



Determining the Ability to Pay in the Collection of Court Ordered Financial Obligations

“The court shall not sentence a defendant to a term of incarceration, nor revoke probation, for failure to comply with an order to pay money unless the court finds, on the record, that the defendant is able to comply with the order without manifest hardship and that the defendant has not made a good-faith effort to comply with the order.” [MCR 6.425\(D\)\(3\)\(a\)](#). See also [MCL 769.1k\(10\)](#); [MCR 6.610\(F\)\(2\)](#); *Bearden v Georgia*, 461 US 660 (1983).

The court must determine a defendant’s ability to pay in the following types of cases where incarceration or probation revocation is possible:

- Felony cases. [MCR 6.425\(D\)](#); [MCR 6.610\(F\)\(2\)](#).
- Misdemeanor cases. [MCR 6.001\(B\)](#); [MCR 6.425\(D\)](#).
- Contempt proceedings. [MCR 3.606\(F\)](#); [MCR 3.928\(D\)](#); [MCL 769.5\(6\)](#).
- Juvenile proceedings, including the juvenile and/or the parents. [MCR 3.928\(D\)](#); [MCR 3.944\(F\)](#); [MCR 3.956\(C\)](#); [MCR 6.933\(J\)](#).
- Probation violation hearings. [MCR 3.944\(F\)](#); [MCR 3.956\(C\)](#); [MCR 6.445\(G\)](#); [MCR 6.933\(J\)](#).

Adequate Notice of the Show Cause, Probation Violation, or Conditional Sentencing Hearing

Notice should include the following information:

- hearing date and time;
- purpose for the appearance;
- that the person should bring any documentation or information the court should consider in determining ability to pay;
- that a person unable to pay can request payment alternatives or payment modification;
- that the court will not order incarceration if the person is found to have a lawful inability to pay, but failure to appear in court may result in a warrant for the person’s arrest.

See *People v Jackson*, 483 Mich 271, 292 (2009); [SCAO Form MC 230](#) (show cause); [SCAO Form MC 246](#) (probation violation summons); SCAO Ability to Pay Workgroup’s *Tools and Guidance for Determining and Addressing an Obligor’s Ability to Pay*, p 2, April 20, 2015.

Meaningful Opportunity to Raise Inability to Pay

At the time of the enforcement of a trial court’s imposition of a fine, fee, cost, or other financial obligation, the defendant must be advised of the enforcement action and be given an opportunity to contest the enforcement on the basis of his or her indigency.

See *Jackson*, 483 Mich at 292; *Bearden*, 461 US at 672-673.

Legal Representation for the Defendant

The defendant must be offered legal representation if the court, as part of the show cause hearing, is considering incarceration as a penalty for violating the court’s order or for a probation violation hearing.

See [MCR 6.445\(B\)\(3\)\(b\)](#); [MCR 6.445\(D\)](#); *Cooke v United States*, 267 US 517, 537 (1925); *Turner v Rogers*, 564 US 431, 441, 448 (2011) (no automatic right to counsel in civil contempt cases).

Factors the Court Must Consider When Determining Manifest Hardship

- Defendant's employment status and history.
- Defendant's employability and earning ability.
- The willfulness of the defendant's failure to pay.
- Defendant's financial resources.
- Defendant's basic living expenses including but not limited to food, shelter, clothing, necessary medical expenses, or child support.
- Any other special circumstances that may have bearing on the defendant's ability to pay.

[MCR 6.425\(D\)\(3\)\(c\)\(i\)-\(vi\)](#).

Required Findings by the Court

If the court determines that incarceration must be imposed or probation revoked, the court must make findings that:

- (1) the defendant is able to comply with the order without manifest hardship; and
- (2) the defendant has not made a good-faith effort to comply with the order.

[MCR 6.425\(D\)\(3\)\(a\)](#).

Alternative Sanctions to Imprisonment that Courts Should Consider When There is an Inability to Pay

If the court determines that the defendant is unable to comply with an order to pay money without manifest hardship, the court may consider:

- a payment plan;
- a modification of any existing payment plan;
- a reduction of the amount due;
- an extension of the time to pay;
- waiver of part or all of the money owed to the extent permitted by law;
- credit for community service;
- credit for completion of a relevant, court-approved program (e.g., education, job skills, mental health or drug treatment, youth-oriented projects);
- credit for school attendance and/or good grades.

See [MCR 6.425\(D\)\(3\)\(b\)](#); *Bearden*, 461 US at 672; SCAO Ability to Pay Workgroup's *Tools and Guidance for Determining and Addressing an Obligor's Ability to Pay*, p 3, April 20, 2015.

Tools For Determining Ability to Pay

While not required by [MCR 6.425\(D\)](#), courts seeking additional guidance when making an ability to pay determination may consider the [federal poverty guidelines](#), the Chapter 7 [means test calculation](#), and the [checklists](#) located in the SCAO Ability to Pay Workgroup's *Tools and Guidance for Determining and Addressing an Obligor's Ability to Pay*, Appendix A, April 20, 2015. See also [MCR 2.002\(C\)](#), [\(D\)](#), and [\(F\)](#) (determining indigency for purposes of waiving filing fees). "Notwithstanding any other provision of [[MCR 2.002](#)], courts must enable a litigant who seeks a fee waiver to do so by an entirely electronic process." [MCR 2.002\(L\)](#).