



## Michigan Supreme Court

State Court Administrative Office

Trial Court Services

**Friend of the Court Bureau**

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Steven D. Capps  
Director

October 21, 2010

TO: Circuit Court Judges, Family Division Judges, and Friends of the Court  
cc: Office of Child Support  
Circuit Court Administrators  
Family Division Administrators

FROM: Steven D. Capps, Trial Court Services

RE: State Court Administrative Office (SCAO) Administrative  
Memorandum 2010-06  
Child Support Arrearage and Surcharge Repayment Plan

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In December 2009, the Legislature amended MCL 552.605e by eliminating the provision that tied repayment plans for child support arrearages to the federal poverty guidelines. The statute now permits courts to establish a payment plan for a payer in arrears that is based on both the payer's ability to pay and the best interests of the child. The payment plan must require payers to pay a reasonable portion of the amount of the arrearage over a reasonable time period. In addition, MCL 552.605e no longer precludes payers who have been prosecuted for felony nonsupport from filing an arrearage payment plan.

The Legislature also modified the procedure to be used to discharge amounts assessed as surcharges. Under MCL 552.603(d), a party or the friend of the court (FOC) may file a motion with the court for an order to establish a repayment plan that provides discharge of previously assessed surcharges and allows future surcharges to be waived.

This Administrative Memorandum 2010-06 summarizes the statutes that govern repayment plans. It supersedes SCAO Administrative Memorandum 2005-05.

If a judge or FOC has questions, please contact Elizabeth Stomski at (517) 373-5975 or [stomskie@courts.mi.gov](mailto:stomskie@courts.mi.gov).

## **I. Initiating an Arrears Payment Plan**

A payer who has an arrearage under a support order may use SCAO's "Motion Regarding Payment Plan/Discharge of Arrears" (FOC 109) to request that the court establish a payment plan. The payment plan may address payee-owed arrears, state-owed arrears, or both payee- and state-owed arrears.<sup>1</sup> If the court determines by a preponderance of the evidence that the payment plan is in the best interest of the parties and the children, the court must approve the proposed payment plan.<sup>2</sup>

### **A. Arrearages Owed to a Payee**

If the court determines that the payment plan is in the best interest of the parties and the children, and that the arrearages are owed only to the payee, the court must further determine that both of the following conditions apply before the court grants the motion for a payment plan:

1. The payee has consented to entry of the order under circumstances that satisfy the court that the payee is not acting under fear, coercion, or duress; and
2. The payer establishes that the arrearage did not arise from conduct that the payer engaged in exclusively for the purpose of avoiding a support obligation.<sup>3</sup>

### **B. Arrearages Owed to the State**

When the arrearages are owed solely to the state, the court must determine that all of the following conditions apply before the court grants the motion for a repayment plan:

1. The arrearage did not arise from conduct that the payer engaged in exclusively for the purpose of avoiding payment of a support obligation;
2. In the absence of a court-approved payment plan, the payer has no present ability, and will not have an ability in the foreseeable future, to pay the arrearage;

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<sup>1</sup> In this memorandum "state-owed arrears" refers to arrearage amounts owed to the State of Michigan. This memorandum does not cover the discharge of an arrearage owed to another state.

<sup>2</sup> MCL 552.605e(1). MCL 552.605e(7)(d) increases the burden of proof when the arrearage is owed to the state and the state does not respond to the motion. See Section III.D.

<sup>3</sup> MCL 552.605e(1)(a)(i)-(ii).

3. The payment plan will require the payer to pay a reasonable portion of the arrearage over a reasonable period of time in accordance with the payer's current ability to pay; and
4. The Office of Child Support or its designee has been served with a copy of the motion at least 56 days before the hearing.<sup>4</sup>

### **C. Both Payee- and State-Owed Arrearages**

When a payer owes arrearages both to the payee and to the state, all requirements for both payee-owed arrearages and state-owed arrearages (paragraphs A and B above) must be met.

## **II. Office of Child Support Central Operations Involvement**

A party who files a motion for a payment plan regarding state-owed arrearages must send a copy of the proposed plan to Office of Child Support (OCS). Based on internal OCS criteria, the OCS Central Operations office will either "support" or "oppose" an arrearage payment plan.

It is possible that OCS Central Operations will reject the forgiveness of some or all of a state-owed arrearage and request that the payer pay the entire state-owed arrearage amount. Also, the support of OCS Central Operations of a payment plan does not guarantee that OCS will support discharge of an arrearage balance. More information about the OCS process can be read in the *Michigan IV-D Child Support Manual*, Chapter 6, Section 6.42.<sup>5</sup>

## **III. Court Action**

### **A. Forms**

If the payment plan concerns state-owed arrearages, the statute requires that the court consider OCS's written comments before it enters a payment plan order.<sup>6</sup> However, the court retains the authority to establish all terms and conditions of the payment plan, and has the final say on whether to approve the plan.

The State Court Administrative Office has a standard form available, *Order for*

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<sup>4</sup> MCL 552.605e(1)(b)(i)-(iv). The notice to OCS must be sent to the following address: Office of Child Support Central Operations; c/o Arrears Payment Plan Review Unit; P.O. Box 30744; Lansing, MI 48909-8250.

<sup>5</sup> This can be found online at <http://mi-support.cses.state.mi.us/policy/manual/6.0/6.42.pdf>.

<sup>6</sup> MCL 552.605e(7).

*Payment Plan* (FOC 110), on which the court may order the arrears payment plan.<sup>7</sup>

#### **B. Additional Requirements**

The court order that approves a payment plan may also contain other conditions that a payer must meet, including, but not limited to:

1. Participation in a parenting program;
2. Drug and alcohol counseling;
3. Anger management classes or participation in a batterer intervention program;
4. Participation in a work program;
5. Counseling; or
6. Continued compliance with a current support order.

The court may impose these additional conditions at its discretion. If the court does order additional conditions, the FOC must monitor the payer's compliance.

#### **C. Consideration of OCS Comments**

OCS Central Operations reviews all arrearage payment plan requests regarding state-owed arrearages. OCS then provides the circuit court with comments regarding each payment plan by submitting a standard form to the court.<sup>8</sup> The staff of OCS Central Operations will forward a copy of the comments to the FOC, the payer, the payee, and the attorneys of record, if applicable.

#### **D. OCS Failure to Comment**

If OCS Central Operations does not provide the court with comments before the hearing date, the court may take any of the following actions;

1. Adjourn the hearing to seek written comments from OCS Central Operations before making a decision.
2. Appoint an examiner who will review the payer's assets and the payment plan and make a recommendation concerning the plan, including possible payment alternatives. The payer must compensate the examiner for services provided.

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<sup>7</sup>See: <http://courts.michigan.gov/scao/courtforms/domesticrelations/support/foc110.pdf>.

<sup>8</sup> OCS uses the form DHS 986, located in the Child Support Manual at <http://mi-support.cses.state.mi.us/policy/manual/6.0/chapter6.0.pdf>.

3. Appoint a receiver who will review the payer's assets and make a recommendation concerning the plan, including possible payment alternatives. The receiver will have the power of a receiver under all applicable laws and may, at the court's discretion, use the payer's assets to complete the plan or otherwise monitor the payer's progress in complying with the plan. The payer must compensate the receiver for services provided.
4. Approve the plan as presented, but only if the court finds by clear and convincing evidence that the payer satisfies all the requirements for approval of the payment plan.
5. Deny the payment plan as presented if the court finds that the payer has not satisfied the requirements of MCL 552.605e(1).<sup>9</sup>

#### **IV. Termination of the Arrearage Payment Plan**

At any time, any interested party may move to terminate an arrearage payment plan and reinstate the arrearage amount for good cause. Typically, a termination motion will be filed by an actual party to the case, and not the court, the FOC, or a state agency. "Good cause" for termination includes, but is not limited to:

1. The payee has become a recipient of public assistance.
2. The payer has received property in an amount that is sufficient to pay a substantial portion of the amount discharged. Examples include:
  - a. Lottery proceeds or other winnings;
  - b. A settlement under an insurance policy;
  - c. A judgment in a civil action; or
  - d. An inheritance.<sup>10</sup>

#### **V. Fulfilling the Requirements of an Arrearage Payment Plan**

Upon completing the repayment plan, the payer must provide written notice to all "interested parties"<sup>11</sup> and request that the court conduct a hearing to consider the discharge of any remaining arrearage. After notice and hearing, if the court finds that

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<sup>9</sup> For further OCS Central Operations information regarding arrearage payment plans, please see the *Michigan IV-D Child Support Manual*, Chapter 6.0, section 6.42, entitled "Enforcement -- Payment Plans."

<sup>10</sup> MCL 552.605e(4).

<sup>11</sup> MCL 552.605e(2) does not define "interested party." Because there is no definition provided in this context, SCAO recommends that everyone who is involved in the case may be considered an interested party, including OCS Central Operations.

the payer has *fully* complied with the payment plan, the court shall enter an order that discharges any remaining arrearage. If the court finds that the payer has only *substantially* complied with the payment plan, the court may enter an order that discharges all or a portion of the remaining arrearage, depending on the circumstances. The court may use SCAO form (FOC 111), *Order Discharging Arrears* to enter either type of order.<sup>12</sup>

Until the payer has fully complied with the payment plan, all mandatory enforcement remedies, such as credit reporting and tax refund offset, shall continue on any arrearage amounts that are subject to the payment plan.<sup>13</sup> MCL 552.605e allows discretionary enforcement remedies to also continue, but a referee, judge, or other person conducting an administrative review hearing on the matter must stop the discretionary enforcement if the payer is currently in compliance with the payment plan.

SCAO recommends that a court's order that approves a payment plan specify whether to include enforcement-related receipts when determining payer compliance. If the court order does not specify otherwise, all payments should be credited under the payment plan.

## **VI. Surcharge Payment Plans**

Under MCL 552.603d, a party or the FOC may file a motion for a repayment order that discharges previously assessed surcharges and waives future surcharges. To the extent that the law provides for discharge of surcharges assessed after June 30, 2005, the statutory definition of "surcharge" includes support. Because a surcharge is considered child support, federal and state laws require that a payee agree to the discharge of those surcharges. It is unlikely that a payer would petition a court for a surcharge-only waiver under MCL 552.603d instead of a waiver of all arrearages under MCL 552.605e. However, in the unlikely situation that a payer files such a petition, the court shall enter a surcharge repayment plan order after notice and a hearing if the court finds that all the following are true:

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<sup>12</sup> The form FOC 111 does not have to be submitted to OCS Central Operations once a court signs the discharge. The FOC must enter the court's order into the Michigan Child Support Enforcement System (MiCSES) and adjust the arrearage balance according to the court order.

<sup>13</sup> MCL 552.605e(9) states that enforcement under a payment plan must continue if federal or state law requires the enforcement action. OCS policy has determined that tax offset and credit reporting are mandated enforcement procedures that will continue under arrearage payment plans. OCS policy may increase the list of mandated enforcement procedures in the future.

1. The arrearage did not arise from conduct that the payee engaged in exclusively for the purpose of avoiding a support obligation.
2. Absent a repayment plan that waives or discharges the surcharges, the payer has no present ability, and will not have an ability in the foreseeable future, to pay the arrearage.
3. The payer's plan is reasonable based on the payer's current ability to pay.
4. The surcharge accrued or will accrue after June 30, 2005.<sup>14</sup>

Unlike arrearages that are discharged under a repayment plan, a court may reinstate discharged or waived surcharges. Upon notice and hearing, if the court finds that the payer has failed to substantially comply with the repayment plan, the court shall enter an order reinstating all or a portion of any surcharge.

Because of functional similarities between arrearage payment plans under MCL 552.605e and the surcharge payment plan under MCL 552.603d, SCAO has no plans to develop forms to be used specifically for surcharge matters.

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<sup>14</sup> MCL 552.603d.