

Contempt Actions for Child Support Nonpayment

In Michigan, three types of contempt proceedings are available for failure to pay support: civil and criminal contempt under the Revised Judicature Act (MCL 600.1701 and 1715), and civil contempt under the Support and Parenting Time Enforcement Act (MCL 552.633). The Support and Parenting Time Enforcement Act was amended in 2014 effective March 17, 2015. The following tables summarize the procedures as amended; differences between the statutes are separated by column, while common requirements are merged.

Contempt under the Revised Judicature Act (MCL 600.1701 *et. Seq.*)

	Criminal Contempt	Civil Contempt
Grounds	Parties to actions, attorneys, counselors, and all other persons may be in contempt if they disobey or refuse to comply with any order of the court for the payment of temporary or permanent alimony or support money or costs made in any action for divorce or separate maintenance. [MCL 600.1701(f).] See also MCL 600.1701(g) for disobeying orders in general.	
Procedure	The contempt must be proved by affidavit or some other means and the defendant must have an opportunity to defend. [MCL 600.1711(2).] The motion to hold a person in contempt may be ex-parte if it is supported by an affidavit. [MCR 3.606(A).] The court may either order the accused to show cause why the accused should not be punished for contempt or issue a bench warrant for the accused's arrest. [MCR 3.606(A).] The order likely must be served personally unless MCR 3.208 is considered to apply to all contempt proceedings.	
Necessary Findings	The court must find beyond a reasonable doubt that, under all the circumstances of the case, the contemnor has the present ability to comply with the order and has failed to do so.	The court must find by some standard less than beyond a reasonable doubt (likely clear and convincing evidence) that, under all the circumstances of the case, the contemnor has the present ability to comply with the order and has failed to do so.
Remedies (Common)	The court may fine the criminal contemnor not more than \$7,500 or imprison the person for up to 93 days or both. [MCL 600.1715.]	
Remedies (Different)	The court may place the criminal contemnor on probation.	
Limitations	A payer who is found in contempt for failing to pay support must be released when the payer pays the support or no longer has the ability to do so, notwithstanding that the payer has not served the full sentence.	

Contempt under the Support and Parenting time Enforcement Act

Grounds	<ul style="list-style-type: none"> ○ The payer is in arrears and either <ul style="list-style-type: none"> ○ The payer has capacity to pay out of currently available resources all or some portion of the amount due under the support order (Available Resources). ○ The court is satisfied that by the exercise of diligence the payer could have the capacity to pay all or some portion of the amount due under the order and that the payer fails or refuses to do so (Due Diligence). ○ The payer has failed to obtain a source of income and has failed to participate in a work activity after referral by the friend of the court (Work Activity).
Procedure	<ul style="list-style-type: none"> ○ The friend of the court (or recipient) must petition for an order to show cause. [MCL 552.631.] ○ The order must be served personally or by ordinary mail to the last address provided to the friend of the court in writing. ○ The hearing may be held no sooner than 7 days after personal service or 9 days after service by mailing.
Necessary Findings (Common)	<ul style="list-style-type: none"> ○ The court must find that the payer is in arrears.
Necessary Findings (Different)	<ul style="list-style-type: none"> ○ The court must find that the payer has currently available resources. The court may presume in the absence of evidence to the contrary that the payer has currently available resources equal to one month of current support (Available Resources) ○ The court must find that the payer has failed to exercise options that would put the payer into a position to pay the support order (Due Diligence). ○ The payer has failed to obtain employment and has failed to participate in a work activity after referral by the friend of the court (Work Activity).

Remedies	<p>Upon finding a payer in contempt of court under this section, the court may immediately enter an order that does 1 or more of the following:</p> <ul style="list-style-type: none"> ○ Commit the payer to the county jail or an alternative to jail. ○ Commit the payer to the county jail or an alternative to jail with the privilege of leaving the jail or other place of detention during the hours the court determines, and under the supervision the court considers, necessary for the purpose of allowing the payer to exercise conditions the court imposes under section 37 for due diligence or work activity contempt. ○ Commit the payer to a penal or correctional facility in this state that is not operated by the state department of corrections. ○ Apply any other enforcement action available under the Friend of the Court Act or the Support and Parenting Time Enforcement Act (e.g., License Suspension, Credit Reporting, Liens, Bonds for future support, etc.) if the payer satisfies the conditions for imposing that remedy and the evidence supports using it. ○ Order the payer to participate in a work activity. ○ If available within the court's jurisdiction, order the payer to participate in a community corrections program established as provided in the community corrections act, (MCL 791.401 to 791.414). ○ Order the parent to pay a fine of not more than \$100.00 ○ Place the payer under the supervision of the FOC for a term fixed by the court with reasonable conditions, including but not limited to one or more of the following: <ul style="list-style-type: none"> ▪ Participating in a parenting program. ▪ Participating in drug or alcohol counseling. ▪ Participating in a work program. ▪ Seeking employment. ▪ Participating in other counseling. ▪ Continuing compliance with a current support or parenting time order. ▪ Entering into and compliance with an arrearage payment plan.
Limitations (Common)	<ul style="list-style-type: none"> ○ An order of commitment may be entered “only if other remedies appear unlikely to correct the payer’s failure or refusal to pay support.” [MCL 552.637(1).] ○ An order of commitment for failure to pay out of Available Resources must state the amount the payer must pay in order to be released from the order of commitment, which cannot be more than the payer's currently available resources as found by the court. [552.637(2).] ○ An order of commitment for failure to attend a Work Activity or failure to exercise Due Diligence must state the conditions the payer must satisfy in order to be released from the order of commitment, which cannot be beyond the payer's ability to perform. [552.637(3).] ○ A payer who is found in contempt and committed must be released when the payer pays the support, satisfies the requirements of the order of commitment, or no longer has the ability to comply with the requirements of the order of commitment, notwithstanding that the payer has not served the full sentence. If the court enters an order for conditional license suspension and the payer fails to comply with the arrearage payment schedule the court must afford notice and opportunity for a hearing before suspending the license. ○ The order of commitment must continue until the contemnor complies with the terms of the order of commitment but no longer than 45 days for the first adjudication of contempt or 90 days for a subsequent adjudication of contempt. ○ The court may release a payer who is unemployed if committed to a county jail who finds employment if either of the following applies: <ul style="list-style-type: none"> ▪ The payer is self-employed, completes 2 consecutive weeks at his or her employment, and makes a support payment as required by the court. ▪ The payer is employed and completes 2 consecutive weeks at his or her employment and an order of income withholding is effective.

Delayed Conditional Commitment Order

Sometimes the court will enter a delayed conditional commitment order. The order will give the payer time to comply with the order by raising money or securing employment. There is no reason to give the payer time to pay if the payer is in contempt under MCL 600.1715 that statutes requires that the payer have *currently* available resources to pay support. The 2014 amendments provide authority for the court to enter a conditional commitment order that gives the payer an opportunity to avoid commitment by taking action prospectively when the payer cannot satisfy his or her entire obligation:

If the court finds that the payer is in contempt for failing to pay out of Available Resources and the court additionally finds that the payer, by performing conditions set forth in the order of commitment will have the ability to pay specific amounts. Upon making this finding, the court must establish a specific amount for the payer to pay and do any of the following:

- Stay the order of commitment conditioned upon the payer's making the specified payments.
- Stay the order of commitment and order that upon the payer's default in making a specified payment, the payer shall be brought before the court for further proceedings in connection with the contempt proceedings that may include committing the payer for the number of days that the payer would have been committed had the court not stayed the order.
- Give credit toward the payer's potential maximum commitment for each specified payment made in compliance with the order of commitment.

If the court enters a commitment order based on the payer's failure to exercise Due Diligence or to participate in a Work Project, the court may do any of the following:

- Stay the order of commitment conditioned upon the payer's complying with the conditions set forth in the order of commitment.
- Stay the order of commitment and order that upon default of the payer to satisfy a condition of the order, the payer shall be brought before the court for further proceedings in connection with the contempt proceedings that may include committing the payer for the number of days the payer would have been committed had the order not been stayed.
- Give credit toward the payer's potential maximum commitment for complying with conditions in the order.
- Incarcerate the payer with the privilege of leaving jail to comply with conditions in the order of commitment.

Delayed commitment orders could deprive a person of due process when the payer's circumstances change between the time the conditional sentence is imposed and when it is served. Allowing a payer time to go to a bank to make a payment the same day is different than having a payer earn that payment within 30 days. The court may only incarcerate a payer after a delayed commitment order if the court finds that the payer has the ability to purge his or her contempt.

The court may incarcerate a payer who fails to satisfy the court's conditions to improve the payer's ability to pay, but only under such terms and conditions that allow the payer to satisfy the earlier order and be released. The court in *In re: Moroun*, 295 Mich App 312 (2012) stated the court's obligation as follows:

Because the purpose of civil contempt is to enforce compliance with an order, rather than to punish for disobedience, the contemnor may not be incarcerated beyond the time that he or she is able to comply with the court's order. *People v Kearns*, 38 Mich App 561, 563; 196 NW2d 805 (1972), quoting *Spalter v Wayne Circuit Judge*, 35 Mich App 156, 161; 192 NW2d 347 (1971). "Civil contempt seeks to coerce compliance, to coerce [the contemnor] to do what he is able to do but refuses to do." ... In other words, the contemnor "carries the keys to his prison in his own pocket." *Id.* In *Bagwell*, 512 US at 828, the Supreme Court further explained:

The paradigmatic coercive, civil contempt sanction . . . involves confining a contemnor indefinitely until he complies with an affirmative command such as an order to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance. Imprisonment for a fixed term similarly is coercive when the contemnor is given the option of earlier release if he complies. In these circumstances, the contemnor is

able to purge the contempt and obtain his release by committing an affirmative act, and thus, carries the keys of his prison in his own pocket.

Bench Warrants for Failure to Comply

The 2014 amendments allow the court to have the payer brought before the court to answer to a failure to comply with a conditional commitment order but they require a hearing before the court can impose the jail sentence contained in the commitment order. The court can ensure due process in issuing a conditional commitment order by:

- Before requiring the payer to serve a jail sentence, determine whether the payer has complied, substantially complied, or failed to comply despite having the ability to do so.
- Allowing the payer to request a hearing if the payer feels s/he can no longer comply with the order.
- Fashioning remedies within the payer's power to perform.

Before the 2014 amendments, some courts issued a bench warrant for the payer's arrest and incarceration when the payer did not comply with a delayed conditional commitment order.

These former types of orders increase the risk that the payer's due process rights will be violated because the payer is deprived of liberty pending a hearing and without proof that he or she still has the ability to comply with the order. Therefore, to protect the payer's right to due process, it is best to only follow the procedure in the new statute when issuing a conditional commitment order. Notwithstanding the type of order a court issues, if a payer fails to obey an order and a bench warrant is issued, once the payer is arrested, the next step should not be incarceration, but rather a hearing to determine whether the payer has willfully failed to comply with both the child support order and the contempt order.¹

Right to Counsel in Contempt Cases

In *Mead v Bacthlor*, 435 Mich 480 (1990), the Michigan Supreme Court ruled that the Due Process Clause of the United States Constitution's 14th Amendment prohibits the trial court from incarcerating an individual in civil contempt proceedings when the defendant has not had the benefit of counsel.

The *Mead* decision is now in question because of a recent United States Supreme Court decision. *Turner v Rogers*, 564 US ____ (2011) found all 9 justices agreeing that an indigent defendant does not have an absolute right to counsel under the 14th Amendment. That is where the agreement stops. Five justices found that other "safeguards" in contempt proceedings compensate for the lack of counsel. The dissenting four justices stated that notwithstanding other safeguards, there is no right to counsel in civil contempt proceedings. The split indicates that future decisions may find a limited right to counsel in contempt proceedings.

The United States Supreme Court noted that the following procedural safeguards were sufficient to protect a payer's rights without requiring appointed counsel:

- providing notice to the payer that his ability to pay is a critical issue in the contempt proceeding;
- using a form (or similar document) to gather relevant financial information about the payer;
- providing the payer an opportunity at the hearing to respond to questions about his financial status; and
- an express finding by the court that the payer has the ability to pay.

¹ This would also be true for contempt proceedings under MCL 600.1701 which allows the contempt proceeding to begin with a warrant upon the filing of an affidavit showing noncompliance with the court's order. Upon arrest, the payer would then be allowed to show that the payer could not comply with the order.

The decision specifically states that the Court only addressed situations where (1) the payer is before a court for a civil contempt case for failure to pay support, (2) the payer is indigent, (3) the other party is without counsel, and (4) there are other procedural safeguards in place. The majority took pains to stress that there were other situations that it was not addressing.

In most cases it is relatively easy for courts to comply with the *Turner* ruling.

- First, before a contempt hearing begins, the court could ask the payer to complete a form regarding his or her financial status. Many already do so. Others have the friend of the court interview the payer and report to the court on the payer's financial status. Courts who do not already use this procedure may find SCAO-approved form [MC 287](#), Financial Statement helpful.
- Second, at the outset of the contempt hearing, the court may want to explain on the record the purpose of the hearing and what issues it will hear.
- Third, the payer must have a chance to respond.
- And finally, the court should state clearly its reasons for finding the payer in contempt.

While the limits of the *Turner* decision are unclear, courts can tailor the procedures they use to bring contempt cases within *Turner's* scope. One such step would be to ensure that no one appears before the court as an advocate for a contempt finding, or in any capacity other than to provide factual information concerning the accounting and procedural history of the case. Another step would be to allow non-attorney court staff to appear at the hearing without a staff attorney or rely on the petition without having a staff member present at the hearing.² Additionally, the court can ensure that its commitment orders clearly state why other remedies are unlikely to correct the payer's failure or refusal to pay support, and contain the amount that the payer must pay in order to be released from the order of commitment.

² Most payers do not dispute that they are in arrears and so the focus of the hearing is on what the payer can pay and what remedies will bring the payer into compliance. If the court needs the FOC to provide information, the hearing could be adjourned.