



Michigan Supreme Court

State Court Administrative Office

Trial Court Services Division

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MEMORANDUM

DATE: June 9, 2010

TO: Circuit Court and Family Division Judges
Friends of the Court

cc: Circuit Court Administrators
Family Division Administrators
Office of Child Support

FROM: Steven D. Capps, Trial Court Services Director

RE: SCAO Administrative Memorandum 2010-03
Credit Balances on Friend of the Court Cases

The State Court Administrative Office's (SCAO) Friend of the Court Bureau (FOCB) develops guidelines for the conduct, operations, and procedures of all the friend of the court (FOC) offices. Each FOC must adopt office procedures that implement the FOCB's recommendations. MCL 552.503(7).

This memorandum provides policies and procedures intended to help FOC offices correctly process payments when more money has been disbursed than was due under the order.

Courts or FOC offices may call 517-373-5975, or contact Daniel J. Bauer at bauerd@courts.mi.gov or William J. Bartels at bartelsb@courts.mi.gov with any questions.

Credit Balances

Credit balances occur when more money is disbursed under a court order than was due under the court order. Many transactions may result in a credit balance, but each will generally fall into one of two categories: overpayment (where more money is disbursed than was due under the order) or retroactive modification (where a reduction in the amount of support due is recorded after the support amount has been paid).

A. Introduction

1. Typical Causes of Credit Balances

Credit balances generally occur because:

- a. A child begins residing full time with the original payer or a third party and support owed to the original payee is abated retroactively.
- b. A child begins residing full time with the original payer, who is in arrears to the original payee. There is now a credit balance in favor of the new payer.¹
- c. Direct payments made by the payer to the payee outside of the friend of the court (FOC) are credited to the account.
- d. Parenting time abatement-related reductions in the amount of support due.²
- e. Delay in support adjustments regarding emancipation of a child.
- f. Child support order with retroactive effective date.

2. Purpose and Effect of This Policy

This policy is intended for courts and FOC offices both to:

- a. Prevent a credit balance from occurring, and
- b. Outline options for courts to eliminate any credit balances that may occur.

This policy is not intended to override or conflict with the Office of Child Support (OCS) policy regarding use of state make-whole funds. Further, FOC staff are encouraged to coordinate collection efforts with OCS and the Michigan State Disbursement Unit (MiSDU) to ensure FOC or court action does not result in orders directing those offices to take actions that they are not allowed to take by state or federal law.

¹ This may not appear as a credit balance, but is listed here as there may be an overpayment to one party and current support due to another party, causing complications in the administration of the court case (docket).

² The Michigan Child Support Enforcement System (MiCSES) has functionality to handle credit balances as a result of parenting time abatements. However, credit balances still can result as part of this action.

B. Preventing Credit Balances

Courts and FOC offices may use the following strategies to prevent or limit credit balances from occurring.

1. Basing Enforcement on Compliance with the Order of the Court

- a. A parent cannot be forced to pay an amount that exceeds:
 1. The current support obligation,
 2. Any accrued outstanding support arrears (as a separately enforceable amount from the current support obligation), and
 3. Any other amount required by statute or court order.³
- b. Support orders must state the support obligation in monthly amounts and make the support payable on the first of each month. MCL 552.605c(1). Unless there are arrears or a payer designates an amount as additional support, state law requires that support payments exceeding the current month's obligation, but that do not exceed the next month's support obligation, be retained to pay the next month's support obligation.⁴ However, amounts that exceed the next month's support obligation must be returned to the payer. MCL 552.605c(4).
- c. FOC offices must promptly refund money improperly withheld through income withholding. MCL 552.619(6).
- d. If money is on hold when current support comes due, and there is a negative arrears balance on the case, the money on hold should still be distributed towards current support. 45 CFR 302.51(a)(1).⁵ If no money is on hold, but there is a negative arrears balance on the case, the court must still enforce the current support when it comes due.

2. Distribution of Amounts Towards Future Support Obligations

- a. Voluntary Overpayment
 1. A designated additional support payment⁶ that would cause a credit balance may not be used to pay future current support, but current

³ This includes statutory fees, court-ordered fees, and court-ordered costs.

⁴ Because this kind of payment is disbursed only after the next support installment becomes payable, it is not an overpayment that results in a credit balance.

⁵ The purpose of support is to provide for the child's ongoing needs.

⁶ A payment the obligor makes with the specific intention of both paying support and overpaying the amount of support due.

support may be reduced by payments, collections, or release of properly retained money from a prior month.⁷

2. Courts should avoid giving credit for direct payments outside of the court-ordered payment method (i.e., through MiSDU or FOC). If they do give credit, the credit should only be allowed up to the amount of arrears owed the recipient at the time the credit is applied. If, for purposes of equity, the court chooses to give credit in excess of the current arrears balance, the court should provide specific direction to the FOC on how to handle the negative balance.
3. Unless designated as additional support, any voluntary overpayments that exceed, on all a payer's cases, the current support, arrears, fees, and costs, should be applied only towards future support obligations to the extent allowed by law. MCL 552.605c. Any amount exceeding the next month's future support obligation should be refunded to the payer.
4. If the FOC wants to retain any portion of an overpayment exceeding the next month's future support, the FOC should obtain a court order allowing it to retain the payment and establishing a bond for future support.

b. Involuntary Overpayments (e.g., collections)

1. Involuntary overpayments include all non-income-withholding collections that exceed current support, arrears, fees, costs, and a case's future support obligation.
2. Michigan law limits support collections that may be retained for future support to the support owed for the next month. MCL 552.605c(4). A collection is deemed excess only if all balances due (i.e., current support, arrears, fees, and costs) have been paid in full.
3. FOCs should not allocate, distribute, or disburse involuntary overpayments from case-specific enforcement actions to other cases if statute or court rule limits that collection to just that case.⁸ Instead, FOC employees should promptly return the involuntary overpayments to the payer, except bond payments for future support.

⁷ As of the publication date of this administrative memorandum, MiCSES prohibits applying a designated additional support payment that would cause a credit balance. Court personnel must first increase the arrears balance reported as due on MiCSES before applying a designated additional support payment. This increased arrearage precludes a credit balance from being created.

⁸ Courts should be aware of a potential conflict between involuntary overpayments from case-specific enforcement orders with MCL 552.605c(5), effective Dec. 28, 2010. That statute requires refunds must be applied to any past due support the payer owes in another case before being refunded to the payer. Conversely, collections resulting from an enforcement order might only be applied to the case(s) specified by the enforcement order (if statute or court rule so limit that allocation) or as designated by the payer under MCR 3.208(C)(3).

4. A court may order the overpayment held as a performance bond for future payments. See SCAO Administrative Memorandum 2003-04 for more information on performance bonds.

3. Court-Ordered Changes (That Result in a Credit Balance)

- a. Reductions in current support or changes in custody commonly cause credit balances because of payments made during the time it takes to forward the new order to the FOC and enter it into the computer system.
- b. Whenever possible, before issuing the order that reduces support, the court should consider options that would prevent a credit balance. These options could include a prospective effective date, making the order effective on the first of a month, or ordering a payee to reimburse directly to the payer any overpayment.⁹
- c. When reviewing proposed orders pursuant to MCR 3.211(G), and to the extent practical, FOC offices should analyze whether the proposed order contains appropriate provisions for adjusting their records and settling any credits that the order may create. The FOC office should make recommendations to the court, attorneys, and parties to avoid creating the credit balance before the order enters.

4. Redirection

- a. Redirection of support pursuant to MCL 552.605d(4) provides for prospective charge adjustments through a notice of redirection. Such administrative redirections are valid prospectively only; FOC offices should not use administrative redirection for retroactive changes, to prevent a credit balance.
- b. When a child for whom support is owed comes under the state's jurisdiction in a child welfare case and is placed in foster care, MCL 552.605d(3) assigns that child's support to the Michigan Department of Human Services (DHS). That mandatory redirection takes precedence over any other redirection of support that would otherwise occur. Timely and proper coding on MiCSES will direct support appropriately, notwithstanding the provisions of other orders.
- c. Whenever another court becomes involved with a child in an existing FOC or child welfare case, the FOC should request notice of all proceedings and orders in the non-FOC case, and take steps to monitor that case for changes that affect support payments.

⁹ If an order requires a payee to directly reimburse a payer, the order should state that the FOC will not track the payments made pursuant to that order.

5. Deceased Payees

Credit balances frequently occur when a payee dies but the support payments or collections continue for some additional time. FOC offices should prevent overpayments by either:

- a. Suspending the current support charges owed to a deceased recipient as of the payee's date of death;¹⁰ or
- b. Administratively abating the current support if the child support payer now has custody.

Reference sections C and D of this administrative memorandum for payments received after the payee's date of death, but before the obligation is updated with the correct termination date.

C. Policies and Procedures to Resolve Credit Balances and Collecting Overpayments

1. Actions to Recoup Overpayments

- a. In the rare case where the state may already be taking action to recover the same debt, the FOC office should ensure no other agency is attempting to recover the same overpayment. Contact the MiSDU¹¹ to ensure there is no duplication of effort and to prevent multiple recovery of the same debt.

After confirming that no other agency is currently engaged in attempting to recover the overpayment, the FOC office should attempt to recover overpayments through the following steps:¹²

1. Send a written request to the wrongfully enriched person or agency explaining the circumstances of the overpayment and requesting the recipient return the funds, or asking permission to recoup the amount from payments intended for another purpose. The written request should specify a reasonable date to respond.
2. If the wrongfully enriched person fails to respond by the stated date, the FOC office should send a second letter requesting recovery and specifying a reasonable date to respond.
3. If after receiving a written request or second letter, a payee agrees to allow recovery of a percentage of the overpayment from payments

¹⁰ The existing support order should be suspended for a reasonable time to allow any interested party to take appropriate action concerning the children. There is authority for the court to substitute a third party in the case of a deceased parent. See *Bert v Bert* 154 Mich App 208, 212 (1986). However, even if the third party is entitled to receive support in the original case, it remains unclear if the death of the custodial party terminates the support obligation, or whether the third party should intervene in that case in order to request support.

¹¹ http://mi-support.cses.state.mi.us/partneractivities/ocscontacts/ocs_sdu_contacts.pdf

¹² These steps are designed to include one way the federal Office of Child Support Enforcement (OCSE) has identified to obtain an overpaid party's permission to recover an overpayment. The federal practice is detailed in OCSE's Policy Interpretation Questionnaire (PIQ) 2002-01, and clarified in PIQ 2003-02.

otherwise payable to the payee, the agreement must be reduced to writing in sufficiently specific terms.

4. If neither the written request nor the second letter prompts a response, a final letter should be sent to the wrongfully enriched recipient of the support indicating that, unless the recipient *denies* permission by a certain date, the FOC will administratively recoup the overpayment through a reduction in future support payments otherwise payable to the recipient.
 5. If a wrongful recipient of support fails to respond, or responds by refusing to allow recoupment of the overpayment amount through a reduction in payment, the FOC may file a motion with the court seeking direction to adjust the overpayment. (See section C-4 of this memorandum.)
- b. The FOC office should handle recovery payments as special instruction payments per MCR 3.208(C)(3), which requires written instruction from the paying party directing the allocation of the payment.
 - c. The FOC office must not recoup monies from court-ordered support or arrearage payments without one of the following:
 1. The express written consent of the payee;
 2. Consent implied by the payee's failure to respond to three written requests; or
 3. A court order authorizing recoupment from other payments due to that payee.¹³
 - d. The FOC office should avoid administrative action:
 1. That lets the current support obligation "charge off" by cancelling any active Income Withholding Notices (IWNs) and otherwise not collecting the current support obligation until the arrears overpayment has been completely offset.¹⁴
 2. To redirect support collections (e.g., wage withholdings, unemployment compensation payments, etc.) away from current support to fees, even if a credit balance exists on the case.¹⁵

¹³ The order should be compliant with governing state and federal law and should not jeopardize Title IV-D funding for FOC efforts to enforce the order. Alternatively, the order could ensure that the FOC need not take action to enforce the order, removing any IV-D funding concerns.

¹⁴ Similarly, when a payment has been misapplied from Case A to Case B, there is still a support amount the Case B payer never paid pursuant to the order, even though the recipient of support on Case B did receive money due under the order. Even if the misapplied payment was never recovered from Case B's support recipient, the FOC has a continuing statutory duty to collect the support never paid by the Case B payer.

¹⁵ This does not preclude a paying parent from specially instructing the FOC to apply payments made pursuant to MCR 3.208(C)(3) to nonsupport debts, even if current support remains unpaid at the time of the payment.

2. Advancing Funds to Cover FOC Office Mistakes

- a. As provided in the Michigan Court Administration Reference Guide Section 6-05(H)(11), an FOC office may advance money to remedy any FOC misapplication of a case's funds.
- b. The process to obtain local reimbursement through the MiSDU is set forth in OCS IV-D Memorandum 2005-023 (REVISED: Use of State Make Whole Funds), published by OCS.

3. Venue and Jurisdiction

- a. If the credit balance occurs on two cases, both in the same circuit court's jurisdiction, the FOC office for the circuit court can proceed to address the credit balance according to this policy and the court's direction.
- b. If the credit balance occurs on two cases, one located in a different circuit court's jurisdiction, the FOC office for the first circuit court must coordinate any efforts to address the credit balance with the other FOC office.
- c. If the credit balance occurs on two cases, neither of which is located in the same jurisdiction of the circuit court that identified the overpayment, the FOC office should alert the FOC offices in both courts with current jurisdiction.

4. FOC-Initiated Court Proceedings

- a. The FOC office may initiate proceedings to seek direction from the court regarding how to adjust the FOC records in a domestic relations case whenever:
 1. An order creates and does not resolve a credit balance,
 2. A case has a balance that isn't resolved through administrative actions, or
 3. Other special circumstances require it.
- b. An FOC office should initiate recovery proceedings to collect funds advanced by the FOC office to cover FOC office misapplication of funds.

5. Court Orders Resolving Credit Balances

- a. When resolving the credit balance, the court should consider potential unjust or inappropriate unintended consequences of the proposed resolution. The order should ensure that the payee will be able to meet the child's ongoing financial needs.¹⁶

¹⁶ A child subsequently going on assistance (e.g., FIP, FAP, CDC, etc.) is an indication that the recipient of support does not have enough money to meet the child's ongoing financial needs, and the support obligation amount should be reviewed.

- b. The court should avoid issuing any order that leaves the current support obligation unchanged but orders the FOC not to enforce current support until the arrears overpayment has been completely offset.
- c. To remove an overpayment balance from FOC records, the court may do one or more of the following:
 1. Compute the court-ordered obligation for current support pursuant to the Michigan Child Support Formula (MCSF), then order a deviation from the formula's recommended amount for a specified period of time. The deviations must meet state and federal requirements that find the credit balance is other property the payee has received in lieu of support, and further must both:
 - a. Offset the credit balance by an amount the court determines is equitable, and
 - b. Keep the reduced monthly payments high enough to meet the child's needs.¹⁷
 2. Establish terms for direct repayment between parties (payee to payer, or payee to payee) **without** any FOC office involvement. Any direct repayment of an overpayment between individuals must occur without any participation by the FOC.¹⁸ But, in some circumstances, the party who overpaid can ask the court to establish the amount as a money judgment and specify the terms for direct repayment.
 3. If the resolution involves an individual who is not a party to the case (e.g., a nonparty custodian) or an overpaid payee who resides outside of Michigan, re-enter a money judgment in the amount of the overpayment so the individual to whom the amount is owed can initiate a collection action **without** any FOC office involvement.
 4. Determine that the credit balance is neither unfair nor unjust to the paying parent and require the FOC to remove the credit (e.g., set

¹⁷ The court must record the MCL 552.605(2) deviation factor information in the order. The reduced amount should stay in effect only for the period needed for the periodic reductions to equal the amount of overpayment removed, or until it becomes obvious that the child's ongoing financial needs are not being met, whichever occurs first. For example, to remove a credit balance of \$X from the FOC records over T months, the court may reduce the current support of \$Y/month to \$Z /month, where $Z = Y - (X/T)$. Each month, the "unpaid" difference between \$Y and \$Z would "reduce" the credit balance. After T months, the current support will revert to \$Y/month.

¹⁸ FOCs lack statutory authority to collect, disburse, or enforce reimbursements because these payments do not meet the statutory definition of "support." If a court orders an FOC office to handle such repayments, OCS may identify such activities as non-IV-D reimbursable actions. If so, the court should be aware that ordering the FOC to enforce or monitor compliance with this order might have to be 100 percent county-funded. Regardless, if the court orders no FOC involvement, the FOC still must adjust MiCSES to reflect the order of the court; updating MiCSES for this function should be reimbursable under the CRP, as the action causes the statewide child support system to reflect the accurate balance on the IV-D case.

arrears at \$0, instead of the negative balance that would otherwise exist).¹⁹

5. Order a payee to repay misapplied funds from another case.
 - a. A court with jurisdiction over the payee may order the payee to return misapplied funds.
 - b. In order for a payee to return misapplied funds through the FOC, the individual must send designated payments that specify the parties' names, the case number, and the designated account for that case. See MCR 3.208(C)(3).
 - c. An order may recoup misapplied funds by reducing the current support charge and requiring application of the reduction towards a specified account to recover the misapplied funds, provided proper deviation has been made according to MCSF.
6. Grant other equitable relief.

6. Offsetting Support Obligations Between the Same Parties

- a. The court should avoid offsetting current child support obligations against arrears. Unlike other debts, support obligations are intended to fulfill an obligation to support the child.
- b. Offsetting current support in this manner typically does not follow the MCSF recommendations, and fails to take into account the current financial needs of the child. All child support obligations in the state must be established pursuant to the MCSF, except as provided by MCL 552.605.
- c. To settle support debts between the same parties, the court should order the credit balance removed from the FOC's records and try to settle any remaining difference under the terms stated in Subsection C.5., above.

7. Other Proceedings to Recover Overpayments.

- a. When seeking recovery from a party or offsets between parties, it is best to conduct the proceedings within or ancillary to the existing case.²⁰
- b. Even when an amount is remitted in a particular case, constraints related to subject matter or personal jurisdiction may make a separate proceeding necessary.
- c. When seeking recovery from an individual who is not a party to a case, or when someone lacks standing to initiate proceedings in an existing domestic

¹⁹ Before issuing such an order, the jurist should consider whether such an order would be a child support deviation.

²⁰ If a payer in Case A tries to recover money he paid that was sent to Case B, the payer in Case A may have standing as an intervener in Case B.

relations matter, the laws or court rules may necessitate filing a new action in a court that has appropriate subject matter and personal jurisdiction.

- d. Proceedings outside an existing case may be filed as original actions in the civil division of a circuit court when the plaintiff seeks equitable relief, or the amount in dispute exceeds \$25,000.
- e. The court should avoid issuing an order that conflicts with MCL 400.238, or an order that requires a nonparty to the case (e.g., the MiSDU) to take certain action.

D. Deceased Recipients of Support

Remaining arrears owed or overpayments made to a deceased party may be set forth in a court order and documented in case notes, from which the party's estate can collect, or from which the payment can be collected. If ordered by a court with competent jurisdiction, the FOC will redirect the arrearage payments to the estate of the decedent. Without such an order, the FOC will remove these items from the FOC records, as the statute only allows support payments to be made to a recipient of support, and the payee's estate is not defined as a recipient of support. MCL 552.602(y). The FOC should not otherwise collect this debt.