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MEMORANDUM

To: People Interested in Access to Court Issues

From: Dick Rothschild

Date: May 2004

Re: Update XXII

Fee Waiver Issues

1 The Los Angeles Superior Court has been ordered to show that it is not illegally denying access to the courts for indigent litigants. *Cruz v. Superior Court*.

The issue arose when, in a massive housing case, a Superior Court commissioner denied all 19 *in forma pauperis* applications filed under Government Code §68511.3(a)(6)(C), which authorizes a court to waive court fees when a litigant shows she is unable to pay without sacrificing the “necessaries of life.” Petitioners filed a writ in the Court of Appeal, arguing that the Superior Court had illegally failed to exercise its discretion under the statute, and also failed to schedule hearings before denying applications as required by Rule 985(f) of the California Rules of Court. On the day the Superior Court’s opposition was due, that court vacated all 19 denials, and then asked the Court of Appeal to deny the writ as moot.

The Court of Appeal agreed with plaintiffs that the issue is not moot, and issued an Order to Show Cause. Briefing is completed, and oral argument is set for June 11.

Tai Glenn at the Legal Aid Foundation of Los Angeles’s West office and I represent the petitioners. David Ettinger, a partner at Horvitz & Levy, filed an amicus curiae brief in support of the petitioners.

2. The Los Angeles Superior Court, Appellate Division has denied a writ seeking review of a fee waiver denial on the ground that “[t]here is an adequate remedy at law.” *Patton v. Superior Court*. This unexplained assertion is surprising, given that every appellate decision we are aware of that has reviewed a fee waiver denial has done so in a writ proceeding.

Petitioners, unlawful detainer defendants, applied for a fee waiver in the trial court, but were denied because of incorrect information on the application. When they attempted to reapply, a deputy clerk issued a rejection sheet on which he wrote, "enclosed papers could not be processed" because "can not take a 2nd fee waiver after the [1]st was denied". Petitioners argued in the writ that the trial court lacks authority to deny reapplications for fee waivers; and that the clerk’s role in denying an application violates Rule 985(d) of the California Rules of Court, which states that the

“court may not delegate authority to deny an application.”

After the writ was denied, petitioners filed a request to the Appellate Division to certify the case for transfer to the Court of Appeal, and intend to pursue their remedies in the latter court. Counsel : same as in *Cruz*.

3. The Stanislaus County Superior Court has issued a notice requiring fee waiver applicants to submit proof of receipt of public benefits, or proof of income. The proof of benefits requirement violates Government Code §68511.3(b)(1), which permits litigants who qualify for fee waivers as public assistance recipients (§68511.3(a)(6)A)) to submit their date of birth and social security number as sufficient proof.

Similarly, litigants who qualify because their income is below 125% of federal poverty guidelines need only state their income under penalty of perjury. Under Rule 985(b), a court may ask for additional documentation only if there is reason to doubt the truthfulness of the applicant.

When Catherine Hallinan of CRLA’s Modesto office protested the notice, she was informed that a mistake had been made and the clerks would only “request” the additional information. Stay tuned.

4. Those whose idea of a really bad time is standing in line at the Department of Motor Vehicles should spend a day in the Inglewood branch of L.A. Superior Court, reports Cesar Noriega of Bet Tzedek Legal Services. Here’s the short version:

Cesar’s clients, whose income fell below the 125% of federal poverty guidelines, applied for a fee waiver under Government Code §68511.3(a)(6)(B), but were denied because they didn’t fill out the information required for a fee waiver under subsection (C). When Cesar tried to clarify to a clerk that the Judicial Council form instructs applicants not to fill out that information, the clerk told him to file a declaration. Cesar prepared a motion for reconsideration and an ex parte application to shorten time and took it to the clerk’s office, where he was told he must pay \$36.50 to file it. When he explained that his clients were poor, the clerk first refused to file the application, then made Cesar wait a long time, until finally sending him to a courtroom. There he waited longer, until a judge granted the ex parte application, and told the clerk to tell Cesar to send notice to opposing counsel.. Cesar explained he could not do that, because fee waiver proceedings are confidential under Rule 985(f). This did not go over well, and Cesar was made to wait longer, until finally he was permitted to show the clerk his authority and eventually his application was granted. Several days later, Cesar’s motion was granted as well, and his clients received their fee waivers.

Followup efforts are planned to address the Inglewood court’s apparent policy of requiring the entire form to be filled out in violation of Judicial Council instructions.

5. Attorneys know that success on a case may depend on which judge is drawn. The same is true in Kern County Superior Court for court clerks as well, reports Mike Meuter of CRLA’s Salinas office. Mike’s clients applied for a fee waiver, but were turned away by a deputy clerk, who demanded proof of income. As described above (no. 3), this was illegal, so CRLA attorneys brought the application back to the clerk’s office, fully ready to file a writ. This time, however, a different clerk accepted the application, assured the attorneys that there was no policy requiring extra proof

of income and promised to speak to the offending clerk.

6. A Ventura County court issued a waiver for only half of the jury fees in a case, reports Michael Rodriguez of CRLA's Oxnard office. In addition, the court issued only a partial waiver of fees for subpoenas of public employees. Michael resolved the issue in a discussion with the presiding judge.

7. Compton court clerks were requiring fee waiver applicants to submit proof of income and receipt of public benefits, reports LAFLA attorney Christian Abasto. Kara Fecht, also a LAFLA attorney, had a conversation with a supervising clerk, which resolved the issue.

8. Numerous indigents in Shasta County have suffered defaults because they followed Judicial Council instructions on filling out fee waiver applications, reports Heather Cibula, Managing Attorney at Legal Services of Northern California's Shasta office. Form 982(a)(17) instructs litigants who qualify because their income is below 125% of federal poverty, Gov. Code §68511.3(a)(6)(B) not to fill out expense information required for those who seek relief under (a)(6)(C). The Shasta courts apparently take a different view, according to Heather, who spoke with the presiding judge. LSNC contemplates further action.

9. A Yolo County refused to waive court reporter fees for a litigant who had received a fee waiver, reports John Gianola, Managing Attorney of LSNC's Yolo office. Rule 985(i)(7) includes reporter's fees as "waived upon granting an application to proceed in forma pauperis" John and LSNC attorney Steve Goldberg convinced the judge to waive fees in the particular case.

10. LAFLA attorney Minty Siu-Kootnikoff reports that in a certain Long Beach family law court how much you got to talk and how the judge treated you depended on how much money you had. Minty was informed before a custody proceeding brought by her opponent that if the hearing exceeded an hour there would be a court reporter fee. Minty applied for a fee waiver on the spot, even producing (unnecessarily, under the law) a Food Stamp card. The judge, however, denied waiver of the court reporter fee, and proceeded with the hearing. Minty tried to keep the hearing short, but the length of the hearing is not something an attorney can control, and the hearing went over by approximately 15 minutes. After the hearing, the clerk demanded payment, and Minty refused. The judge went back on the record to call Minty "disingenuous" and kept Minty in the courtroom long enough for her to miss an obstetrician appointment. Minty says that the judge has been transferred to the criminal courts "where people at least have theoretical due process rights."

11. The San Benito County court denied a fee waiver application by an unemployed litigant with no income because the litigant listed a phone number and email address, reports private attorney John Wallpe.

12. The Contra Costa court sought to force an indigent tenant to pay half of the jury fees, reports Monique Doryland of Bay Area Legal Aid. The issue was mooted out when the case settled.

13. Things didn't progress even that far for Michael Smith of Central California Legal Service's Visalia office. He applied to the Tulare court for a jury fee waiver along with his request for a jury trial. A clerk informed him that there wasn't going to be a jury trial. A writ is planned.

14. A San Joaquin County clerk refused to file a tenant's answer because the fee waiver application was not accompanied by proof of income, reports Rich Oliver of CRLA's Stockton

office. The issue was resolved after Rich wrote a letter pointing out both that proof was not required, and that Rule 985(a) requires a clerk to accept a document for filing regardless of the clerk's view of the fee waiver application.

Fees Not Covered by In Forma Pauperis Applications

1. Sacramento courts are charging first appearance fees for third parties objecting to a business records subpoena, report Brian Lawlor and Bob Stalker of LSNC. Brian represents an ombudsman program which often receives subpoenas. LSNC usually objects, almost always successfully. LSNC, citing Government Code §26826, contends that filing fees apply only to parties, and a third party objector to a subpoena is not a party. LSNC paid the fee in a recent case, while reserving its rights.

2. Michelle Benedetto from the Legal Aid Society of San Diego convinced San Diego courts not to charge \$120 for sealing juvenile court records. She emphasized particular problems faced by foster youth, who don't have family to loan them money.

Miscellaneous

1. The Court of Appeal has held that probate courts must provide copies of confidential investigative reports in time for guardianship litigants to prepare for hearings. The appellate court struck down a Los Angeles Superior Court policy which forced attorneys to take longhand notes on the day of hearing. *Tracy A. v. Superior Court*, No. B170542 (Cal. App. April 27, 2004), 2004 WL 886975

With tongue slightly in cheek, the Court of Appeal noted that the Superior Court's rule would have been defensible "[b]efore the invention of the typewriter and carbon paper . . ." In the era of photocopiers and scanners, the court continued, a litigant must either receive her own copy or be permitted to make a copy.

The Court of Appeal rejected the Superior Court's argument that its policy was needed to keep investigative reports confidential. The appellate court noted that people with enough money to hire a lawyer to copy the report had complete access to the confidential reports, while other litigants did not.

Jane Preece of the Legal Aid Foundation of Los Angeles represented the prevailing petitioner.

2. Rich Oliver of CRLA's Stockton office claims that changes in the summons form make it harder for clients to read. If you share Rich's concern, contact him directly (209) 946-0605.

