

**IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA**

**VICTORIA ANN LATZEL,**  
Petitioner,

vs.

**CRAIG JAMES LATZEL,**  
Respondent.

Case No. CI01-42

**ORDER DENYING MOTION TO  
PROCEED *IN FORMA*  
*PAUPERIS***

**DATE OF HEARING:** No hearing held.

**SUBJECT OF ORDER:** Petitioner’s affidavit and application to proceed in forma pauperis.

**ORDER:** After examination of the files, the court finds, determines, and orders:

1. The petitioner filed her affidavit and application to proceed in forma pauperis.
2. In 1999, the statutes relating to proceedings in forma pauperis were substantially modified.

Section 25-2301.01 provides:

Any county or state court . . . may authorize the commencement, prosecution, defense, or appeal therein, of a civil or criminal case in forma pauperis. Any application to proceed in forma pauperis *shall include an affidavit stating* that the affiant is unable to pay the fees and costs or give security required to proceed with the case, the nature of the action, defense, or appeal, and the affiant’s belief that he or she is entitled to redress.

NEB. REV. STAT. § 25-2301.01 (Cum. Supp. 2000) (emphasis supplied).

3. This statute requires the affidavit to make three statements. First, the affiant must state that he or she is unable to pay the fees and costs or give security required to proceed with the case. Second, the affiant must state the nature of the action, defense, or appeal. Third, the affidavit must set forth a statement that the affiant believes that he or she is entitled to redress. While the application and affidavit in this case complies with the second requirement, it partially fails to comply with the first requirement and totally fails to comply with the third requirement.

4. In *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995), the Supreme Court stated that the poverty affidavit in a criminal appeal must *follow the language of the statute*. The

Court also stated that an inadequate affidavit does not waive the mandatory docket fee or vest jurisdiction. *Id.* In that case, the Court recognized that a poverty affidavit serves as a substitute for the docket fee otherwise required upon appeal by NEB. REV. STAT. §§ 33-103 and 25-1912. In *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996), the Supreme Court, citing *Schmailzl*, concluded that if the poverty affidavit is not sufficient to meet the statutory requirements, the appeal has not been perfected. Of course, *Schmailzl* and *Noelle F.* were decided under the former statute.

5. In *State v. Dallmann*, 260 Neb. 937, \_\_\_ N.W.2d \_\_\_ (2000), the Supreme Court recognized that language of the modified version of § 29-2306 specifically conferred jurisdiction on the appellate court if the district court granted the application despite the absence of specific language. However, a careful reading of the case shows that the statutory requirements as previously interpreted remain very much alive in the district court. The Supreme Court stated: “It is not a function of this court to determine whether an affidavit to proceed in forma pauperis *contains specific language* stating the nature of the case and that the affiant is entitled to redress. *These determinations must be made by the district court.*” *Id.* at 948, \_\_\_ N.W.2d at \_\_\_ (emphasis supplied). See also *State v. Campbell*, 260 Neb. 1021, \_\_\_ N.W.2d \_\_\_ (2001); *State v. Grant*, 9 Neb. App. 919, \_\_\_ N.W.2d \_\_\_ (2001).

6. While the jurisdictional document might now be the application to proceed *in forma pauperis*, the statute requires that the application “shall include” the affidavit stating the required statements. The use of the word “shall” is presumed to constitute a mandatory requirement. *State v. Jensen*, 259 Neb. 275, \_\_\_ N.W.2d \_\_\_ (2000). In addition, the Legislature is presumed to have been familiar with the previous decisions of the Supreme Court. *Halstead v. Rozmiarek*, 167 Neb. 652, 94 N.W.2d 37 (1959). Consequently, it appears from the language of the statute, in light of the previous Supreme Court decisions and in view of the decision in *Dallmann*, that the Legislature intended that the application, including the required affidavit, would substitute for the payment of costs, fees, or security. Consequently, the plain language of the statute would direct the conclusion that an inadequate affidavit thereby renders inadequate the application, upon which the court proceeds the same as if no application had been filed.

7. The only matter requiring further discussion is the effect of § 25-2301.02. That section requires that the application be granted unless there is an objection upon either or both of two bases, i.e.,

that the affidavit is untruthful (affiant has sufficient funds) or that the appeal is frivolous or malicious. NEB. REV. STAT. § 25-2301.02 (Cum. Supp. 2000). The court concludes that section has no application where an inadequate application, i.e., an inadequate affidavit, has been filed. Both of the grounds specified go to the merits of the affidavit and not to the form. The Legislature obviously intended to provide a procedure for adjudication of the merits of an application. See *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995). But there is no point to the procedure where the underlying application and affidavit are legally inadequate to invoke the statute. Similarly, the part of that section authorizing the applicant to pay the fee and proceed with the action within 30 days after a determination that the objection is proper has no proper application to the situation where the application and affidavit are legally inadequate.

8. Section 25-1301.02 commands that the application be granted unless there is an objection. But where the application is legally insufficient to constitute a proper application, the statutory mandate obviously cannot apply.

9. Because the mandatory affidavit, deemed by the statute as part of the application, is legally inadequate, the same must be denied without hearing. Because there were no other proceedings prior to the application, this order terminates this case. Of course, where no statute of limitation or time limit for filing of an appeal applies, there is nothing to prevent the applicant from submitting a proper application, in effect beginning a new case.

10. The court therefore orders that the application *in forma pauperis* be denied.

11. This court considers this case and at least two previous similar decisions as adequate warning to the practicing bar that deviation from the statutory language will result in denial of an application to proceed in forma pauperis. The court does not intend to produce lengthy orders in the future in such circumstances, but will merely refer the party to this order.

**IT IS SO ORDERED.**

Signed in chambers at Ainsworth, Nebraska, on April 11, 2001.  
DEEMED ENTERED upon the date of filing by the court clerk.

If checked, the Court Clerk shall:

- ⋮ Mail a copy of this order to all counsel of record and to any pro se parties.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.
- 9 Enter judgment on the judgment record.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.
- 9 Mail postcard/notice required by § 25-1301.01 within 3 days.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.
- ⋮ Note the decision on the trial docket as: [date of filing] Signed “Order Denying Motion to Proceed In Forma Pauperis” entered.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.

Mailed to:

BY THE COURT:

---

William B. Cassel  
District Judge