



Michigan Supreme Court
State Court Administrative Office
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DATE: October 12, 2004

TO: Friends of the Court
cc: Chief Circuit Judges
Circuit Court Administrators
Family Division Administrators

FROM: John D. Ferry, Jr.

RE: SCAO Administrative Memorandum 2004- 16
Opting Out of Friend of the Court Services

The State Court Administrative Office (SCAO), develops guidelines for the conduct, operations, and procedures of all Friend of the Court (FOC) offices. "Each friend of the court shall take all necessary steps to adopt office procedures to implement... the FOC Act, Supreme Court rules, and Friend of the Court Bureau policies and procedures.

The parties to a domestic relations case may refuse all services provided by the FOC. Many refer to this provision as the "opt out" law. FOC offices must open and maintain a Friend of the Court case file for all domestic relations matters, unless the parties opt out of the FOC system. MCL 552.505a.

This memorandum outlines the procedural issues the FOC should consider when the parties opt out of FOC services. FOC's with any questions may contact Kelly Howard or Steve Capps at (517) 373-4835, or howardk@courts.mi.gov; cappss@courts.mi.gov.

Requirement to Open FOC Case; Authorization for Parties to Opt Out

Michigan law requires the FOC to open and maintain a case for each domestic relations matter, unless the parties opt out of the FOC system. When parties opt out, they assume full responsibility for the administration and enforcement of the court's orders, and the FOC may no longer engage in those activities. [MCL 552.505a](#)¹

A. Statutory Procedure to Opt Out

In new and existing domestic relations cases, parties who agree to manage their own case must file a motion with the court requesting an order exempting their case from all FOC services. Both parties must also sign an acknowledgement, Form [FOC 101](#) (Advice of Rights Regarding Use of Friend of the Court Services), which lists services that the FOC provides. By signing the form, the parties acknowledge that they will not receive the services.²

1. Existing Domestic Relations Case

When the parties to an *existing* FOC case file a motion to opt out accompanied by a signed Form FOC 101, the court must approve the motion and enter an order directing the FOC to close its case file unless the court determines that one or more of the following are true:

- (a) A party objects to the motion.
- (b) A party is eligible for Title IV-D services because the party is receiving public assistance (see Section 3, "Public Assistance", below).
- (c) A party is eligible for Title IV-D services because the party formerly received public assistance and an arrearage is owed to the governmental entity that provided the assistance.
- (d) The record shows that a child support arrearage or a custody or parenting time order violation occurred within the previous 12 months.³
- (e) Within the previous 12 months, a party to the case reopened this or another FOC case.⁴

¹ MCL 552.505a "(1)Except as required by this section, an office of the friend of the court shall open and maintain a friend of the court case for a domestic relations matter. If there is an open friend of the court case for a domestic relations matter, the office of the friend of the court shall administer and enforce the obligations of the parties to the friend of the court case as provided in this act. If there is not an open friend of the court case for a domestic relations matter, the office of the friend of the court shall not administer or enforce an obligation of a party to the domestic relations matter."

² Form FOC 101 is not a motion, nor is it intended to be a separate pleading. It does not, therefore, contain the captions found on pleadings and other court papers. It is intended to be filed as an attachment to the motion like any other supporting document.

³ The statute does not specify whether the 12 months is from the date of the motion or the date of the court's consideration of the motion. Therefore, courts are free to adopt their own standards. SCAO suggests that courts count back from the date of the motion.

- (f) There is evidence of domestic violence or uneven bargaining positions and evidence that a party's decision to opt out of the FOC system is against the best interests of the party or a child.
- (g) The parties have not filed form FOC 101 listing the available FOC services and acknowledging that the parties are choosing to do without those services.

2. New Domestic Relations Case

If the parties have a *new* domestic relations case, the motion to opt out and signed Form FOC 101 must be filed with the *initial* pleading.

When the parties have filed a motion and Form FOC 101, the court must order the FOC not to open a case file unless it determines that one or more of the following are true:

- (a) One of the parties is eligible for Title IV-D services because of that party's current or past receipt of public assistance (see Section 3, "Public Assistance").
- (b) One of the parties applied for Title IV-D services.⁵
- (c) One of the parties requested that the FOC open and maintain a case, even though the party might not be eligible for Title IV-D services.⁶
- (d) There is evidence of domestic violence or uneven bargaining positions and evidence that a party's failure to apply for title IV-D services is against the best interests of the party or a child.
- (e) The parties have not filed Form FOC 101 listing the available FOC services and acknowledging that the parties are choosing to do without those services.

3. Public Assistance

The law prohibits parties from closing their FOC file if they are receiving or have received public assistance and an arrearage is owed to the state.⁷ Public assistance includes programs such as Temporary Assistance to Needy Families

⁴ See footnote 3.

⁵ Public Act 210 of 2004, effective October 1, 2004, limits the FOC's responsibilities to perform activities to *cases in which a party has requested Title IV-D services*

⁶ Most child support cases are eligible for IV-D services. It often happens that IV-D services could be available but neither party has applied for them. A party might not be eligible for IV-D services if, for example, the case involves only spousal support, child custody, parenting time, or child custody and parenting time.

⁷ Arrears owed to the state include permanently assigned arrears (PAA), conditionally assigned arrears (CAA) or IV-E Foster Care (IVEF).

(TANF), Medicaid, Food Assistance Program (FAP), child day care, and foster care.⁸

4. Domestic Violence

Other factors that will prevent the parties from opting out of the FOC system include a history of domestic violence or uneven bargaining positions between the parties. If domestic violence has occurred, a party may feel coerced to opt out of FOC system even though doing so is against the party's or the child's best interests. The court may wish to check the record for certain indicators of abuse, such as personal protection orders.

B. FOC Procedure after Opt Out

1. IV-D Case Closure

SCAO has developed Form [FOC 102](#) (Order Exempting Case from Friend of the Court Services) for courts to use to direct the FOC to close a case file. The order contains a checklist to assure that all statutory requirements are met; it also specifies that the case file can be opened or reopened in the future and what the parties must do in that event. The opt out order should include a provision to require a party to file a Verified Statement ([FOC 23](#)) when reopening a FOC case. The Verified Statement will provide the FOC with the most recent contact and employment information for the other party, if known, in order to effectively administer and enforce the order.

2. Notifying Employer

When an FOC case file is closed and support payments are, at that time, being paid through income withholding, the FOC must send Form [FOC 103](#) (Notice of Friend of the Court Case Closure), along with a copy of the order exempting the case from FOC services, to the payer's employer.

This will notify the employer that the FOC is no longer involved in managing the case. Depending on what is said in the court's order, the notice will either explain the income withholding procedures to follow if the Michigan State Disbursement Unit (MiSDU) will continue to process the support payments, or direct the employer to terminate income withholding.

⁸ Michigan law provides a narrow definition of public assistance to include cash assistance provided under the Social Welfare Act. However, under federal regulations and Michigan Administrative Rules governing public assistance programs, a person who receives Medicaid, food stamps, child day care, or foster care benefits must cooperate with title IV-D child support enforcement provisions. Therefore, a recipient of any of these public assistance programs is prohibited from opting out of the FOC. 42 CFR 433.145; Michigan Administrative Rules: R 400.3009, R 400.3010, R 400.3124, R 400.3125, R 400.5008.

3. Support payments through MiSDU

If a party wants to ensure that all child support payments made after the FOC case file is closed will be taken into account in a possible future FOC enforcement action, then the opt-out order should require that those support payments be made through the MiSDU. If the MiSDU will remain involved, then the FOC cannot close its case file until notified by the MiSDU that the parties have provided the necessary information to enable MiSDU to process the support payments⁹.

If the parties do not choose to have payments made through MiSDU, and they subsequently opt back into the FOC, the FOC system will monitor only those support payments that fall due after the FOC case file is reopened (see Section C, “Opening or Reopening an FOC Case”).

4. Services the FOC cannot provide

Once an order exempting a case from FOC services has been entered, the parties assume full responsibility for the administration and enforcement of the court’s orders. The FOC then cannot be involved in enforcement, investigation, or accounting functions for support, custody, or parenting time. This prohibition exists regardless of whether the support payments are being made through the MiSDU.

C. Opening or Reopening an FOC Case (Opt In)

Parties who have opted out of FOC services may change their minds. If either party requests services from the FOC, or applies for public assistance, the FOC is required to open (or re-open) its case file.

A party should file Form [FOC 104](#) (Request to Reopen Friend of the Court Case) and Form [FOC 23](#) (Verified Statement) with the FOC (if the order requires a Verified Statement to be filed upon opt in), and send a copy of Form 104 to the other party’s last known address and to the court. The case file will be reopened when the FOC receives this information. The other party cannot object to the case being reopened.

When parties opt out of the FOC system, they may have support orders that do not satisfy statutory requirements for FOC cases. If the court order does not contain a provision that is required by either the Friend of the Court Act, the Support and Parenting Time Enforcement Act,¹⁰ or court rule, upon opening or reopening an FOC case file, the court must issue an order or amended order that includes the statutory provisions. FOC offices should use Form [FOC 10](#) (Uniform Child Support Order) or Form [FOC 94](#) (Order Correcting Omission in Order), as appropriate, to add the necessary provisions to the

⁹ Although the law refers to the SDU, the Office of Child Support has directed the Special Initiatives Unit (SIU) to enter the case information into MiCSES.

¹⁰ The Friend of the Court Act is MCL 552.501-552.535; the Support and Parenting Time Enforcement Act is MCL 552.601-552.650

support order. The order that initially exempted the case from FOC services (FOC 102) should provide that these new orders could later be entered ex-parte.

If there is a dispute about support payments made during the time the case was not an FOC case, and the payments were not made through the MiSDU, the parties must ask the circuit court to resolve the dispute. Since the disputed payments were to have been made directly between the parties, the FOC does not have any evidence of those payments. The FOC cannot intervene other than to let the parties know they will need a judicial determination of the payment history.

Due to funding and staff limitations, courts should avoid using the FOC to recalculate support when the parties have not provided for record-keeping during an opt-out. A court should consider appointing an independent examiner or auditor, paid for by the parties, to determine if support is overdue. The court can then order a sum-specific due at the time the opt in occurs.

D. Prohibition on Fees Charged to Opt In or Opt Out

The court may charge a motion fee when a party files a motion to opt out of FOC services. There is no statutory authority for the FOC to charge any fees in addition to the motion to parties who opt out.

No statute or court rule authorizes the FOC to charge a fee to re-open a case file.¹¹ In some circumstances, charging such a fee would violate federal regulations.¹² Re-opening a case does not require that a motion be filed when the proper opt out form (FOC 102) is used; therefore, no motion fees may be charged to a party opting back into the FOC system.

E. Direct Payments Prohibited

Current law, enacted prior to and without recognition of a statewide child support system, requires child support payments to be made through the MiSDU, “except as otherwise provided in the order or judgment”. MCL 552.509. Federal law requires states to have one central entity through which *all* IV-D support payments must be made. Due to this conflict, Public Act 210 of 2004, effective October 1, 2004, eliminates the provision that allows a court order to exempt a case from being paid through the MiSDU. This means that all support payments must be paid through the MiSDU unless the parties follow the statutory procedures to opt out of FOC services.

¹¹ The judgment entry fee, [MCL 600.2529](#), applies to all domestic relations cases in which child support, custody, or parenting time is determined or modified. The court must waive or suspend the fee for consent orders, or for other good cause shown. If the fee is suspended due to the parties opting out of the FOC, the court should include a provision that reinstates the fee if the parties open or re-open their case with the FOC. If the fee is paid before the parties opt out, it cannot be charged again, as the custody, parenting time, or support order has already been entered.

¹² [42 USC 654\(6\)\(B\)](#) authorizes only certain fees in IV-D cases.

F. IV-D Application Required for FOC Services

Public Act 210 of 2004, effective October 1, 2004, limits the FOC's responsibilities to perform activities under the Friend of the Court and Support and Parenting Time Enforcement Acts for *cases in which a party has requested Title IV-D services*, unless the FOC activity is required by federal law.

A party who does not sign an application for IV-D services is not opting out of FOC services. The procedure for parties to opt out is clearly prescribed in the law and outlined above. Rather, for cases that do not sign the application, the FOC can determine what services it may provide on the case, so long as federal requirements are met. The same is true for cases in which a party requests IV-D case closure. That is, the FOC must close the IV-D case status, but continue to provide non-IV-D services required by state and federal law.¹³ Other services may be performed on the case at the discretion of the FOC.

¹³ Examples of federally-mandated non-IV-D services include Federal Case Registry requirements (42 USC 654a(f)(1) and income withholding (42 USC 666(8)). Examples of state-mandated non-IV-D services include custody and parenting time.