the state's expense only if required by law.

### **Reporter's Notes—2020 Amendment**

Rule 24 is amended for consistency with the simultaneous amendments to V.R.C.P. 3.1 and V.R.P.P. 3.1. See Reporter's Notes to amendment of V.R.C.P. 3.1.

3. That these rules, as amended, are prescribed and promulgated effective August 18, 2020. 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 12<sup>th</sup> day of June, 2020.



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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

Signed by the Vermont Supreme Court

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice

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William D. Cohen, Associate Justice