



## Michigan Supreme Court

State Court Administrative Office

### Trial Court Services Division

Michigan Hall of Justice

P.O. Box 30048

Lansing, Michigan 48909

Phone (517) 373-4835

Steven D. Capps  
Director

### MEMORANDUM

DATE: December 16, 2010

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 2010-09  
Surcharge Changes  
Replaces Administrative Memorandum 2004-07, Changes in Surcharge Law

---

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

On December 28, 2009, statutory modifications of MCL 552.603a terminated support surcharges ordered before December 28, 2009, and suspended surcharge assessments for one year. If a court determines that the payer has willfully failed to pay support under a support order, it may order a surcharge assessment on that case on January 1 and July 1 of each year, but the first assessment cannot occur before January 1, 2011. Once ordered, that surcharge must continue until abated by order of the court.

This administrative memorandum identifies steps courts may take to update existing court orders through a local administrative order, and provides instruction to FOC offices on ways to offer factual information to petitioners who seek case-specific surcharge assessment. FOC staff may also refer to the Office of Child Support's Michigan IV-D Child Support Manual Section 5.75, *Surcharge*, for more information.

If court staff have any questions, comments, or concerns about this policy, contact Daniel Bauer at [bauerd@courts.mi.gov](mailto:bauerd@courts.mi.gov) or (517) 373-5975.

## **BACKGROUND**

Beginning January 1, 1996, MCL 552.603a required courts to assess a surcharge on support arrears semi-annually at a compounded fixed rate of eight percent. Subsequent changes to this state law created certain provisions when a surcharge would not be charge, and changed the rate to a non-compoundable variable rate. In December 2009, the Legislature again modified the statute to immediately end the automatic assessment of surcharge. Now, a surcharge is allowed to be assessed only after a specific court finding of willful failure to pay support.

## **EXISTING ORDERS**

Prior to the 2009 statutory change, all Michigan support orders had to include language that required assessment of a surcharge. In light of the change in the law, courts that issued orders with the outdated language may enter a local administrative order (LAO) to amend all such orders to incorporate the new statutory requirements.

Existing model LAO 23 includes the following language: "For a friend of the court case, as of January 1 and July 1 of each year, a surcharge shall be added to support payments that are past due as of those dates." With the change in the statute that requires imposition of a surcharge only after a finding of willful failure to pay, the sentence in the existing LAO no longer reflects the statute. Every chief judge will have to determine whether to issue this new LAO.

Because all court orders issued prior to the statutory change contain provisions assessing a surcharge automatically, the chief judge must determine if the statutory change is self-effectuating, or if a local administrative order should be issued to reflect current law. If the court has issued a prior LAO on this topic, that existing LAO on surcharge (model LAO 23) must be rescinded. A new LAO should be issued to reflect the current statutory provisions at the discretion of the chief judge.

A model LAO is located at: <http://courts.michigan.gov/scao/resources/other/lao.htm#surcharge>.

## **SURCHARGE ASSESSMENTS**

State law allows a court to order that a case may have a surcharge assessment. Before issuing that order, the court must determine that:

- The payer has failed to pay support under a support order; and
- The failure was willful.<sup>1</sup>

A party can file a motion alleging willful failure to pay, and request the court to order surcharge assessment. A judge may also order surcharge assessment after making a finding of willful failure to pay at a show cause hearing.

---

<sup>1</sup> MCL 552.603a(1)

The FOC is the keeper of the record for financial transactions, and can provide factual data to the court supporting the failure to pay support through payment records. Payment records from the Michigan Child Support Enforcement System (i.e., MiCSES) are prima facie authentic and may be entered into evidence without extrinsic testimony.<sup>2</sup> If an individual who files a motion for surcharge assessment under MCL 552.603a is authorized to receive nonconfidential information from FOC records under MCR 3.218, the FOC may provide that information to that individual or directly to the court.

After a court has determined that a specific case is eligible for surcharge assessment, the existing statutory provisions control whether a surcharge will assess on the surcharge assessment date (January 1 or July 1). Under these provisions, a surcharge shall not assess:

- If the payer has paid 90 percent of current support due in the six months immediately before the surcharge assessment period.<sup>3</sup>
- On arrears due for a period of time before the court order was in effect (prejudgment arrears), if the order was entered after July 14, 2004.<sup>4</sup>
- If the payer is complying with a surcharge payment plan.<sup>5</sup>

#### **SURCHARGE ADJUSTMENTS**

Surcharge assessment in all cases was eliminated on December 28, 2009, and courts cannot subject a payer to surcharge assessment under the new provisions before January 1, 2011. Therefore, there is no statutory authority to assess a surcharge between December 28, 2009, and December 31, 2010.

Surcharge is support.<sup>6</sup> Support is not subject to retroactive modification, except during a period in which there is a pending petition for modification. Even then, support can be retroactively modified only from the date the petition was served on the other party.<sup>7</sup> The effective date of a surcharge provision may be that date of service. If the service date was before the January 1 or July 1 assessment date, but the court did not issue an order authorizing surcharge assessment until after January 1 or July 1, a surcharge may be assessed for the surcharge assessment date that fell between the date of service and the order issued date.

For example, a custodial party may file a motion for surcharge assessment on June 28, and serve process on the noncustodial parent (NCP) on that same date. The court holds a hearing on that motion on August 10. At the hearing, the court may determine that the NCP did willfully fail to pay support, and should be subject to a surcharge. The court may either assess the surcharge retroactively back to the July 1 assessment, or begin the surcharge assessment on January 1 of

---

<sup>2</sup> MCL 552.603(13)

<sup>3</sup> MCL 552.603a(3)(a)

<sup>4</sup> MCL 552.603a(3)(b)

<sup>5</sup> MCL 552.603d

<sup>6</sup> MCL 552.602(ee)(iii)

<sup>7</sup> MCL 552.603(2)

the next year. This retroactive modification is allowed because the petition to modify support by assessing the surcharge was served on the NCP before the July 1 assessment.

If the court specifies the case is eligible for surcharge assessment retroactively to the date of notice of the proceeding to the other party, the FOC must determine whether the surcharge would have assessed on the case.<sup>8</sup> If so, the FOC must adjust the surcharge arrears to reflect the case-specific surcharge assessment.

#### **ENDING SURCHARGE ASSESSMENTS**

After a court has ordered surcharge assessment, the order applies until it is abated by the court. The statute does not proscribe the method by which the court abates the surcharge assessment.

A court order may authorize that a surcharge assessment will be abated if the payer meets certain conditions determined by the court.<sup>9</sup> If the court order authorizing a case-specific surcharge assessment does not specify an end date, the case will continue to be eligible for the surcharge assessment until the earlier of the date:

- Both the current support charge ends and no surcharge-eligible arrears are due on the case, or
- The court issues a new order abating surcharge assessment.

---

<sup>8</sup> A surcharge would only assess against arrears eligible for a surcharge if the payer paid less than 90 percent of current support due in the six months preceding the surcharge assessment, or the payer had not entered into a surcharge payment plan.

<sup>9</sup> Such conditions may include a future date certain, all arrears existing at order entry are paid in full, a specified duration of current support paid on time, or any other conditions specified by the court.