

ACCESS TO JUSTICE: COMMON PROCEDURAL ISSUES CONFRONTED BY THE IN FORMA PAUPERIS PRACTITIONER

Ashley P. Gonzalez¹

“[A]n individual’s privilege to litigate his claim in our courts is not regarded as a luxury. Rather, it is regarded as a privilege granted him in the interest of individual justice to him, and in the interest of a judicial system designed to provide justice for all.”²

I. Introduction

The Statewide Family Law Task Force of the Louisiana State Bar Association (“LSBA”) has identified a number of issues facing impoverished litigants seeking access to Louisiana courts. The ability of a litigant to proceed without the pre-payment of such court costs, also known as proceeding *in forma pauperis* (“IFP”), is a privilege entrenched in the United States Constitution and the Louisiana Constitution of 1974. This privilege is also codified in 28 U.S.C. § 1915 and Louisiana Code of Civil Procedure articles 5181 through 5188.

Unfortunately, certain customs in practice have created significant impediments for IFP litigants. Part I of this paper discusses the federal and state authority granting litigants the opportunity to proceed IFP. Part II outlines the procedural rules and requirements governing IFP litigants. And, Part III identifies some of the practices that impede IFP litigants’ access to the judicial system, some of which are clear violations of Louisiana’s Code of Civil Procedure, including but not limited to the IFP Articles.

II. Federal and State Statutory Authority To Litigate In Forma Pauperis

A. Federal Authority and Procedure

The traditions of IFP proceedings have their roots in the federal system. The original federal IFP statute enabled citizens to proceed in federal court “without being required to prepay fees or costs or for the printing of the record in the appellate court . . . upon filing in said court a statement under oath in writing, that because of his poverty he is unable to pay the costs of said suit or action or of such writ of error or appeal, or to give security for the same.”³ The United States Supreme Court explained that the original IFP statute was “intended to guarantee that no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, ‘in any court of the United States’ solely because his poverty makes it impossible for him to pay or secure the costs.”⁴

¹ Ashley Gonzalez, an associate at King Krebs & Jurgens, is a volunteer for Louisiana Appleseed, a nonprofit that recruits professionals to donate pro bono time to solve problems at the systemic, or policy, level. Louisiana Appleseed’s projects seek to increase access to justice, education and opportunity.

² Benjamin v. Nat'l Super Markets, Inc., 351 So. 2d 138, 141 (La. 1977).

³ Adkins v. E.I. du Pont de Nemours & Co., Inc., 335 U.S. 331, 333 (1948).

⁴ Id. at 342.

{N0587928 -}

The current federal IFP statute states: “any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant’s belief that the person is entitled to redress.”⁵ Louisiana is one of the fifty states that has authorized the commencement, prosecution or defense of judicial proceedings without pre-payment of court fees and costs.

B. State Authority and Procedure

1. Louisiana Constitution

Section 22 of the Louisiana Constitution of 1974 guarantees access to Louisiana courts for all of its citizens. It provides: “All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.”⁶ This may seem like a fundamental concept, however, our judicial system is not built to finance litigation for all of its citizens. There are costs associated with litigating in Louisiana courts. From filing fees to court costs, litigation requires a certain amount of capital. Some citizens simply do not possess the means to litigate.

Recognizing this fundamental unfairness, the Louisiana legislature enacted IFP laws in an effort to guaranty all Louisiana citizens equal access to justice. These laws provide the impoverished with special exceptions relative to cost so that they too may litigate in Louisiana courts. There are, however, limitations on who may obtain relief under the IFP laws.

2. Who is Entitled to Litigate IFP?

The Louisiana Code of Civil Procedure permits a litigant to proceed with a claim without pre-paying the costs related to such claim or furnishing a bond for such costs, if the litigant is “unable to pay the costs of court, because of his poverty and lack of means.”⁷ The privilege codified in Article 5181 of the Code of Civil Procedure is “restricted to litigants who are clearly entitled to it, with due regard to the nature of the proceeding, the court costs which otherwise would have to be paid, and the ability of the litigant to pay them or to furnish security therefor, so that the fomentation of litigation by an indiscriminate resort thereto may be discouraged, without depriving a litigant of its benefits if he is entitled thereto.”⁸ In the event an IFP litigant dies after being granted IFP status, but prior to resolution of the litigation at issue, the IFP

⁵ 28 U.S.C. § 1915.

⁶ LA. CONST. art. I, § 22.

⁷ LA. CODE CIV. PROC. art. 5181-88. There are special rules for permitting those persons incarcerated or imprisoned for the commission of a felony to proceed without paying costs in advance as they accrue or furnishing security for such costs. Under such circumstances, the court shall require such persons to advance costs in accordance with the schedule set forth in LA. CODE OF CIV. PROC. art. 5181, a copy of which is attached hereto as Appendix 1.

⁸ LA. CODE CIV. PROC. art. 5182.

{N0587928 -}

litigant's succession representative may continue to proceed IFP upon establishing that the succession of the deceased is indigent.⁹

A trial judge has the authority, as well as the duty, to subject IFP orders to consistent scrutiny to thwart abuse.¹⁰ The trial judge may reconsider a litigant's IFP status if the judge has a reason to believe such litigant's circumstances have changed or that the order was improperly granted.¹¹ Such reconsideration, however, must occur after an evidentiary hearing if rescission of the IFP order is dependent upon contested issues of fact.¹²

3. What Must an IFP Applicant Submit to the Court?

Any litigant wishing to proceed IFP will be required to apply for permission from the court in the initial pleading, or in an *ex parte* motion if requested at a later date. The litigant shall attach to the pleading or motion: (1) an affidavit stating that he or she is unable to pay court costs in advance or as they may become due, or to furnish security therefor, because of his or her poverty and lack of means together with any supporting documentation; and (2) an affidavit of a third person, other than the applicant's attorney, that knows the applicant, his or her financial condition and believes that the applicant is unable to pay the costs in advance or as they accrue, or to furnish security therefor.¹³

Rule 8.0 of the Uniform Rules for Louisiana District Courts ("Uniform Rules") requires that all parties seeking to proceed IFP, other than prison inmates, complete the IFP Affidavit Form.¹⁴ A trial court may require an IFP applicant to file the necessary affidavits in connection with his or her request to proceed IFP within a certain time frame.¹⁵ Failure to file the affidavits within such time frame may result in a dismissal of the case unless the applicant proceeds to pre-pay costs.¹⁶

Louisiana Code of Civil Procedure Article 5183 requires an applicant to obtain a written recommendation from the clerk of court's office as to whether the clerk of court feels the applicant is in fact indigent, and thus unable to pay the court cost in advance, or as they accrue, or to furnish security therefor, if required by local rule of the court. Rule 8.2 of the Uniform Rules emphasizes that the recommendation from the clerk of court's office need not be attached to an applicant's affidavit of poverty.¹⁷

⁹ Bates v. Dep't of Culture, Recreation & Tourism, Office of State Museum, 94-2265 (La. App. 1 Cir. 2/23/96); 694 So. 2d 294, 295.

¹⁰ City Stores v. Petersen, 268 So. 2d 662, 663 (La. 1972).

¹¹ Id.

¹² Id.

¹³ LA. CODE CIV. PROC. art. 5183(A).

¹⁴ A copy of the IFP Affidavit Form is attached hereto as Appendix 2. Under Comment b to Rule 8.0, federal laws "provide that social security numbers are confidential and that government benefits may not be denied because of a person's refusal to provide that information, unless its provision is required by federal statute. Accordingly, an applicant is not required to list his or her Social Security number in the IFP Affidavit Form."

¹⁵ Harrison v. Minardi, 2007-514 (La. App. 3 Cir. 10/31/07); 968 So. 2d 1221, 1224; see also, Pearson v. Fontaine, 583 So. 2d 493 (La. 1991).

¹⁶ Harrison, 968 So. 2d at 1225.

¹⁷ "Rule 8.2 No Recommendation from Clerk of Court Required. No recommendation from the clerk of courts office as to whether a litigant is in fact indigent need be attached to an affidavit of poverty submitted by a party {N0587928 -}.

Upon submission of the application and supporting affidavits to the court, the court must examine the facts.¹⁸ If the court is satisfied that the applicant has satisfied the requirements for proceeding IFP, it shall render an order permitting the applicant to litigate, or continue to litigate, the proceeding without pre-paying court costs or furnishing security.¹⁹ The submission of supporting documentation establishing: (1) that the applicant is receiving public assistance benefits; or (2) that the applicant's income is less than or equal to one hundred twenty-five percent (125%) of the federal poverty level, shall create a rebuttable presumption that the applicant is entitled to the privilege to proceed without pre-payment of court costs.²⁰ Thus, absent evidence to rebut the presumption, a court may not deny a litigant's request to proceed IFP if such litigant is receiving public assistance or if the litigant's income is less than or equal to 125% of the federal poverty level. A court may, however, reconsider its order granting IFP status on its own motion at any time upon contradictory hearing.²¹

Before the current Article 5183 was enacted, the Louisiana Supreme Court explained that the key consideration in determining whether to grant IFP status is the applicant's ability to pay court costs out of "net income," taking into account reasonable living expenses and debts.²² In Benjamin v. Nat'l Super Markets, Inc., the trial court granted the plaintiffs' right to appeal IFP and denied the defendant's motion to traverse the plaintiff's indigency, finding that the evidence showed that the plaintiffs were entitled to proceed IFP.²³ The court of appeal reversed on the basis that the husband's gross annual income for the previous year was \$20,898.23.²⁴ The appellate court did not, however, consider that the family's monthly debts exceeded income due to the wife's disability and inability to work.²⁵ While the family owned a home, furniture and a car and the husband earned approximately \$14,793.19 per year, or \$1,200 per month, the monthly expenses of the family, which consisted of the husband, wife and five children, and the amounts owed for past debts, totaled \$1,700 per month.²⁶

The Louisiana Supreme Court reversed the court of appeal and reinstated the trial court ruling explaining that "[t]he purpose of these (*in forma pauperis*) articles is to enable indigent persons to assert their causes in the courts of this state. This statutory privilege is to be interpreted liberally in favor of giving indigent persons their day in court."²⁷ The decision notes that other Louisiana state courts "have taken a realistic view as to the litigant's actual ability to advance or secure court costs out of net income available for that purpose, after payment of reasonable living expenses and debts, and in view of unencumbered property other than a modest

wishing to proceed in forma pauperis. No requirement that such a recommendation be attached, pursuant to LA. CODE CIV. PROC. art. 5183, may be instituted except by amendment to these Rules."

¹⁸ LA. CODE CIV. PROC. art. 5183(B).

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² Benjamin v. Nat'l Super Markets, Inc., 351 So. 2d at 139.

²³ Id. at 139.

²⁴ Id.

²⁵ Id.

²⁶ Id. at 139-40.

²⁷ Benjamin, 351 So. 2d at 140.

{N0587928 -}

family residence.”²⁸ The Louisiana Supreme Court recognized that under certain circumstances, IFP litigants remain liable for the costs of the proceedings.²⁹ Additionally, if the IFP litigant is later able to pay such costs, then such costs may be collected, assuming the costs were not already recovered from the opposing party if the IFP litigant prevailed in his or her litigation.³⁰

4. Who Makes the Initial Decision As to the Ability of Litigant to Proceed IFP?

The ability of a litigant to proceed IFP is determined by the trial court.³¹ Absent clear abuse, an appellate court may not disturb a trial court’s decision to grant or deny IFP status.³² A clerk of court is also authorized to sign an order approving IFP status but may not deny a request to proceed IFP.³³ If a trial court denies an IFP request, a litigant may apply for supervisory writs to obtain relief from an appellate court.³⁴ The grant of a supervisory writ application is difficult to obtain. Very few of the writ considerations set forth in Rule X of the Louisiana Supreme Court’s Rules apply to situations involving IFP applications. The Louisiana Supreme Court has, however, “granted remedial and supervisory writs directing the court of appeal to accept such writ applications without payment of a filing fee so that the applicant’s right to review of his status as a pauper is not foreclosed by that very status.”³⁵

5. May a Litigant’s Request to Proceed IFP Be Challenged?

Simply applying for IFP status does not guarantee that an applicant will be permitted to proceed IFP. An adverse party, or the clerk of court, may traverse the facts alleged in an IFP affidavit and challenge the IFP litigant’s request to exercise the privilege. This is done through a rule to show cause why the order of the court permitting the litigant to proceed IFP should not be rescinded.³⁶ Only one rule to traverse the affidavit is permitted, regardless of whether the rule is filed by an adverse party or the clerk of court.³⁷ As discussed previously, the trial judge may reconsider the grant of IFP stats if the applicant’s circumstances change.³⁸ The order must be rescinded if the court finds that the litigant is not entitled to the privilege to proceed IFP.³⁹

²⁸ Id. at 141.

²⁹ Id.

³⁰ Id. at 141-42.

³¹ Benjamin, 351 So. 2d at 142.

³² Id.

³³ LA. CODE CIV. PROC. art. 283(4). “A. The clerk of a district court may sign any of the following orders or judgments: . . . (4) An order to permit a party to institute and prosecute, or to defend, a suit without the payment of costs, under the provisions of Articles 5181 through 5188.” LA. CODE CIV. PROC. art. 283(A)(4).

³⁴ Roger A. Setter, La. Prac. Civ. App. § 3:82 Special Provisions for In Forma Pauperis Appeals – Procedure For Invoking Right to Proceed In Forma Pauperis (2011 ed.).

³⁵ Charles M. Delbaum, In Forma Pauperis In Louisiana: The Nuts and Bolts, 45 La. B.J. 528, 529-30 (April 1998).

³⁶ LA. CODE CIV. PROC. art. 5184(A); Rule 8.1 of the Uniform District Rules.

³⁷ Id.

³⁸ LA. CODE CIV. PROC. art. 5183(B).

³⁹ LA. CODE CIV. PROC. art. 5184(B).

{N0587928 -}

6. What Services are Available to an IFP Litigant?

Article 5185 states that an IFP litigant is entitled to the following:

- The services required by law of a sheriff, clerk of court, court reporter, notary or other public officer in connection with the judicial proceeding. This includes, without limitation, the filing of pleadings and exhibits, the issuance of certificates, the certification of copies of notarial acts and public records, the issuance and service of subpoenas and process, the taking and transcribing of testimony, and the preparation of a record of appeal.⁴⁰
- The right to compel attendance of not more than six witnesses for testifying either in court or by deposition, without paying fees, mileage or other expenses allowed by law.⁴¹
- If after making its own inquiry as to the facts, and if satisfied that the litigant is entitled to proceed IFP, the court shall render an order permitting the party to subpoena additional witnesses at the expense of the parish. If it is denied, the court must state its reason(s) for the denial in writing.⁴²
- The right to a jury trial and the services of the jury.⁴³
- The right to a devolutive appeal, and to apply for supervisory writs.⁴⁴

An IFP litigant may file a pleading by facsimile transmission.⁴⁵ Within five days of the clerk's receipt of the facsimile transmission, the IFP litigant must send the original pleading, facsimile transmission fee and filing fee to the clerk of court as required by La. R.S. § 13:850.⁴⁶

There are some limitations on the services available to IFP litigants. An IFP litigant is "not entitled to a suspensive appeal, or to an order or judgment required by law to be conditioned on his furnishing security other than for costs, unless he furnishes the necessary security therefor."⁴⁷ Public officers are not required to "make any cash outlay" to perform the duties in Article 5185 "except to pay witnesses summoned at the expense of the parish the witness fee and

⁴⁰ LA. CODE CIV. PROC. art. 5185(A)(1).

⁴¹ LA. CODE CIV. PROC. art. 5185(A)(2)(a).

⁴² LA. CODE CIV. PROC. art. 5185(A)(2)(b).

⁴³ LA. CODE CIV. PROC. art. 5185(A)(2)(c).

⁴⁴ LA. CODE CIV. PROC. art. 5185(A)(2)(d).

⁴⁵ Tenney v. Burlington Norther & Sante Fe Ry. Co., 2003-1260 (La. 1/21/04); 863 So. 2d 526, 528; see also, La. R.S. § 13:850 which states: "A. Any paper in a civil action may be filed with the court by facsimile transmission. All clerks of court shall make available for their use equipment to accommodate facsimile filing in civil actions. Filing shall be deemed complete at the time that the facsimile transmission is received and a receipt of transmission has been transmitted to the sender by the clerk of court. The facsimile when filed has the same force and effect as the original. B. Within five days, exclusive of legal holidays, after the clerk of court has received the transmission, the party filing the document shall forward the following to the clerk: (1) The original signed document. (2) The applicable filing fee, if any. (3) A transmission fee of five dollars. C. If the party fails to comply with the requirements of Subsection B, the facsimile filing shall have no force or effect. The various district courts may provide by court rule for other matters related to filings by facsimile transmission. D. The clerk may purchase equipment and supplies necessary to accommodate facsimile filings out of the clerk's salary fund."

⁴⁶ Id.

⁴⁷ LA. CODE CIV. PROC. art. 5185(B).

{N0587928 -}

mileage to which they are entitled.”⁴⁸ The public officers to whom such costs would be payable shall keep an account of the costs incurred by an IFP litigant.⁴⁹

7. Who is Responsible for Payment of Costs?

If judgment is rendered in favor of the IFP litigant, the party against whom the judgment is rendered shall pay all costs incurred by the IFP party.⁵⁰ Public officers have a privilege on the judgment for the costs incurred by the IFP litigant that is superior to the rights of the IFP litigant or his or her attorney.⁵¹ If the IFP litigant is unsuccessful and judgment is rendered against him or her and the IFP litigant is required to pay court costs, the public officer must prepare an affidavit of the account and record it in the mortgage records.⁵² Such an affidavit has the effect of a judgment for the amount of the costs incurred.⁵³

8. What is the Impact of IFP Status on a Litigant’s Ability to Settle or Compromise His or Her Claim?

An IFP litigant may not compromise or release his or her claim until the costs incurred in the IFP proceeding have been paid to the public officers.⁵⁴ “No release of a claim or satisfaction of a judgment shall be effective between the parties to a judicial proceeding in which one of the parties has been permitted to litigate without the payment of costs unless all costs due the Clerk of Court have been paid.”⁵⁵ If a compromise agreement is entered into without providing for the payment of costs, each party is liable for all costs incurred.⁵⁶ Similarly, an action may not be dismissed unless all costs due to the public officers have been paid, or certificates of all counsel of record stating that no compromise has been reached or is contemplated are attached to the motion to dismiss.⁵⁷

9. Will an Unsuccessful IFP Litigant Be Responsible for the Payment of Costs?

Except as otherwise provided in Articles 1920⁵⁸ and 2164 of the Code of Civil Procedure,⁵⁹ a litigant shall be responsible for the payment of costs incurred in accordance with

⁴⁸ LA. CODE CIV. PROC. art. 5185(C).

⁴⁹ LA. CODE CIV. PROC. art. 5186.

⁵⁰ Id.

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ LA. CODE CIV. PROC. art. 5187.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ “Unless the judgment provides otherwise, costs shall be paid by the party cast, and may be taxed by a rule to show cause. Except as otherwise provided by law, the court may render judgment for costs, or any part thereof, against any party, as it may consider equitable.” LA. CODE CIV. PROC. art. 1920.

⁵⁹ “The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The court may award damages, including attorney fees, for frivolous appeal or application for writs, and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable.” LA. CODE CIV. PROC. art. 2164.

{N0587928 -}

Article 5186 together with those recoverable by the adverse party if a judgment is entered against the IFP litigant.⁶⁰

III. IFP Issues in Practice

Despite the IFP scheme outlined in Louisiana's Code of Civil Procedure, filing the proper documentation and obtaining IFP status can be difficult for qualified litigants. This Part III discusses examples of some of the significant obstacles facing practitioners seeking to obtain IFP status for their clients. These examples are broken down into two general categories: customary practices which actually conflict with Louisiana's Code of Civil Procedure (Subpart A) and customary practices which create obstacles for IFP practitioners, but have not been contemplated by Louisiana's Code of Civil Procedure (Subpart B).

A. IFP-Related Issues That Are Clear Violations of Louisiana Law

The following examples illustrate obstacles encountered by practitioners that conflict with Louisiana law but have been addressed in either the Code of Civil Procedure or in case law.

1. The Clerk of Court May Not Refuse to File the Pleadings Submitted by a Litigant Seeking to Proceed IFP.

While a clerk of court does have the right to challenge a litigant's request to proceed IFP pursuant to Article 5184,⁶¹ a clerk of court may not refuse to accept the filing of a pleading of a litigant seeking to proceed IFP. The Louisiana Code of Civil Procedure affords IFP litigants the right to file his or her pleadings and exhibits with the court.⁶² An IFP litigant is entitled, among other things, to: “[a]ll services required by law of . . . a clerk of court . . . in, or in connection with, the judicial proceeding, including but not limited to the filing of pleadings and exhibits.”⁶³ The refusal to file such pleadings violates Louisiana's Code of Civil Procedure and could be challenged with a writ of mandamus.⁶⁴

2. A Court or Clerk of Court Should Not Withhold A Judgment Pertaining to IFP Proceedings Pending Payment of Court Costs in an IFP Proceeding

Article 5185 further entitles IFP litigants to: The clerk of court may not refuse to provide an IFP litigant with a certified copy of a judgment, even if court costs have not yet been paid. As mentioned above, an IFP litigant is entitled to, among other things, the “services required by law of a . . . clerk of court . . . in, or in connection with, the judicial proceeding, including but not limited to . . . the certification of copies of notarial acts and public records . . .”⁶⁵

⁶⁰ LA. CODE CIV. PROC. art. 5188.

⁶¹ LA. CODE CIV. PROC. art. 5184.

⁶² LA. CODE CIV. PROC. art. 5185(A)(1).

⁶³ Id.

⁶⁴ See generally, Aucouin v. Fidelity & Cas. Co. of New York, 212 So. 2d 748 (La. App. 1 Cir. 1968); State ex rel. Aucouin v. Blakeman, 207 So. 2d 860 (La. App. 1 Cir. 1968).

⁶⁵ LA. CODE CIV. PROC. art. 5185(A)(1).

{N0587928 -}

In Carline v. Carline, a plaintiff was permitted to proceed IFP in a divorce proceeding.⁶⁶ The judgment granting the divorce had been rendered in open court and was signed by the judge.⁶⁷ In response to the plaintiff's request for a certified copy of the judgment, the clerk of court refused to release a copy of the judgment until the plaintiff paid the outstanding court costs.⁶⁸ The trial court dismissed the IFP plaintiff's writ of mandamus against the clerk of court.⁶⁹ Relying on Article 5185, the First Circuit reversed holding that the IFP plaintiff was entitled to a certified copy of the judgment because proceeding IFP "surely includes for the pauper the certification of a copy of a portion of the public record in the judicial proceeding."⁷⁰ The First Circuit issued a writ of mandamus to the clerk of court, and also required the clerk to pay the costs associated with the appeal.⁷¹

A clerk of court should not refuse to release a judgment in an IFP proceeding pending payment of costs. Doing so would deprive an IFP litigant of the rights provided by Article 5185 and may be challenged by a writ of mandamus. Refusing to release a judgment pending payment of court costs may also cause the clerk to be taxed with costs under the rationale of Carline.

3. The Clerk of Court May Not Prevent the Filing of a New Suit Pending Payment of Costs by the IFP Litigant in a Previous IFP Proceeding.

A clerk of court should not be ordered to refuse to file pleadings of an IFP litigant, and a clerk of court may not refuse to file pleadings of an IFP litigant, who has outstanding court costs in other suits.⁷²

In Hawkins v. City of Jennings, the plaintiff filed suit against the city and police officers asserting civil rights violations during his detention by the officers.⁷³ The plaintiff represented himself in connection with the claim and obtained IFP status.⁷⁴ At the time of his civil rights claim, the plaintiff also had suits pending in another court involving the same defendants.⁷⁵

On the date of trial for the state court claims, the plaintiff was not present.⁷⁶ The judge stated that no order was submitted to the court to have the plaintiff transported to the court from the correctional facility.⁷⁷ The judge granted the defendants' motion to dismiss the case at plaintiff's expense and awarded defendants' attorneys fees.⁷⁸ The judge further ordered the clerk of court to refuse additional filings in any other matters, including those that remained pending

⁶⁶ 93-1505 (La. App. 1 Cir. 10/7/94); 644 So. 2d 835, 835.

⁶⁷ Id.

⁶⁸ Id. at 836.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id. at 837.

⁷² Hawkins v. City of Jennings, 1997-1291 (La. App. 3 Cir. 3/6/98); 709 So. 2d 292, 295.

⁷³ Id. at 293.

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Hawkins, 709 So. 2d at 293.

⁷⁸ Id.

{N0587928 -}

after the instant case, from the plaintiff until the awarded attorney's fees and costs incurred in this case had been paid.⁷⁹

The plaintiff filed a motion for new trial, which was denied.⁸⁰ The plaintiff appealed the denial arguing that he attempted to have an order permitting him to be present at the trial signed, but it was refused and returned to him.⁸¹

The Third Circuit affirmed the trial court's denial of plaintiff's motion for new trial due to plaintiff's failure to timely request a new trial; however, the appellate court reversed the portion of the judgment ordering the clerk of court to refuse additional filings until the attorneys fees and court costs were paid.⁸² The Third Circuit concluded: "the trial court's order which prevented filing in both the instant matter, as well as all filings in any other proceeding or future suit the plaintiff may have a right to bring, is violative of [Section 22 of the Louisiana Constitution] and, accordingly, must be reversed."⁸³ It further found that "the trial court committed legal error in ordering the clerk of court to refuse to accept any type of filing by the plaintiff, and reverse[d] this portion of the judgment."⁸⁴

An IFP applicant may not be prevented from filing a lawsuit because he or she may owe costs in another IFP proceeding. To prevent such filings may effectively deny a citizen access to courts and violate the Louisiana Constitution.

4. It is Improper to Charge a Successful IFP Litigant with Costs or Require a Successful IFP Litigant to Pay a Portion of the Costs Associated with the IFP Proceeding

A successful IFP litigant may not be required to pay either all or a portion of the court costs associated with the IFP proceeding. Articles 5186 and 5188 govern the payment of court costs in connection with an IFP proceeding. If the IFP litigant is successful, the party against whom judgment is rendered is responsible for the court costs.⁸⁵ It is only when the IFP litigant is unsuccessful that he or she shall be responsible for the payment of court costs.⁸⁶

The Second Circuit visited this issue recently in Porter v. Porter, which involved an IFP plaintiff's petition for divorce.⁸⁷ The plaintiff first obtained a preliminary default.⁸⁸ When the court entered judgment in the plaintiff's favor at a subsequent confirmation hearing, the clerk of court stated on the record: "Cost, your honor. A cost assessment for the pauper case."⁸⁹ The

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id.

⁸² Hawkins, 709 So. 2d at 294-95.

⁸³ Id. at 295.

⁸⁴ Id.

⁸⁵ LA. CODE CIV. PROC. art. 5186.

⁸⁶ LA. CODE CIV. PROC. art. 5188.

⁸⁷ 46,754 (La. App. 2 Cir. 12/14/11); 79 So. 3d 1287.

⁸⁸ Id.

⁸⁹ Id.

{N0587928 -}

judge replied “Right. If you’ll just stamp it there. All right, taken care of that. Thank you ma’am.”⁹⁰

The judgment did not specify who was responsible for the costs but the clerk of court later filed a document entitled “Orders of Court” that said “[i]t is ordered that court costs be paid by the petitioner.”⁹¹ This document was signed by a deputy clerk of court, not a judge.⁹² The IFP litigant argued that the court erred by requiring her to pay court costs.⁹³

The Second Circuit agreed finding that although Louisiana Code of Civil Procedure Article 1920 grants the trial court equitable discretion to “tax costs against any party,” this discretion is limited by Article 5186 which requires costs to be paid by the party against whom judgment is rendered.⁹⁴ The trial court “committed legal error in assessing costs against the party who took and confirmed the default.”⁹⁵

The Fourth Circuit reached a similar result in Yarls v. Yarls, which also involved an IFP petition for divorce.⁹⁶ The trial court granted a default judgment and charged the plaintiff with half the court costs.⁹⁷ Rather than signing the plaintiff’s proposed judgment, the court prepared and signed its own judgment “decreeing a divorce ‘between the parties’” but failed to include the names of the parties or that judgment was in plaintiff’s favor.⁹⁸ The plaintiff appealed.⁹⁹

Like the court in Porter, the Yarls court acknowledged that a trial court’s discretion to tax costs under Article 1920 is limited by Article 5186.¹⁰⁰ The Yarls Court emphasized that a default judgment is entered against a party who failed to answer the petition and amended the judgment accordingly.¹⁰¹ The court further reversed the judgment insofar as it required the plaintiff to pay half of all court costs.¹⁰² All costs were taxed to the defendant.¹⁰³

The Fourth Circuit again addressed this issue in Ulyanov v. Ulyanov, another IFP divorce proceeding.¹⁰⁴ In that case, the trial court entered a judgment of divorce on the plaintiff’s motion to confirm default and charged the plaintiff with the cost for filing the divorce action and ordered her to “pay all costs within (90) ninety days of the signing of [the] judgment.”¹⁰⁵ On appeal, the Fourth Circuit reversed the portion of the judgment assessing the plaintiff with all costs, citing

⁹⁰ Id.

⁹¹ Id.

⁹² Id.

⁹³ Id.

⁹⁴ Porter, 79 So. 3d at 1289.

⁹⁵ Id.

⁹⁶ 2009-1173 (La. App. 4 Cir. 1/27/10); 30 So. 3d 1101, 1101.

⁹⁷ Id.

⁹⁸ Id.

⁹⁹ Id.

¹⁰⁰ Yarls, 30 So. 3d at 1102.

¹⁰¹ Id.

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ 2009-0642 (La. App. 4 Cir. 9/23/09); 23 So. 3d 380, 381.

¹⁰⁵ Id.

{N0587928 -}

Article 5186.¹⁰⁶ The Fourth Circuit further noted the absence of any evidence that the plaintiff's right to proceed IFP had been traversed or rescinded.¹⁰⁷

The First and Third Circuits also reached similar conclusions. In Cage v. Cage, the trial court granted an indigent litigant's petition for divorce by default and charged the costs to both parties.¹⁰⁸ On appeal, the First Circuit found that the trial court abused its discretion because Article 5186 precluded the sharing of court costs when judgment is rendered in favor of an IFP litigant.¹⁰⁹ The defendant was charged with all costs associated with obtaining the divorce decree as well as the appeal.¹¹⁰ Likewise, in Holloway v. Holloway, the trial court ordered a plaintiff who obtained a judgment of divorce to pay one-third of the costs, and the plaintiff appealed.¹¹¹ The Third Circuit held that the trial court clearly erred by ordering the IFP plaintiff to pay costs, and rendered judgment ordering the defendant to pay all costs associated with the trial court proceeding.¹¹²

The IFP provisions of the Code of Civil Procedure –provide that a successful IFP litigant is not responsible for costs associated with the proceeding. An order or judgment holding otherwise may be appealed.

5. A Successful IFP Litigant May Not be Required to Pay Court Costs in Installments

A litigant who obtains IFP status is not required to pay court costs in advance or as they accrue.¹¹³ Further, the clerk of court may not require an IFP litigant to pay his or her court costs in installments.

In Brownell v. Brownell, the district judge granted an order permitting the litigant to proceed IFP, but ordered her to make payments of \$10.00 per month to satisfy court costs owed

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*; see also, Ford v. Ford, 2009-1494 (La. App. 4 Cir. 2/24/10); Snowton v. Snowton, 2009-0600 (La. App. 4 Cir. 9/30/09); 22 So. 3d 1111); Williams v. Williams, 98-2899 (La. App. 4 Cir. 4/28/99), 732 So. 2d 1243, 1244; Smith v. Smith, 99-0365 (La. App. 4 Cir. 5/5/99), 733 So. 2d 729, 730.

¹⁰⁸ 99-2072 (La. App. 1 Cir. 9/22/00); 809 So. 2d 144, 144.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ 2001-0273 (La. App. 3 Cir. 6/6/01); 787 So. 2d 600, 600.

¹¹² *Id.*; see also, Stapleton v. Stapleton, 2005-1034 (La. App. 3 Cir. 2/1/06); 922 So. 2d 1234 (Trial court judgment charging husband who was granted right to proceed IFP in his divorce proceeding with half of costs associated with the divorce was reversed by the Third Circuit.); Whatley v. Whatley, 01-0105 (La. App. 3 Cir. 5/2/01) ("Article 5186 provides that when a judgment is rendered in favor of an indigent party, the party against whom the judgment is rendered shall be condemned to pay all costs due. According to the record, Ms. Whatley is an indigent party. She was improperly cast for costs. We reverse the portion of the judgment assessing court costs against her and render judgment against her former spouse. The appellee will pay the costs of this appeal."); Michel v. Michel, 00-01540 (La. App. 3 Cir. 11/2/00) ("The trial court erred in granting the plaintiff-realtor's request for pauper status then imposing reduced costs upon her. Once plaintiff-realtor was granted pauper status she was relieved of the burden of paying costs in advance or as they accrue or furnishing security."). All unreported cases cited in this Paper are attached *in globo* in Appendix 3.

¹¹³ LA. CODE CIV. PROC. art. 5181. Article 5181 makes an exception for those persons incarcerated or imprisoned for the commission of a felony who wish to proceed without paying costs in advance or as they accrue and requires such litigants to advance costs in accordance with the schedule set forth in Article 5181.

{N0587928 -}

to the clerk of court.¹¹⁴ The plaintiff then filed a writ contesting the order insofar as it required her to make monthly payments.¹¹⁵ The appellate court found that because the plaintiff's financial situation had not changed and her pauper status had not been challenged by the court that the trial court abused its discretion in requiring the plaintiff to pay court costs in monthly installments.¹¹⁶

Similarly, in Smith v. Smith, the Second Circuit granted an IFP litigant's supervisory writ and held that the trial court's authority to "require an indigent litigant proceeding in forma pauperis to make periodical nominal deposits to defray costs . . . is limited by guidelines of Art. 5181 to those litigants who are imprisoned for the commission of a felony."¹¹⁷ The trial court's ruling that required the IFP litigant to pay the clerk of court \$10.00 per month until the costs were paid, was reversed.¹¹⁸

The IFP privilege is requested because those seeking it do not have the ability to pay court costs in advance or as they accrue. When a court grants the IFP applicant such status, he or she is not required to pre-pay any court costs, either up front or in installments.

6. A Successful IFP Litigant is Not Responsible for Costs Associated with the IFP Proceeding When an Adverse Party Was Taxed With the Costs

As discussed above, Articles 5186 and 5188 provide for the payment of costs during an IFP proceeding. The costs of a suit should not be determined before the final adjudication.¹¹⁹ If the IFP litigant is successful, the party against whom judgment is entered shall be responsible for the costs associated with the proceeding.¹²⁰ If the IFP litigant is unsuccessful, however, he or she will be responsible for the costs of the proceedings.¹²¹ In Spence v. Spence, the IFP plaintiff sought increased spousal support and child support payments.¹²² The plaintiff obtained a judgment awarding increased child support payments, but did not obtain an increase in spousal support.¹²³

The plaintiff appealed the trial court's judgment charging her with the costs for the transcription of evidence.¹²⁴ All other costs were charged to the defendant.¹²⁵ The Third Circuit overruled the portion of the judgment charging plaintiff with the transcription costs because she

¹¹⁴ 00-1803 (La. App.3 Cir. 10/3/01); 799 So. 2d 587, 588.

¹¹⁵ Id.

¹¹⁶ Id. at 589.

¹¹⁷ 543 So. 2d 608, 609 (La. App. 2 Cir. 1989)

¹¹⁸ Id.; see also, Henry v. Henry, 03-530 (La. App. 5 Cir. 5/13/03); Hampton v. Moten, 00-1394 (La. App. 5 Cir. 8/30/00).

¹¹⁹ Savoy v. Doe, 315 So. 2d 875, 876 (La. App. 3 Cir. 1975).

¹²⁰ LA. CIV. CODE art. 5186.

¹²¹ LA. CIV. CODE art. 5188.

¹²² 465 So. 2d 155, 157 (La. App. 3 Cir. 1985).

¹²³ Id.

¹²⁴ Id. at 157-58.

¹²⁵ Id.

{N0587928 -}

was granted the right to proceed IFP and judgment was rendered against the defendant.¹²⁶ The costs of the trial court proceeding, as well as the appeal were taxed to the defendant.¹²⁷

If the IFP litigant is successful, he or she may not be charged with any portion of the costs. In the event a successful IFP litigant is charged with any portion of the costs of the IFP proceeding when judgment was rendered against the other party, the IFP litigant may choose to appeal.

7. An IFP Litigant is Not Required to Pre-pay Fees or Costs Associated with the Services of an Attorney Appointed to Represent an Out of State Defendant or for a Curator

While the Code of Civil Procedure relieves an IFP litigant from having to pre-pay fees or costs, some IFP litigants have, nevertheless, been required to do so. In Jones v. Jones, the plaintiff was granted IFP status in connection with her petition for divorce.¹²⁸ The IFP plaintiff requested appointment of an attorney to represent the defendant who was allegedly living out of state.¹²⁹ The trial court refused to sign an order appointing an attorney to represent the defendant because the plaintiff could not pay the attorneys fees or expenses.¹³⁰ The trial court's action was affirmed by the appellate court.¹³¹

The Louisiana Supreme Court granted supervisory writs in Jones.¹³² In its decision, the court examined Article 5091. That Article provides that a court shall appoint an attorney to represent a defendant on the petition of the plaintiff when: “[i]t has jurisdiction over the person or property of the defendant, or over the status involved, and the defendant is [a] nonresident or absentee who has not been served with process, either personally or through an agent for the service of process, and who has not waived objection to jurisdiction.”¹³³

The Court noted that Article 5096 requires the appointed attorney's fees to be paid by the plaintiff and that the fees “shall be taxed as costs of court.”¹³⁴ To prohibit the appointment of an attorney because the plaintiff could not afford to pay the fees would, in the Court's view, “abridge her due process right to judicial determination of the merits of her case and of the equal protection of the laws.”¹³⁵ The Court explained “[s]ince indigents are exempt from prepaying costs of court and from paying these costs as they accrue, and since the attorney's fees under C.C.P. 5096 are characterized as costs of court at least for ‘taxing’ purposes, we hold that

¹²⁶ Id. at 158.

¹²⁷ Id.

¹²⁸ 297 So. 2d 198, 198 (La. 1974).

¹²⁹ Id.

¹³⁰ Id.

¹³¹ Id.

¹³² Id.

¹³³ Jones, 465 So. 2d at 199, citing, LA. CODE CIV. PROC. art. 5091(A)(1)(a).

¹³⁴ Id., citing, LA. CODE CIV. PROC. art. 5096.

¹³⁵ Id. at 200. Pursuant to Article 1201, “[c]itation and service thereof are essential in all civil actions except summary and executory proceedings, divorce actions under Civil Code Article 102, and proceedings under the Children's Code. Without them all proceedings are absolutely null.” LA. CODE CIV. PROC. art. 1201(A).

{N0587928 -}

payment of the attorney's fees may not be made a condition precedent to the attorney's appointment by the court in *Forma pauperis* proceedings.”¹³⁶

Similarly, in Warren v. Warren, an IFP plaintiff husband filed a petition for divorce against his non-resident wife.¹³⁷ The plaintiff argued to the Fourth Circuit Court of Appeal that “his divorce has been delayed and his constitution rights violated by the required appointment of a curator ad hoc (whom he cannot pay) to represent his [out of state] wife . . .”¹³⁸ The plaintiff had filed a motion to replace the curator and employ the Long Arm Statute to serve his wife.¹³⁹ The trial court denied the motion and the plaintiff filed a writ.¹⁴⁰ The Fourth Circuit reversed the trial court stating: “[a] plaintiff proceeding *in forma pauperis* is not required to pay a curator's fee.”¹⁴¹

While Code of Civil Procedure articles governing IFP litigation do not address curator's fees, the requirement that the plaintiff pay such fees could prevent him from obtaining service and a judgment against the defendant.¹⁴² The Fourth Circuit found nothing in the “statutes or jurisprudence which prohibits use of the Long Arm Statute in divorce proceedings.”¹⁴³ The court explained that “[i]f an absent defendant/spouse is served pursuant to La. R.S. 13:3201 and claims that the court does not have jurisdiction, that spouse has the right to challenge jurisdiction by an exception. Whether the defendant/spouse comes under R.S. 13:3201¹⁴⁴ and has minimal contacts with the state must be decided on a case by case basis.”¹⁴⁵ Accordingly, the trial court's denial of the plaintiff's motion to dismiss the curator and serve the defendant in accordance with the Long Arm Statute was reversed.¹⁴⁶

The Third Circuit addressed the issue of curator's fees in granting a supervisory writ application.¹⁴⁷ In Atkins v. Atkins, the Third Circuit ruled that the trial court erred in requiring a plaintiff to pay a curator's fee citing Article 5181 of the Louisiana Code of Civil Procedure as well as Warren v. Warren.¹⁴⁸

¹³⁶ Jones, 297 So. 2d at 201.

¹³⁷ 622 So. 2d 864, 865 (La. App. 4 Cir. 1993).

¹³⁸ Id.

¹³⁹ Id.

¹⁴⁰ Id.

¹⁴¹ Id. at 866.

¹⁴² Warren, 622 So. 2d at 867.

¹⁴³ Id.

¹⁴⁴ The opinion quotes the following portion of Section 13:3201: “A. A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from any one of the following activities performed by the nonresident: (1) Transacting any business in this state. . . . (6) Non-support of a child, parent, or spouse or a former spouse domiciled in this state to whom an obligation of support is owed and with whom the nonresident formerly resided in this state. . . . B. In addition to the provisions of Subsection A, a court of this state may exercise personal jurisdiction over a nonresident on any basis consistent with the constitution of this state and of the Constitution of the United States.” La. R.S. § 13:3201.

¹⁴⁵ Id. at 868.

¹⁴⁶ Id.

¹⁴⁷ Atkins v. Atkins, 01-00583 (La. App. 3 Cir. 7/16/01).

¹⁴⁸ Id.

{N0587928 -}

A judgment or order requiring an IFP litigant to pre-pay fees or costs for an attorney appointed to represent an absent defendant is contrary to Louisiana law and may be challenged with a motion for rehearing or appeal. While the Warren opinion stated that an IFP litigant is not required to pay a curator's fee, the court ultimately found that the defendant could be served through the Long Arm Statute and granted the plaintiff's motion to dismiss the curator.

8. An IFP Litigant is Not Required to Post a Bond for Court Costs

Section 13:4522 of the Louisiana Revised Statutes permits a defendant (prior to pleading) to require a plaintiff or intervenor to give security for the costs associated with the proceeding.¹⁴⁹

An IFP litigant, however, is not required to post a bond or give other security for such costs. Section 13:455 specifically exempts IFP litigants.¹⁵⁰ The Second Circuit has found that the rules governing bonds for costs are applicable to bonds for attorneys fees.¹⁵¹

In Jones v. Anderson, the plaintiff filed suit against a city police officer and the City of Shreveport in connection with injuries allegedly caused by the officer while on duty.¹⁵² The officer filed a motion requesting that the plaintiff be required to post a bond for attorneys' fees pursuant to La. R.S. § 42:261(D)¹⁵³ because the officer was a public official.¹⁵⁴ The court granted the officer's motion.¹⁵⁵ The plaintiff then filed a motion for a new trial, which was denied, and a motion to proceed IFP, which was granted.¹⁵⁶ After granting the plaintiff's motion to proceed IFP, the trial court found that the plaintiff was required to post the defendant officer's attorneys' fee bond.¹⁵⁷ When the plaintiff was unable to post the bond, his case was dismissed.¹⁵⁸

The plaintiff appealed and the Second Circuit reversed finding that the rules governing bonds for costs, are applicable to the attorneys' fee bond. "Since no bond for cost can be

¹⁴⁹ La. R.S. § 13:4522.

¹⁵⁰ Id. The full text of La. R.S. § 13:4522 states: "The defendant before pleading in all cases may by motion demand and require the plaintiff or intervenor to give security for the cost in such case, and on failure to do so within the time fixed by the court such suit or intervention, as the case may be, shall be dismissed without prejudice. This section shall not apply to the Parish of Orleans and to cases brought in forma pauperis, nor to the state or any political subdivision thereof."

¹⁵¹ Jones v. Anderson, 277 So. 2d 697, 698 (La. App. 2 Cir. 1973); see also, Bolden v. City of Shreveport, 278 So. 2d 138 (La. App. 2 Cir. 1973); Gilmore v. Rachl, 202 La. 652 (La. 1943).

¹⁵² 277 So. 2d 697, 698 (La. App. 2 Cir. 1973).

¹⁵³ La. R.S. § 42:261 has been amended and the provision concerning the attorneys fees bond is provided in La. R.S. § 42:261(E); however, Subsection E has since been declared unconstitutional. In Lafourche Parish Council v. Breaux, the First Circuit explained that the Louisiana Supreme Court had found that "the requirement that bond for attorney fees be furnished before proceeding to trial is unconstitutional and violative of the equal protection clauses of the state and federal constitutions. The court also found that the provision denied litigants to due process and open access to state courts." 2002-1565 (La. App. 1 Cir. 5/9/03); 845 So. 2d 645, 649, citing, Detraz v. Fontana, 416 So. 2d 1291 (La. 1982).

¹⁵⁴ Jones, 277 So. 2d at 698.

¹⁵⁵ Id.

¹⁵⁶ Id.

¹⁵⁷ Id.

¹⁵⁸ Id.

{N0587928 -}

required of a pauper, neither can a bond for attorneys' fees be required pursuant to finding the plaintiff indigent, as it too is waived.”¹⁵⁹

In Bolden v. City of Shreveport, a plaintiff filed suit against a police officer and the City of Shreveport in connection with the death of her son.¹⁶⁰ The defendants requested a bond for costs pursuant to La. R.S. § 13:4522 and a bond for attorneys' fees pursuant to La. R.S. 42:261(D).¹⁶¹ In response to defendants' rule to show cause concerning the bonds, the plaintiff filed a motion to proceed IFP which the court granted.¹⁶² The trial court denied the defendants' request for a bond for costs, but required the plaintiff to post the bond for defendants' attorneys' fees.¹⁶³

On appeal, the Second Circuit found that the phrase “as in the case of bond for costs” referenced in La. R.S. § 42:261(D) “plainly equate[s] a bond for attorneys' fees provided for in LSA-R.S. 42:261(D) to a bond for costs provided for in LSA-R.S. 13:4522.”¹⁶⁴ Reversing the trial court, the Second Circuit held that an “indigent plaintiff who has been permitted to litigate without payment of costs or furnishing security therefor under the provisions of LSA-C.C.P. Arts. 5181 *et seq.* cannot be required to furnish bond to cover attorneys' fees under LSA-R.S. 42:261(D).”¹⁶⁵

An IFP litigant is not required to post a bond for court costs. An order or judgment requiring such a bond may deprive the IFP litigant of access to the courts and a denial of due process.

9. An IFP Litigant Is Entitled to a Jury Trial Without the Pre-payment of Costs

An IFP litigant is entitled to a jury trial and to the services of jurors.¹⁶⁶ In McCoy v. Winn-Dixie Louisiana, Inc., the plaintiffs, husband and wife, brought an action against defendant for damages suffered by the wife when she slipped and fell in defendant's store.¹⁶⁷ The plaintiffs requested a jury trial.¹⁶⁸

When the jury bond was fixed at \$1,000.00, the plaintiffs filed a motion requesting that the wife be permitted to proceed IFP.¹⁶⁹ The wife's claim was for her personal injuries and the husband's claim was for medical expenses and loss of the wife's earnings.¹⁷⁰ The husband waived his right to a jury trial and refused to allow community funds to be used to post the

¹⁵⁹ Id.

¹⁶⁰ 278 So. 2d 138, 143 (La. App. 2 Cir. 1973).

¹⁶¹ Id. at 144.

¹⁶² Id.

¹⁶³ Id.

¹⁶⁴ Id.

¹⁶⁵ Bolden, 278 So. 2d at 146.

¹⁶⁶ LA. CODE CIV. PROC. art. 5185(A)(3).

¹⁶⁷ 345 So. 2d 1175, 1176 (La. 1977).

¹⁶⁸ Id.

¹⁶⁹ Id.

¹⁷⁰ Id.

{N0587928 -}

bond.¹⁷¹ The trial court denied the plaintiff wife's request to proceed IFP and the appellate court refused the wife's application for supervisory writs.¹⁷² In denying the plaintiff's writ application, the appellate court reasoned:

Here, both spouses are together attempting to recover all of the damages arising from an injury to one spouse, but are together unwilling to underwrite the risk of an unsuccessful trial by jury. To allow the wife to proceed alone with a jury trial in forma pauperis under these circumstances would make ludicrous the fundamental concept of C.C.P. art. 5181 et seq., which accord a privilege to indigent litigants who would otherwise be deprived because of their poverty of benefits to which they are entitled.

While theoretically a husband and wife with separate causes of action arising out of the same injury could proceed in separate actions in separate parishes (if there were no venue problems), we believe that to allow them to proceed in the same action, one before the judge upon payment of costs and the other before the jury in forma pauperis, does substantial violence to the purpose of the forma pauperis procedure and sets dangerous precedents. If this motion were granted, virtually every husband-wife cumulated action for damages from injuries sustained by the wife could be separately prosecuted in forma pauperis, without regard to whether the husband-wife partnership is able to afford the cost of prosecuting the claim. Perhaps two unrelated plaintiffs, joined in a cumulated action, would be entitled to the relief sought by this motion. But the relationship between these plaintiffs, acting in concert to recover all damages arising out of an injury to one party, justifies the trial judge's denial of the motion.¹⁷³

The Louisiana Supreme Court granted writs and reversed. The court found that the existence of community assets should not operate to prevent the wife from proceeding IFP in an action for damages which, if awarded, would be separate funds.¹⁷⁴ It was uncontested that if the wife were filing suit alone, she would be eligible to proceed IFP.¹⁷⁵ The Louisiana Supreme Court explained that the decision to file one action together with her husband should not alter the fact that, alone, the plaintiff wife had insufficient separate funds to post a jury bond in connection with a cause of action that is her separate property.¹⁷⁶

An IFP litigant is entitled to a jury trial and to the services of jurors. The IFP litigant may not be ordered to post a jury bond.¹⁷⁷

¹⁷¹ Id.

¹⁷² McCoy, 345 So. 2d at 1176.

¹⁷³ Id. at 1178.

¹⁷⁴ Id. at 1177.

¹⁷⁵ Id. at 1178.

¹⁷⁶ Id.

¹⁷⁷ District Judges have, at times, struck juries when a bond has not been posted pursuant to LA. CODE CIV. PROC. art. 1734 regardless of IFP status, perhaps due to the expenses associated with impaneling jurors and financial strain on the courts. Article 1734 states: "A. Except as otherwise provided by R.S. 13:3105 et seq., when the case has been set for trial, the court shall fix the amount of the bond to cover all costs related to the trial by jury and shall fix the time for filing the bond, which shall be no later than sixty days prior to trial. Notice of the fixing of the bond shall be {N0587928 -}.

10. If an IFP Litigant Satisfies the Criteria Set Forth in Article 5183, He or She is Not Required to Answer Question No. 9 of the Louisiana Supreme Court's IFP Affidavit Form¹⁷⁸

If the IFP applicant is receiving public assistance or his or her income is less than or equal to 125% of the federal poverty level, he or she may not be required to answer Question No. 9 of the IFP Affidavit Form. Rule 8.0 of the Uniform Rules mandates: “[a] party, other than an inmate, who wishes to proceed in forma pauperis shall complete and file the affidavit in Appendix 8.0.”¹⁷⁹ The paragraph preceding Question 9 of the IFP Affidavit Form states: “If you are a client of a legal services program funded by the Legal Service Corporation or a Pro Bono Project that receives referrals from a legal services program and have a combined income from questions 7¹⁸⁰ and 8¹⁸¹ that is less than or equal to 125% of the federal poverty level, skip all parts of question 9, and continue with question 10 on the next page.”

Question 9 of the IFP Affidavit Form asks whether the affiant owns or has an interest in a list of items which include, without limitation: a house, automobile, truck, watercraft, livestock, machinery, stock, bonds, certificates of deposit, other movable property, and a bank account. Question 9 further requires the affiant to list his or her monthly expenses, including, but not limited to: rent, utilities, medical expenses, daycare, child support, car note and insurance, food, garnishment, credit cards, and/or financial loans. Article 5183 states that if the litigant seeking to proceed IFP submits documentation establishing that either: (1) he or she is receiving public assistance benefits; or (2) that his or her income is less than or equal to one hundred twenty-five percent (125%) of the federal poverty level, then there shall exist a rebuttable presumption that the applicant is entitled to the privilege to proceed without pre-paying court costs.¹⁸²

Both the Louisiana Supreme Court and the Fifth Circuit have addressed this issue. In *Myers v. Berggreen*, the Louisiana Supreme Court granted a supervisory writ filed by the plaintiff and explained that because the plaintiff had complied with the instructions of the IFP Affidavit Form, the trial court must rule on the merits of the plaintiff’s request for pauper

served on all parties. If the bond is not filed timely, any other party shall have an additional ten days to file the bond. B. When the bond has been filed, the clerk of court shall order the jury commission to draw a sufficient number of jurors to try and determine the cause, such drawing to be made in accordance with R.S. 13:3044.” No authority concerning the relationship between LA. CODE CIV. PROC. art. 1734 and LA. CODE CIV. PROC. art. 5185(A)(3) has been located; however, a cash deposit in lieu of an Article 1734 bond may not be required of an IFP litigant. LA. CODE CIV. PROC. art. 1734.1.

¹⁷⁸ See, Appendix 2.

¹⁷⁹ Title I, Uniform District Court Rules, Rule 8.0 (emphasis added). A local district court may, however, impose additional requirements so long as such requirements are not more onerous than those provided in the Code of Civil Procedure. See, Section III(A)(13) of this Paper.

¹⁸⁰ Question 7 asks for an applicant’s gross income, how he or she is paid, and for any other income and monthly deductions.

¹⁸¹ Question 8 asks whether the applicant is married, lives with a spouse, whether the spouse is employed, his or her occupation and salary information, and whether the applicant and spouse receive any social security, disability, worker’s compensation, unemployment benefits, food stamps, child or spousal support payments.

¹⁸² LA. CODE CIV. PROC. art. 5183(B).

{N0587928 -}

status.¹⁸³ In *Buckley v. Gains*, the Fifth Circuit ruled that where an IFP applicant indicated in her petition for IFP status that she has no income, such a plaintiff is entitled to the Article 5183 rebuttable presumption and IFP status, unless the applicant's affidavit is traversed.¹⁸⁴

11. Financial Assistance of Third Parties to an IFP Litigant May Not Be Considered in Determining Whether a Litigant Qualifies For IFP Status

The assistance provided by third parties to a litigant seeking to proceed IFP does not detract from his indigent status.¹⁸⁵ The Supreme Court of Louisiana has found that the entitlement to prosecute a suit IFP does not require that the litigant be "destitute even of a mattress upon which to lie, or a table upon which to eat, or a chair upon which to sit."¹⁸⁶ It has also explained that if friends or sympathetic or charitable persons are willing to assist a litigant rather than see him or her deprived of legal recourse for lack of funds, such assistance will not detract from the litigant's poverty status as intended by the IFP Code articles.¹⁸⁷ Additionally, the existence of a contingency contract between a plaintiff seeking to proceed IFP and his or her attorney will not prevent a litigant from being granted the right to file pleadings without pre-paying court costs.¹⁸⁸

12. Either the Adverse Party or the Clerk of Court May Traverse an IFP Affidavit

An order permitting a litigant to proceed IFP may not be rescinded without a trial of a rule to traverse.¹⁸⁹ Either the adverse party or the clerk of court may traverse the facts alleged in an IFP affidavit and file a rule to show cause against the IFP litigant; however, only one rule to traverse the affidavit will be permitted.¹⁹⁰ An order must be rescinded if the court finds at the trial of the rule to traverse that the litigant is not entitled to proceed IFP.¹⁹¹ A trial court is awarded wide discretion in determining whether to grant or rescind the privilege to litigate IFP.¹⁹²

13. Local District Courts May Not Impose Greater Obligations on a Party Seeking to Proceed IFP Than Those Contained in the Louisiana Code of Civil Procedure

¹⁸³ 2003-2022 (La. 11/7/03); 857 So. 2d 507.

¹⁸⁴ *Buckley v. Gaines*, 00-1469 (La. App. 5 Cir. 10/2/00); *see also, Boudoin v. Boudoin*, 03-436 (La. App. 5 Cir. 5/2/03); *Guidry v. Spahn*, 02-238 (La. App. 5 Cir. 3/27/02); *Goldman v. Goldman*, 02-177 (La. App. 5 Cir. 2/28/02); *Johnson v. Johnson*, 98-533 (La. App. 5 Cir. 6/15/98).

¹⁸⁵ *Fils v. Iberia, St. M. & E.R. CO.*, 82 So. 697, 700 (La. 1919); *see also, Hollier v. Broussard*, 220 So. 2d 175, 177 (La. App. 3 Cir. 3/12/69); *In re Peters*, 2007-0349 (La. 6/29/07); 959 So. 2d 846 (Financial assistance from attorney did not preclude pauper status).

¹⁸⁶ *Id.* at 700.

¹⁸⁷ *Id.*

¹⁸⁸ *Jackson v. Aetna Life & Cas. Co.*, 392 So. 2d 1073, 1074 (La. App. 3 Cir. 1980).

¹⁸⁹ *Carbajal v. Carbajal*, 02-1236 (La. App. 5 Cir. 1/17/03); *Riley v. Lifeworks of New Orleans*, 96-506 (La. App. 5 Cir 6/19/96).

¹⁹⁰ LA. CODE CIV. PROC. art. 5184(A).

¹⁹¹ LA. CODE CIV. PROC. art. 5184(B).

¹⁹² *Perry v. Montistere*, 2008-1629 (La. App. 1 Cir. 12/23/08); 4 So. 3d 850, 854.

{N0587928 -}

In Futch v. Coumes, a district court rule required an IFP applicant, his attorney and the affiant attesting to the applicant's inability to pay the costs of court to appear before the clerk of court to execute the affidavits.¹⁹³ The record indicated that a deputy clerk would "interrogate the litigant, requiring answers to a two-page questionnaire."¹⁹⁴ If satisfied, the clerk was required to sign the IFP order.¹⁹⁵ Upon the district court's denial of the litigant's request to proceed IFP, the Louisiana Supreme Court granted certiorari to review the district court's decision and reversed.¹⁹⁶

The court explained that the local rule conflicted with the provisions of the Code of Civil Procedure, specifically Article 5183, because the local rule required a personal appearance at the clerk of court's office and an interrogation by a deputy clerk.¹⁹⁷ The court explained that the statutory procedure outlined in the Code of Civil Procedure "is designed to assure efficient and non-technical exercise of the privilege by those entitled to it."¹⁹⁸ Requiring a personal appearance and interrogation was contrary to the statutory scheme and could "inhibit access to the privilege by those entitled by law to exercise it . . .".¹⁹⁹

Some local rules applicable to the determination of IFP status have been upheld. In Wilson v. Willis, the First Circuit upheld a local rule requiring that an applicant "attach to his petition a notarized affidavit setting forth facts concerning [the] applicant's net worth, including by way of illustration but not by limitation, all property, movable and immovable owned by applicant and the value thereof, the applicant's earnings for two years preceding the date of filing of the petition, the indebtedness of the applicant, the needs of the applicant and those dependent upon him, etc."²⁰⁰ The court found this requirement was not unduly burdensome to the IFP applicant and that it did not exceed the requirements of Article 5183.²⁰¹

District court rules should not be more burdensome than the rules provided in the Code of Civil Procedure. Those that are more burdensome may be challenged.

14. Unless Rescinded, IFP Status Carries Over on Appeal

An IFP litigant may appeal the judgment of a trial court.²⁰² An appellate court must consider the writ application of an IFP litigant without pre-payment of filing fees related to the

¹⁹³ Futch v. Coumes, 347 So. 2d 1121, 1122 (La. 1977).

¹⁹⁴ Id. at 1122.

¹⁹⁵ Id.

¹⁹⁶ Id. at 1123.

¹⁹⁷ Id.

¹⁹⁸ Id.

¹⁹⁹ Futch, 347 So.2d at 1123; see also, Riley v. Lifeworks of New Orleans, 96-506 ("[T]he clerk of court's procedure of employing a review and recommendation to the district judge prior to presentation of the order for signature violates the requirements of La. Code Civ. P. Art. 5184 that traversal of the party's indigent status be by rule to show cause").

²⁰⁰ 404 So. 2d 529, 530 (La. 1 Cir. 1981)

²⁰¹ Id.

²⁰² Jolivette v. Jolivette, 386 So. 2d 707, 709 (La. App. 3 Cir. 1980).

{N0587928 -}

appeal²⁰³ because the IFP litigant is entitled to proceed without pre-payment of court costs until the order is rescinded.²⁰⁴ A trial court may not condition an IFP litigant's suspensive appeal upon monthly payments of court costs during the pendency of the appeal.²⁰⁵ If an IFP litigant is unsuccessful on appeal, he or she will likely be taxed with the costs of the appeal.²⁰⁶ The appellate court does have the discretion to waive an IFP litigant's appeal costs.²⁰⁷

B. IFP Issues That Arise in Practice But That Have Not Been Directly Addressed by Statute and/or Case Law

The questions below have been raised by IFP practitioners around the State. There is little or no case law applicable to these issues.

1. May an IFP Litigant Seeking to Expunge His or Her Record Proceed IFP?

In State ex rel. Thompson v. State, the plaintiff obtained IFP status in connection with his motion to expunge his criminal arrest record.²⁰⁸ The trial court ultimately denied plaintiff's motion to expunge on the ground that he failed to satisfy the statutory requirements for expungement.²⁰⁹ The plaintiff was unsuccessful on appeal, and was assessed with the costs of the appeal.²¹⁰

While the IFP articles do not address which types of proceedings permit litigants to proceed IFP, as shown in the Thompson case, a plaintiff seeking expungement has been permitted to proceed IFP.

²⁰³ Richardson v. Say, 98-1094 (La. 5/29/98); 719 So. 2d 1271 ("Granted and transferred to the court of appeal for consideration on the merits without the payment of a filing fee. See Riebow v. Riebow, 97-3093 (La. 1/619/6198), 705 So. 2d 1086."); see also, Kenner Reg'l Med. Ctr. v. Mensingh, 98-0186 (La. 1/22/98); 709 So. 2d 684 ("Where relator is seeking review of the denial of an application to proceed in forma pauperis, the clerk of court shall allow the application to be filed without the payment of costs. Accordingly, the application is transferred to the court of appeal for consideration on the merits without the payment of a filing fee."); Cook v. Cook, 98-0023 (La. 1/9/98); 705 So. 2d 1087 ("Where relator is seeking review of the denial of an application to proceed in forma pauperis, the Clerk of Court shall allow the application to be filed without the payment of costs. Application transferred to the court of appeal for consideration on the merits without the payment of a filing fee."); Riebow v. Riebow, 97-3093 (La. 1/9/98); 705 So. 2d 1086 ("Where relator is seeking review of the denial of an application to proceed in forma pauperis, the clerk of court shall allow the application to be filed without the payment of costs. Application transferred to the court of appeal for consideration on the merits without the payment of a filing fee."); Peterson v. Peterson, 97-0144 (La. 3/7/97); 691 So. 2d 664 ("The intent of our order in Language v. Language, was for the court of appeal to consider the merits of relators' argument that the procedure employed in this case for determining relators' pauper status violated La.Code Civ.P. arts. 5181–5188. Accordingly, the case is remanded to the court of appeal to make a determination on the merits in this matter, based on the record before it."); Language v. Language, 96-1874 (La. 10/25/96); 681 So. 2d 350 (Writ application "transferred to the court of appeals for consideration on the merits without the payment of a filing fee.").

²⁰⁴ LA. CODE CIV. PROC. art. 5185(A).

²⁰⁵ Sandra Johnson v. M.J. Sauer, 2012-0022 (La. App. 4 Cir. 1/12/12).

²⁰⁶ Carter v. Smith, 607 So. 2d 6, 8 (La. App. 2 Cir. 10/28/92); Gibson v. Barnes, 597 So. 2d 176 (La. App. 1 Cir. 4/10/92).

²⁰⁷ Harsh v. Calogero, 615 So. 2d 420, 423 (La. App. 4 Cir. 1993); LA. CODE CIV. PROC. art. 1920.

²⁰⁸ 2009-1731 (La. App. 1 Cir. 4/1/10); 2010 WL 1254715.

²⁰⁹ Id.

²¹⁰ Id.

{N0587928 -}

2. May a Judicial Lien be Asserted Against an IFP Litigant?

Article 5187 provides that the clerk of court shall have a lien for the payment of court costs in the event the IFP proceeding is compromised or dismissed and such compromise or dismissal does not provide for the payment of court costs.²¹¹ Article 5187 states, in pertinent part:

No release of a claim or satisfaction of a judgment shall be effective between the parties to a judicial proceeding in which one of the parties has been permitted to litigate without the payment of costs unless all costs due the clerk of court have been paid. The clerk of court shall have a lien for the payment of such costs superior to that of any other party on any monies or other assets transferred in settlement of such claim or satisfaction of such judgment and shall be entitled to collect reasonable attorney's fees in any action to enforce this lien for the payment of such costs.²¹²

Once a litigant receives IFP status, the subject proceeding cannot be dismissed prior to final judgment unless the court costs are paid or all counsel of record certify that no compromise has been effected and none is contemplated.²¹³ The Attorney General's Office has opined that a case may be dismissed by a plaintiff prior to judgment "without the payment of costs incurred as long as there has been no settlement or compromise, made by the defendant, or money paid by the defendant to the plaintiff."²¹⁴ Court costs must be paid if there is a compromise.²¹⁵ If the IFP litigant is granted any of the relief requested through compromise, costs become due.²¹⁶

3. Are the Costs Associated With an IFP Litigant's Attorney's Motion to Withdraw from the Case Due to the Clerk of Court if the Client is Granted IFP Status?

Until an order granting IFP status is rescinded, the IFP litigant is entitled to the services of the clerk of court in, or in connection with, the judicial proceeding, including, but not limited to filing pleadings.²¹⁷ There is no case law discussing whether the costs associated with a motion to withdraw become immediately due to a clerk of court if the withdrawing attorney's client is granted IFP status.

4. May a Court Deny an IFP Applicant's Request to Proceed IFP if the Applicant is LSC (Legal Services Corporation) eligible?

An applicant is not entitled to the benefit of the Article 5183 rebuttable presumption simply because the applicant may be Legal Services Corporation eligible. To take advantage of

²¹¹ LA. CODE CIV. PROC. art. 5187; see also, Hon. Dan Foley, La. Att'y Gen. Op. No. 84-79 (Mar. 22, 1984).

²¹² Id.

²¹³ Id.

²¹⁴ Hon. Claude R. Sledge, La. Att'y Gen. Op. No. 90-51 (May 4, 1990).

²¹⁵ Id.

²¹⁶ Id.

²¹⁷ LA. CODE CIV. PROC. art. 5185(A)(1).

{N0587928 -}

the rebuttable presumption, the applicant must be either (1) receiving public assistance benefits or (2) the applicant's income must be less than or equal to 125% of the federal poverty level. If an IFP applicant is LSC eligible because he or she is receiving public assistance or meets the poverty level requirement, then there is a rebuttable presumption that the LSC eligible litigant is entitled to IFP status because he or she meets the requirements set forth in the Article 5183, not simply because he or she is LSC eligible.

5. May a Duty Judge Grant an Application to Proceed IFP?

Uniform Rule 3.2 provides:

Each judicial district or court may designate one or more of its members to act as a duty judge. In civil proceedings, the duties assigned to a duty judge shall comply with La. Code Civ. Proc. art. 253.3. The identity of each duty judge shall be prominently displayed in a manner deemed appropriate by the court. If the court chooses to use multiple duty judges to perform various functions, the delineation of each duty judge's duties shall also be prominently displayed. The length of term and duties of the duty judge shall be at the sole discretion of the judges in each judicial district or court sitting en banc. For those judicial districts or courts that have designated duty judges, the office hours for performance of his or her duties, and the duties assigned, are listed in Appendix 3.2.²¹⁸

Article 253.3 of the Code of Civil Procedure permits duty judges to hear and sign orders permitting a litigant to proceed IFP.²¹⁹ In addition, a duty judge may sign an order specifically authorized by the judge to whom the case is assigned.²²⁰ When the duty judge signs an order or judgment pursuant to Article 253.3, he or she does not acquire jurisdiction over any other matters in the case.²²¹ After the duty judge's ruling, the judge assigned to the proceeding must hear other matters pertaining to the proceeding.²²²

6. What Proof or Evidentiary Requirements Must be Met with regard to the Traversal of an IFP Applicant's Affidavit?

While Louisiana law allows an opponent, or the clerk of court, to traverse an IFP application, the law does not address the evidentiary guidelines applicable to traversing an IFP application. The party or clerk traversing the affidavit must file a rule to show cause against the applicant to show why the court's order allowing the litigant to proceed IFP should not be rescinded.²²³ The court may reconsider an order granting a litigant IFP status on its own motion at any time in a contradictory hearing.²²⁴ As noted, an IFP litigant's status may be reconsidered at any time if a judge has cause to believe the litigant's circumstances have changed or that the order was improperly granted.²²⁵ For example, an order granting IFP status could be rescinded if

²¹⁸ Uniform Rules, Rule 3.2.

²¹⁹ LA. CODE CIV. PROC. art. 253.3(A)(3) states, in pertinent part: "A. In any case assigned pursuant to Article 253.1, a duty judge shall only hear and sign orders or judgments for the following: . . . (3) Entry of preliminary defaults, confirmation of defaults, stipulated matters, examination of judgment debtors, orders to proceed in forma pauperis, orders allowing the filing of supplemental and amending petitions when no trial date has been assigned, orders allowing incidental demands when no trial date has been assigned, orders allowing additional time to answer, and judicial commitments."

²²⁰ LA. CODE CIV. PROC. art. 253.3(C).

²²¹ LA. CODE CIV. PROC. art. 253.3(D).

²²² Id.

²²³ Id.

²²⁴ LA. CODE CIV. PROC. art. 5183.

²²⁵ City Stores v. Petersen, 268 So. 2d at 663.

{N0587928 -}

the IFP litigant's financial circumstances improved after the court granted the order.²²⁶ Abusing the IFP privilege by embellishing or omitting pertinent facts relative to the IFP litigant's financial condition²²⁷ or repeatedly filing frivolous pleadings²²⁸ has resulted in denial or revocation of pauper status.²²⁹ Reconsideration, however, must occur after an evidentiary hearing when rescission of the IFP order is dependent upon contested issues of fact.²³⁰ The "issue of fact" standard is a judicial doctrine; it was not codified by the legislature.

IV. Conclusion

The United States judicial system, including the courts of Louisiana, grant all persons the privilege of receiving access to justice regardless of whether the litigant is impoverished. The legislature enacted the IFP provisions of Louisiana's Code of Civil Procedure to ensure this privilege for its citizens. The first article of Louisiana's Civil Code states that the sources of law in Louisiana are "legislation and custom" and, as discussed above, some customs in practice have created obstacles conflicting with the intent to ensure access to justice for all. By highlighting the customs that conflict with the law, it is hoped that these customs can now become the exception.

²²⁶ See, Dilley v. Phillips Petroleum Co., 24 So. 2d 209 (La. App. 1 Cir. 1945); Gilmore v. Rachl, 202 La. 652.

²²⁷ Ainsworth v. Ainsworth, 2003-1626 (La. App. 4 Cir. 1/9/04); 860 So. 2d 104, 107-09.

²²⁸ Mendonca v. Tidewater, Inc., 2011-0318 (La. App. 4 Cir. 9/7/11); 73 So. 2d 407, 415.

²²⁹ Ainsworth, 860 So. 2d at 108-09; Mendonca, 73 So. 2d at 415.

²³⁰ See, City Stores v. Petersen, 268 So. 2d at 663.

{N0587928 -}