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Joey Orduna Hastings

Clerk of the Court

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Tracie K. Lindeman
Clerk of Supreme Court

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6 IN THE FAMILY DIVISION
7 OF THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
8 IN AND FOR THE COUNTY OF WASHOE

9 ALEXANDER M. FALCONI,

10 Petitioner,

11 vs.

Case No. FV08-03200

12 [REDACTED] A. [REDACTED]

Dept. No. 11

13 Respondent.
14 _____/

15 **ORDER DENYING REQUEST TO PROCEED IN FORMA PAUPERIS**

16 Before the court for decision is Alexander M. Falconi's "Application to Proceed In
17 Forma Pauperis on Appeal and for the Production of Transcripts at the Expense of the
18 County," filed and submitted on November 21, 2013. The Court now finds and orders as
19 follows:

20 **The Facts**

21 Mr. Falconi asks the court to waive fees for his appeal of the court's determination
22 that he is willfully unemployed for the purpose of avoiding the payment of child support.

23 On November 13, 2013, this Court entered an its Order Denying Motion to Modify
24 Child Support, which is the subject of Mr. Falconi's pending appeal. That order denied
25 Mr. Falconi's request to modify child support on the basis that he failed to demonstrate a
26 sufficient change of circumstances. The order included a finding that Mr. Falconi is
27 willfully underemployed, and that his justifications for underemployment are insufficient
28

1 to prove that the willful underemployment is for reasons other than the avoidance of his
2 support obligation.

3 In his Application, Mr. Falconi states that his request is based upon NRS 12.015.
4 Mr. Falconi requests that the Court issue an Order allowing him to proceed on appeal
5 without paying fees, costs, or security. He also requests, pursuant to NRS 12.015(3), for
6 the Court to provide him with a transcript of the July 25, 2013 hearing at the expense of
7 the County.

8 In Mr. Falconi's Affidavit, contained within his Application, he states that he is
9 currently self-employed. Mr. Falconi states that he is an on-call paralegal at Collection
10 [REDACTED]

11 Chevalier, Esq. Mr. Falconi indicates that he earns approximately \$300.00 per month.

12 Mr. Falconi alleges that he has been approved for unemployment insurance, but no
13 disbursements have been made. He anticipates receiving \$240.00 per week. The Court
14 notes that pursuant to Mr. Falconi's attached "Exhibit 3," the webpage printout indicates
15 that a payment of \$833.00 was made on November 19, 2013. "Exhibit 3" indicates that he
16 will receive a weekly benefit amount of \$227.00.

17 Mr. Falconi indicates that his wife receives an income of \$1,000.00 per month in
18 wages and tips. He states that his wife also contributes an additional \$1,000.00 per month
19 to the household from a personal injury settlement.¹ He claims that he receives \$73.91 per
20 month in child support from Respondent [REDACTED] A. [REDACTED] Mr. Falconi also alleges that
21 he has applied for food stamps, but has not received notification as to whether he qualifies
22 for the program.

23 Regarding his assets, Mr. Falconi states that he has a joint-checking and savings
24 account with his wife. He alleges that these accounts have a combined value of \$260.66.
25 As "Exhibit 1," Mr. Falconi attaches a printout of a "Personal Account" with Bank of

26
27 ¹ Based on the information provided by Mr. Falconi, the Court is unable to determine the characterization of
28 this award. Since Mr. Falconi claims that it is part of Mother's monthly income, the Court finds that it is
income from a family member that should be included. See U.S. Department of Commerce, *How the Census
Bureau Measures Poverty* (2013), available at <http://www.census.gov/hhes/www/poverty/about/overview/measure.html>;
Bowen v. Gilliard, 483 U.S. 587, 107 U.S. 587 (1987).

1 America which includes information for a checking account with a balance of \$404.24 and
2 a savings account with a balance of \$23.81.

3 Mr. Falconi states that he "reside[s] in a home at and is [sic] located at 9218 Running
4 [REDACTED]
5 assessments and \$65.59 in property taxes per month. The Court takes judicial notice of Mr.
6 Falconi's Application to Proceed in Forma Pauperis, case number CV13-01765, filed
7 August 12, 2013, in which he and his wife state: "We own a home which we reside at and
8 [REDACTED]
9 owns a vehicle with an approximate value of \$10,350.00.

10 Regarding monthly expenses, Mr. Falconi states that his household's monthly
11 expenses also include \$500.00 in food costs, \$250 for transportation, \$540 for utilities, \$150
12 for car insurance, and \$160 for auto insurance. Mr. Falconi states that the remaining
13 income is needed to cover education, dental expenses, and other miscellaneous items for
14 the minor child. Mr. Falconi also alleges to have student loan debt in the amount of
15 \$5,500.00.

16 The Court notes that Mr. Falconi did not request a fee waiver in this district
17 proceeding, FV08-03200. In his Application, Mr. Falconi mentions other cases in which he
18 has initiated proceedings on his own behalf in the Second Judicial District Court and
19 Nevada Supreme Court. Mr. Falconi states that he has paid the filing fees for the
20 following cases: FV08-03200, CV12-02385, SCN 59554, and SCN 57516. The Court notes
21 that Mr. Falconi applied, and was granted a fee waiver in CV09-03089, CV12-02385,
22 CV13-01019, and CV13-01765. He has pursued appeals in CV12-02385 and CV13-01765.
23 However, the Court notes that Mr. Falconi's Applications contain different financial
24 information and household composition than his November 21, 2013 Application. In the
25 present Application, the contribution from his wife is significantly higher, and the
26 previous requests were determined without the benefit of the consideration given to Mr.
27 Falconi's financial circumstances that preceded adjudication of his motion to modify child
28 support.

1 The Law

2 Rule 24 of the Nevada Rules of Appellate Procedure states that "a party to a district
3 court action who desires to appeal in forma pauperis shall file a motion in the district
4 court." NRAP 24(a)(1). The party shall file an affidavit that shows in detail the party's
5 inability to pay, claims an entitlement to redress, and states the issues the party intends to
6 present on appeal. NRAP 24(a)(1)(A)-(C). If the district court grants the motion, "the
7 party may proceed on appeal without prepaying or giving security for fees and costs."
8 NRAP 24(a)(2).

9 Additionally, pursuant to the Nevada Supreme Court's decision in *Rodriguez v.*
10 *Eighth Judicial Dist. Court ex rel.*,

11 In the context of civil litigation, the general rule is that courts look to a
12 party's current financial status, including the party's income, property, and
13 other resources, to determine that party's present ability or, more
14 importantly, inability to prosecute or defend an action. When considering an
15 indigency application, a trial judge must consider a party's complete
16 financial picture, balancing income and assets against debts and liabilities,
17 taking into account the cost of a party's basic needs and living expenses.
18 Particularly relevant to this inquiry are (1) the party's employment status and
19 income, including income from government sources such as social security
20 and unemployment benefits, the ownership of any unencumbered assets,
21 including real or personal property and monies on deposit, and finally, (3)
22 the party's total indebtedness and any financial assistance received from
family or close friends. Additionally, when confronted with a party who is
willfully underemployed, especially for purposes of avoiding court ordered
support payments, additional inquiry is required. In such a case, it is prudent
for the court to consider the employability of the nonpaying party and what
his or her ability to pay would be if employment were pursued and obtained.

23 *Rodriguez v. Eighth Judicial Dist. Court ex rel.*, 120 Nev. 798, 806-7, 102 P.3d 41, 46-47
24 (2004).

25 "[W]here two people are living together and functioning as a single economic unit,
26 whether married, related or otherwise, consideration of their combined assets may be
27 warranted." *Id.*, 120 Nev. at 807, 102 P.3d 47, n. 19 (citing *State v. Vincent*, 883 P.2d 278,
28 283-84 (Utah 1994)).

ADKT No. 411, filed January 4, 2008, provides some guidance on the definition of indigency for criminal and juvenile delinquency cases. Regarding the standard for determining indigency, the Order states,

A person will be deemed 'indigent' who is unable, without substantial hardship to himself or his dependents, to obtain competent, qualified legal counsel on his or her own. 'Substantial hardship' is presumptively determined to include all defendants who receive public assistance, such as Food Stamps, Temporary Assistance for Needy Families, Medicaid Disability Insurance, reside in public housing or earn less than 200 percent of the Federal Poverty Guideline. A defendant is presumed to have a substantial hardship if he or she is currently serving a sentence in a correctional institution or housed in a mental health facility.

In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Crim. & Juv. Delinquency Cases, ADKT No. 411, 2-3 (Jan. 4, 2008).

The court finds instructive the United States Department of Health and Human Services Poverty Guidelines ("Poverty Guidelines"). See U.S Department of Health & Human Services, *Poverty Guidelines* (2013), available at <http://aspe.hhs.gov/poverty/13poverty.cfm>. To be eligible for federal food benefits a party's gross monthly income must fall at or below 185% of the Poverty Guidelines. See United States Department of Agriculture, *WIC Income Eligibility Guidelines* (2013), available at <http://www.fns.usda.gov/cnd/Governance/notices/iegs/IEGs.htm>.

The federal Poverty Guidelines do not contain a definition of what income is calculated in determining indigency. However, the Poverty Guidelines state that the Census Bureau utilizes a standard definition on what sources of income comprise a person's gross monthly income. See U.S Department of Health & Human Services, *Frequently Asked Questions Related to the Poverty Guidelines and Poverty* (2013), available at <http://aspe.hhs.gov/poverty/faq.cfm#before>. The Census Bureau indicates that income from all of the family members in the household are combined to compute a person's poverty status. See U. S Department of Commerce, *How the Census Bureau Measures Poverty* (2013), available at <http://www.census.gov/hhes/www/poverty/about/overview/measure.html>.

Analysis

The Court finds that Mr. Falconi's household is composed of Mr. Falconi, his wife, and joint physical custody of his minor child. Presently, 185 percent of the Poverty Guidelines for a household of three is \$3,011 in gross monthly income. 200 percent of the Poverty Guidelines for a household of three is \$3,255 in gross monthly income.

Upon review of Mr. Falconi's Application and accompanying Affidavit, the Court finds that Mr. Falconi's household income is \$3,357.58 (\$300 in Mr. Falconi's employment income, plus \$2,000 in his wife's contribution, plus \$983.67 in his unemployment insurance, plus \$73.91 in child support). Mr. Falconi's additional assets including a home, checking and savings account, and a vehicle. Accordingly, his income does not fall at or below either 185 or 200 percent of the federal Poverty Guidelines.

Based on this Court's finding that Mr. Falconi is willfully underemployed for the purposes of avoiding court ordered support payments, the Court also considers Mr. Falconi's employability. Mr. Falconi is a certified paralegal. In his Application, Mr. Falconi claims to have "prevailed before on appeal." Based upon the quality of the legal research and writing found in the documents he has prepared and filed with this Court and on appeal, it is evident that he is employable as a paralegal.

The Court notes that Mr. Falconi's Affidavit indicates that his employment status has changed since he filed his Financial Declaration on July 10, 2013, and his testimony at the hearing on July 25, 2013. At the hearing, Mr. Falconi testified that he was working "extra hours" and anticipated working thirty hours per week at Collection Service of Nevada while attending school this fall. Mr. Falconi's Financial Declaration stated that he was paid an hourly wage of \$15.00 per hour for a monthly income of \$1,742.60, received bonuses, commissions, or tips in the amount of \$26.67 per month, and received income from "other sources" in the amount of \$133.33.

Mr. Falconi has not provided the Court with any information regarding attempts to gain additional employment. Mr. Falconi states that he is "on-call" at Collection Service of Nevada and "occasionally works" for Yvette Chevalier, Esq. Mr. Falconi does not provide

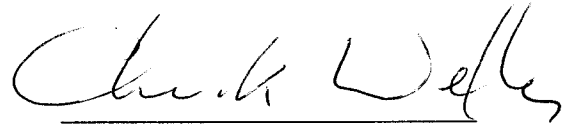
1 any documentation regarding his wages from either employer or the amount of hours he
2 is working for either employer.

3 This Court finds that Mr. Falconi's earning capacity is significantly higher than
4 \$300.00 per month. After reviewing all of Mr. Falconi's sources of income, the household's
5 assets and expenses, and his employability, the Court finds that Mr. Falconi would be able
6 to afford to pay the filing fee associated with his appeal if employment were pursued and
7 obtained. Therefore, the Court finds that he is not indigent and does not meet the
8 standard to proceed *in forma pauperis*.

9 Based on the foregoing reasons, Mr. Falconi's "Application to Proceed In Forma
10 Pauperis on Appeal and for the Production of Transcripts at the Expense of the County"
11 is hereby DENIED.

12 **IT IS SO ORDERED**

13 Dated: January 13, 2014.

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15 District Court Judge
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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of JUDGE CHUCK WELLER, and that I deposited for mailing at Reno, Nevada, a true copy of the attached document, addressed to:

Alexander Falconi
[REDACTED]

I further certify that that I electronically filed the foregoing with the Clerk of the Court system which will send a notice of electronic filing to the following:

Kathrine Berning, Esq.

Dated this 13th Day of January, 2014.

[Signature]
ADMINISTRATIVE ASSISTANT