



Michigan Supreme Court

State Court Administrative Office

Trial Court Services

Friend of the Court Bureau

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MEMORANDUM

DATE: March 18, 2008

TO: Friends of the Court

cc: Chief Circuit Judges
Presiding Family Division Judges
Circuit Court Administrators
Family Division Administrators

FROM: Steven D. Capps

RE: SCAO Administrative Memorandum 2008-03
Felony Nonsupport Referral and Processing Policy

The State Court Administrative Office's (SCAO) Friend of the Court Bureau (FOCB) develops operational guidelines for all friend of the court (FOC) offices. State law requires that each FOC adopt office procedures that implement the FOCB's recommendations (see [MCL 552.503\(7\)](#)).

State law makes it a felony to fail to pay child support or to abandon a spouse or child. The FOCB has developed the attached policy to guide FOCs in the referral of child support nonpayers for criminal prosecution and to assist courts in implementing restitution orders in criminal nonsupport cases. The FOCB developed this policy in consultation with the Office of Child Support, the Prosecuting Attorneys Association of Michigan, and the Attorney General's office. This memorandum replaces Administrative Memorandum 2003-11.

Courts or FOCs should address questions or comments about this policy to Steven Capps at cappss@courts.mi.gov or to Angel Sorrells at sorrellsa@courts.mi.gov, or call (517) 373-5975.

Criminal Non-Payment of Support Procedures

This policy provides general information about criminal nonsupport, recommends procedures for FOC offices to refer cases to prosecuting attorneys (PA) or the Attorney General (AG) for criminal prosecution, and describes best practices for nonsupport restitution orders. This policy was drafted by a workgroup consisting of FOCs, PAs, and representatives from the AG's office, all of whom practice in the area of child support or criminal prosecution of delinquent payers.

A. Child support crimes

There are two nonpayment-of-support felonies. The first involves abandoning a spouse or child and refusing to support them.¹ The second involves failing to pay child support in the amount or at the time ordered by a court.² A third statute makes it a misdemeanor for a person of sufficient ability to refuse or neglect to support his or her family.³

B. Separation of powers

Because the judicial branch decides criminal cases in which the state is represented by the PA or AG, a court should not allow its FOC to determine subjectively whether the facts of a case justify filing criminal charges. Instead, the FOC should refer cases for prosecution only when the cases meet specific objective criteria established by the PA and AG. Similarly, once a case meets those criteria, FOCs must refer it.⁴

Sometimes a parent who is owed support will personally ask the PA to prosecute the other parent. The PA may then request information about the case from the FOC. These cases are not governed by the criteria for referral because the FOC has not made the referral.

C. Procedure and criteria for referral

The specific details of the referral criteria for each circuit or county should be developed by the AG and the county PA, in consultation with the local FOC office. The localized criteria also will determine which cases are referred to the PA and which cases are referred to the AG.

¹ See [MCL 750.161](#).

² See [MCL 750.165](#).

³ See [MCL 750.167](#).

⁴ The FOC may provide information that mitigates against prosecution of a particular case, but this information must also be based on specific criteria established by the PA or AG. For example, the FOC should not ask the PA or AG not to prosecute a case because a payer has a learning disability that prevents the payer from maintaining employment, but the FOC may provide that information when asked if the FOC is aware of any reason the payer cannot maintain employment.

1. Referrals to the PA

The PA in each county will: (a) set the threshold amount of arrears that will require an FOC referral for possible prosecution, and (b) determine whether to prosecute nonpayers who do not reside in that county.

The workgroup recommends the PA in each county work closely with its FOC to ensure that local referral policies and procedures are clearly outlined. Each county's PA and FOC can create a referral system that works for them, specifying objective referral criteria that limit the FOC's subjective involvement.

2. Referrals to the AG

The AG, in consultation with PAAM, FOCA, and SCAO, has established the following criteria for referrals:

a. Amount Owed

The FOC should only refer cases in which the payer owes arrears in excess of \$10,000, unless the AG and local prosecutor have agreed otherwise.

b. Residency

Felony prosecution may be authorized without regard to whether a payer is a resident of Michigan. The AG will determine whether to seek extradition of payers who are nonresidents.⁵

c. Lack of Current Payments

The payer made payments less than 51 percent of the amount that became due during the previous six months.

d. Knowledge of Obligation

The payer must know of the child support obligation. This is a factual determination that the AG will make after an investigation by AG personnel.

⁵ For payers living outside Michigan, federal criminal prosecution may also be an option.

e. Ability to Pay

The payer must have the ability to make support payments. The AG will conduct an investigation into the payer's income, assets, obligations, credit history, and other factors.

f. Custodial Parent Questionnaire

If the criteria in (a)-(e) are satisfied, the AG will send a questionnaire (a sample is attached as Appendix A) to the custodial parent requesting basic information to aid in the decision whether to file charges. The custodial parent should return the questionnaire directly to the AG.

D. Requests for warrants by certified police officers working at the FOC office

Certified police officers who are employed in the FOC office, but whose activities are not directed by the FOC, may ask the PA to initiate a felony nonsupport prosecution. The officer should use a police report format and the warrant request forms approved by the PA. In these situations, the PA may contact the FOC to determine if the FOC can provide information that may assist the PA in determining whether to prosecute.

E. Cases requiring special handling

Certain cases require special handling to protect a parent or child. The FOC should provide a special notice to the PA when the case involves domestic violence, has a family violence indicator, or has a good cause exemption from enforcement. The PA will then take the necessary action to protect the parent or child during any prosecution that follows.

The FOC should also inform the PA if the support payee wishes to shield the child from seeing the other parent prosecuted and portrayed in the media as a criminal.

F. Court and FOC requirements when cases result in prosecution

1. Notice to FOC

The workgroup recommends that when a PA files charges, the PA should inform the FOC immediately. The details of the notice procedures can be finalized at the local level as part of that locality's criminal referral agreement. The FOC then should take necessary steps to prevent a payer from coercing a payee into abating an arrearage in order to thwart the criminal prosecution.

For example, the FOC should flag the MiCSES files of cases that are being prosecuted to alert staff and the court that a criminal prosecution is pending and

that the prosecutor should be notified of any action to reduce or abate the arrearage. If the FOC does not feel comfortable relying on MiCSES notes (or does not have the ability to properly flag a file in MiCSES), the FOC should notify the PA personally of suspicions that a party may be attempting to interfere with the prosecution. The FOC should also place a note in MiCSES about that direct FOC contact with the PA.

2. FOC Testimony

The PA or AG may require testimony from a person in the FOC office as part of a prosecution. The PA and AG should not try to subpoena FOC records, the FOC, or a referee. Instead, each FOC must make someone available who can access the FOC records and testify about them.⁶ Agreements between the FOC and PA may be made locally.

With regard to cases involving the AG, SCAO recommends that each FOC office submit the name of an FOC contact person to the AG. Other FOC personnel may later testify in the criminal case. The designated contact person's role is to serve as the initial FOC contact to whom the AG may direct questions on a specific case.

3. MCL 750.165 Bond Requirements

There are special bond requirements for persons charged under MCL 750.165. Subsection (3) requires the court to set bond for felony nonsupport defendants based on the amount of the arrearage. It states:

(3) Unless the individual deposits a cash bond of not less than \$500.00 or 25% of the arrearage, whichever is greater, upon arrest for a violation of this section, the individual shall remain in custody until the arraignment. If the individual remains in custody, the court shall address the amount of the cash bond at the arraignment and at the preliminary examination and, except for good cause shown on the record, shall order the bond to be continued at not less than \$500.00 or 25% of the arrearage, whichever is greater. At the court's discretion, the court may set the cash bond at an amount not more than 100% of the arrearage and add to that amount the amount of the costs that the court may require under section 31(3) of the support and parenting time enforcement act, 1982 PA 295, MCL 552.631. The court shall specify that the cash bond amount be entered into the L.E.I.N.

⁶ The FOC staffer appearing as a witness will testify about the case and the contents of its FOC file.

The statute also provides that the court handling the criminal case must notify any court that has issued a civil bench warrant (in the same support dispute) under the Support and Parenting Time Enforcement Act that the civil warrant may be recalled:

If a bench warrant under section 31 of the support and parenting time enforcement act, 1982 PA 295, MCL 552.631, is outstanding for an individual when the individual is arrested for a violation of this section, the court shall notify the court handling the civil support case under the support and parenting time enforcement act, 1982 PA 295, MCL 552.601 to 552.650, that the bench warrant may be recalled.

4. Restitution
 - a. Ordering full restitution

Crime victims have a constitutional ([Article 1, section 24](#)) and statutory ([MCL 780.766](#)) right to full restitution. SCAO recommends that courts comply with those restitution requirements by ordering the defendant to pay all outstanding arrears under the existing civil judgment without specifying the amount.⁷ Payment of any future surcharges, as well as current and future support, if applicable, should be made part of the probation or parole requirements.

SCAO recommends that, if the payer has multiple child support orders, payments made in the criminally prosecuted case be designated “special instruction” payments to be made directly to the FOC.⁸ This method will ensure proper payment credit.⁹ If the payer has only one child support order, payments may be sent through the Michigan State Disbursement Unit without the special-instruction designation.

⁷ This eliminates having two orders running at the same time and prevents duplicate collection efforts by the circuit court and the FOC. The FOC can continue to enforce the existing child support order.

⁸ Since MiSDU is currently unable to process special instruction payments, a payer who has multiple child support orders will need to work with the Office of Child Support, the PA, or the AG to obtain a special instruction payment coupon -- or follow all the requirements of [MCR 3.208\(C\)\(3\)](#) .

⁹ Without the special instruction designation, the payment will be allocated among all of the payer’s child support cases. If the payer only remitted payment amounts consistent with the restitution order, this allocation would force the payer into violation of the criminal court’s order to pay the arrears in the criminal case.

5. Modifying Child Support Orders

Adhering to the “one judge, one family” philosophy, a criminal-case judge should not modify a child support order unless that judge is also hearing the civil child support case. Support modification should occur only in response to a motion that complies with the statutory requirements for modifying a child support order.

If a judge in the criminal case believes that the domestic relations child support order should be modified, that judge should suggest to the parties that one or both of them request modification by the court that issued the child support order.

G. Referred cases that do not result in prosecution

When a PA decides not to prosecute a referred case, the PA should inform the FOC immediately and provide the FOC with any relevant information obtained as a result of the PA’s investigation.

H. FOC communication with a payer who may be referred for prosecution

The FOC must communicate with payers concerning the civil aspects of the case -- even with payers who have been referred for criminal prosecution. The FOC should refrain from discussing the criminal proceedings with the payer and should not threaten to refer the case for criminal prosecution in an attempt to obtain child support payments in the case.¹⁰ The FOC does not have the authority to negotiate settlement of a pending criminal action.

I. Post conviction action

The court may require a payer to post a bond or obey probation conditions as a result of the criminal case. Depending on the sentence, the payer may have to post bond with the FOC or report periodically to the FOC. If the payer fails to obey the probation order, the FOC must report the default to the probation department.

When compliance with the current child support order is ordered as part of the restitution in a criminal case, the FOC should not close its case but should continue its enforcement actions as usual.

¹⁰ [MCL 750.213](#) reads: Sec. 213. Malicious threats to extort money - Any person who shall, either orally or by a written or printed communication, maliciously threaten to accuse another of any crime or offense, or shall orally or by any written or printed communication maliciously threaten any injury to the person or property or mother, father, husband, wife or child of another with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do or refrain from doing any act against his will, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 20 years or by a fine of not more than \$10,000 dollars.

J. Statistical information

To evaluate the success of these referral guidelines, the PA, AG, Office of Child Support, and the FOCs will collect information concerning future criminal referrals and collections.

Some FOCs may encounter scenarios where the initial criminal prosecution succeeds, but the payer defaults while on probation, resulting in a conviction based on a probation violation. Sometimes both payments and enforcement efforts may stop at this point. These situations should be specially noted and reported so that we can accurately measure the program's success.

Appendix A

**Felony Nonsupport
Custodial Parent Questionnaire**

FELONY NONSUPPORT -- CUSTODIAL PARENT QUESTIONNAIRE

I. Information About the Custodial Parent (CP) [Parent With Whom the Children Live]

Name _____ Today's Date ____/____/____

Address _____ Home Phone _____

_____ Work Phone _____

Social Security No. _____ Date of Birth _____

Child Support: Amount of Weekly Support _____ Case Worker's Name _____

Case Name _____ Case No. _____ County _____

Arrearage Owed _____ State Portion _____

Birth Expenses Paid by Medicaid: Yes No

Date of Order for Support _____ Copy of Order: Yes No

Amount Last Paid and Date _____ Case Worker's Phone _____

Names of Child(ren) _____ Date of Birth _____

_____ Date of Birth _____

_____ Date of Birth _____

Relationship with Non-custodial Parent (NCP):

Married Divorced Never Married Short Term Long Term

II. Information About the Noncustodial Parent (NCP) [Parent Paying Child Support]

Name _____ Social Security No. _____

Address _____ Home Phone _____

_____ Work Phone _____

Date of Birth _____ Driver's License No. _____

Description of
Vehicle _____

Prior Domestic Violence History: Yes No

Physical Description: Height _____ Weight _____ Eyes _____
Hair _____ Race _____ Other _____

*Please attach a photograph of the NCP if one is available (it will not be returned).

NCP's Immediate Family Members:

Name _____ Relation to NCP _____

Address _____ Home Phone _____

_____ Work Phone _____

* * * * *

Name _____ Relation to NCP _____

Address _____ Home Phone _____

_____ Work Phone _____

NCP's Work History:

Present Employment _____ Location _____

Dates Employed _____ Approximate Income _____

* * * * *

Past Employment _____ Location _____

Dates Employed _____ Approximate Income _____

III. Additional Information:

1. Is the NCP the biological parent of all the CP's children? If not, which ones are not the NCP's children?
2. Where did the NCP live when the court order was entered for child support.
3. What evidence is there the NCP had actual knowledge of the court order to pay (e.g. personal service, voluntary payments, appearances in court)?
4. Summarize the NCP's education background and specialized job skills.

5. State anything else you know, and the source(s) of this information, about:
 - the NCP's ability to work –
 - the NCP's income –
 - the NCP's assets –

6. Have the children lived with you continuously since the child support order was issued? If not, explain.

7. What contact does the NCP currently have with the children? What contact has occurred in the past?

8. Have you received direct payments from the NCP or his/her family that did not go through the Friend of the Court?

9. Have you ever agreed to a support arrangement that is different from the court order? If so, explain.

10. Did you offer or agree not to request child support for any reason? If so, explain.

11. Has the NCP ever been arrested for a crime? If so, explain.

12. Do you know of any outstanding warrants for the NCP's arrest?

13. What reasons might the NCP give for not paying child support?

14. Has the NCP ever declared bankruptcy? If so, explain.

15. Do you have copies of any tax returns filed during your marriage to the NCP. If so, please enclose copies with this completed questionnaire. If not, please state your and the NCP's approximate income(s) for the years you were married to or lived with the NCP.

16. Please describe the child-support enforcement proceedings so far and name the agency that took action. Have any bench warrants been issued? If so, how many?

17. Has the NCP been investigated or prosecuted for criminal nonsupport?

18. To your knowledge, has the NCP ever been disabled, or received social security benefits for a disability?

19. State any other information you might think help us collect the child support owed by the NCP.

20. Have the children ever been adopted, and if so, when?

21. Once a criminal nonsupport charge has been brought, you cannot make the decision to have it dropped or reduced. Any charge reduction decision must be made by the prosecutor or the Attorney General's office. If prosecuted, the NCP may go to jail or prison and would not pay child support while incarcerated. The criminal proceedings may strain any relationship that the NCP has with the children, and possibly your own relationship with the children. There is no assurance that you will receive any money because of a criminal prosecution. You will be required to testify in court. With these things in mind, do you want to request criminal prosecution? If so, please sign below.

Please sign here _____

Date ____/____/____