

Order

Michigan Supreme Court
Lansing, Michigan

November 25, 2015

Robert P. Young, Jr.,
Chief Justice

ADM File No. 2015-12

Stephen J. Markman
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen,
Justices

Proposed Amendments of Rules
3.605, 3.606, 3.928, 3.944, 3.956,
6.001, 6.425, 6.445, 6.610, and
6.933 of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering amendments of Rules 3.605, 3.606, 3.928, 3.944, 3.956, 6.001, 6.425, 6.445, 6.610, and 6.933 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [Administrative Matters & Court Rules page](#).

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 3.605 Collection of Penalties, Fines, Forfeitures, and Forfeited Recognizances

(A)-(C)[Unchanged.]

(D) Remission of Penalty. An application for the remission of a penalty, including a bond forfeiture, may be made to the judge who imposed the penalty or ordered the forfeiture. The application may not be heard until reasonable notice has been given to the prosecuting attorney (or municipal attorney) and he or she has had an opportunity to examine the matter and prepare to resist the application. The application may not be granted without payment of the costs and expenses incurred in the proceedings for the collection of the penalty, unless waived by the court.

(E) [Unchanged.]

Rule 3.606 Contempts Outside Immediate Presence of Court

(A)-(E)[Unchanged.]

(F) The court shall not sentence a person to a term of incarceration for nonpayment unless the court has complied with the provisions of MCR 6.425(E)(3). Proceedings to which the Child Support and Parenting Time Enforcement Act, MCL 552.602 et seq., applies are subject to the requirements of that act.

Rule 3.928 Contempt of Court

(A)-(C)[Unchanged.]

(D) Determination of Ability to Pay. A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court-ordered financial obligations as ordered by the court, unless the court determines that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so.

Rule 3.944 Probation Violation

(A)-(E)[Unchanged.]

(F) Determination of Ability to Pay. A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court-ordered financial obligations as ordered by the court, unless the court determines that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so.

Rule 3.956 Review Hearings; Probation Violation

(A)-(B)[Unchanged.]

(C) Determination of Ability to Pay. A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court-ordered financial obligations as ordered by the court, unless the court determines that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so.

Rule 6.001 Scope; Applicability of Civil Rules; Superseded Rules and Statutes

(A) [Unchanged.]

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006, 6.102(D) and (F), 6.103, 6.104(A), 6.106, 6.125, 6.202, 6.425(E)(3), 6.427, 6.435, 6.440,

6.445(A)-(G), and the rules in subchapter 6.600 govern matters of procedure in criminal cases cognizable in the district courts.

(C)-(E)[Unchanged.]

Rule 6.425 Sentencing; Appointment of Appellate Counsel

(A)-(D) [Unchanged.]

(E) Sentencing Procedure.

(1)-(2)[Unchanged.]

(3) Incarceration for Nonpayment.

- (a) 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.
- (b) Payment alternatives. If the court finds that the defendant is unable to comply with an order to pay money without manifest hardship, the court may impose a payment alternative, such as a payment plan, modification of any existing payment plan, or waiver of part or all of the amount of money owed to the extent permitted by law.
- (c) Determining manifest hardship. The court shall consider the following criteria in determining manifest hardship:
 - (i) Defendant's employment status and history.
 - (ii) Defendant's employability and earning ability.
 - (iii) The willfulness of the defendant's failure to pay.
 - (iv) Defendant's financial resources.
 - (v) Defendant's basic living expenses including but not limited to food, shelter, clothing, necessary medical expenses, or child support.

- (vi) Any other special circumstances that may have bearing on the defendant's ability to pay.

(F)-(G)[Unchanged.]

Rule 6.445 Probation Revocation

(A)-(F)[Unchanged.]

- (G) Sentencing. If the court finds that the probationer has violated a condition of probation, or if the probationer pleads guilty to a violation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration. The court may not sentence the probationer to prison without having considered a current presentence report. The court may not sentence the probationer to prison or jail for failing to pay fines, costs, restitution, and other financial obligations imposed by the court without—and having complied with the provisions set forth in MCR 6.425(B) and (E).

(H) [Unchanged.]

Rule 6.610 Criminal Procedure Generally

(A)-(E)[Unchanged.]

(F) Sentencing.

(1) [Unchanged.]

(2) The court shall not sentence a defendant to a term of incarceration for nonpayment unless the court has complied with the provisions of MCR 6.425(E)(3).

~~(2)~~(3) [Renumbered, but otherwise unchanged.]

~~(3)~~(4) [Renumbered, but otherwise unchanged.]

(G)-(H)[Unchanged.]

Rule 6.933 Juvenile Probation Revocation

(A)-(D)[Unchanged.]

(E) Determination of Ability to Pay. A juvenile and/or parent shall not be detained or incarcerated for the nonpayment of court-ordered financial obligations as ordered by the court, unless the court determines that the juvenile and/or parent has the resources to pay and has not made a good-faith effort to do so.

Staff Comment: The proposed amendments of MCR 3.605, 3.606, 3.928, 3.944, 3.956, 6.001, 6.425, 6.445, 6.610, and 6.933 were submitted by the Michigan State Planning Body for the Delivery of Legal Services to the Poor. The proposed rule revisions are intended to provide clarity and guidance to courts regarding what courts would be required to do before incarcerating a defendant for failure to pay.

With respect to the new language proposed as MCR 6.425(E)(3), the Michigan State Planning Body notes: The United States Supreme Court and the Michigan Supreme Court have recognized that it is unconstitutional to incarcerate someone for failure to pay fines, costs, fees, or restitution simply because the person is unable to pay. See, e.g., *Bearden v Georgia*, 461 US 660, 672-673 (1983); *People v Jackson*, 483 Mich 271 (2009). Any time the court is considering incarceration for failure to pay—whether at the time of sentencing or at a subsequent proceeding, such as a probation revocation or show-cause hearing—the court is required to take into account the defendant’s financial resources. The Michigan Supreme Court has held that “once an ability-to-pay assessment is triggered, the court must consider whether the defendant remains indigent and whether repayment would cause manifest hardship.” *Jackson*, 483 Mich at 275. The defendant should be considered to suffer manifest hardship if the defendant or his or her immediate family would be deprived of funds needed for basic living necessities such as food, shelter, clothing, necessary medical expenses, or child support. Specific statutes requiring ability-to-pay determinations can provide additional guidance. See, e.g., MCL 771.3(8) (in determining whether to revoke probation for failure to pay, courts “shall consider the probationer’s employment status, earning ability, and financial resources, the willfulness of the probationer’s failure to pay, and any other special circumstances that may have a bearing on the probationer’s ability to pay”); MCL 769.1a(11) (substantially similar provision re restitution); MCL 771.3(6)(a) (in determining amount and method of paying costs, the court “shall take into account the probationer’s financial resources and the nature of the burden that payment of costs will impose, with due regard to his or her other obligations”); MCL 771.3(6)(b) (in considering petition for remission of costs, court should consider whether “payment of the amount due will impose a manifest hardship on the probationer or his or her immediate family”); MCL 780.766(12) (in considering modifying the method of restitution payment, court should consider whether payment “will impose a manifest hardship on the defendant or his or her immediate family”).

The United States Supreme Court approved a simple framework for assessing ability to pay, albeit in the context of contempt proceedings: “(1) notice to the defendant

that his ‘ability to pay’ is a critical issue . . . ; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status (*e.g.*, those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.” *Turner v Rogers*, ___ US___; 131 S Ct 2507, 2519 (2011). In implementing this rule, courts should ensure that the *Turner* standards are met.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Office of Administrative Counsel in writing or electronically by March 1, 2016, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-12. Your comments and the comments of others will be posted under the chapter affected by this proposal at [Proposed & Recently Adopted Orders on Admin Matters page](#).



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 25, 2015

A handwritten signature in black ink, appearing to read "Larry S. Royster".

Clerk