

Michigan Supreme Court  
State Court Administrative Office



# ABILITY TO PAY WORKGROUP

Tools and Guidance for Determining and  
Addressing an Obligor's Ability to Pay

April 20, 2015

April 20, 2015

Mr. John A. Hohman, Jr.  
State Court Administrator  
Michigan Hall of Justice  
P.O. Box 30048  
Lansing, MI 48909

Re: Ability to Pay Workgroup

Dear Mr. Hohman:

In the time since the United States Supreme Court issued its opinion in *Bearden v Georgia*, 461 US 660 (1983), courts have been required to address a defendant's ability to pay before incarcerating the individual for failing to pay a required court fine or cost. More recently, judges have been asking for guidance on how and when to determine ability to pay. The State Court Administrative Office (SCAO) set out to work with judges, judicial associations, administrators, collections specialists, attorneys, and other interested parties to promote consistent application of the holding in *Bearden*. This effort led to the formation of the Ability to Pay Workgroup.

The Ability to Pay Workgroup began meeting in June 2014. The workgroup consists of judges, court administrators, collections specialists, attorneys, and SCAO staff. Over the course of six months, we examined the issue of ability to pay. In concluding our work on this issue, we have issued a report that outlines:

- tools to assist judges and their staff;
- best practices currently in use by Michigan judges;
- recommendation of continuing education of judges and their staff on how to address the issues related to ability to pay; and
- changes that might be made to statutes and court rules.

The workgroup's goal was to create a report that works for all involved in the criminal and juvenile justice system.

I would like to extend my thanks to all the members of the workgroup who spent their precious time debating the issues, drafting the materials, and testing the tools. Also, thank you to the SCAO staff, specifically Beth Barber, Connie Daiss, Robin Eagleson, and Deb Green. Your work behind the scenes did not go unnoticed. Thank you.

Sincerely,

Chief Judge John A. Hallacy  
10th District Court  
Chair, Ability to Pay Workgroup

## Ability to Pay Workgroup (2014)

The Honorable John Hallacy (Chair)  
10th District Court

Ms. Carol Bealor  
Court Administrator  
43rd Circuit Court, Family Division

The Honorable James B. Brady  
47th District Court

Ms. Carmilla Bourn  
Collections Liaison  
36th District Court

Ms. Victoria Courterier  
Court Administrator  
46th Circuit Court

Ms. Shauna Dunnings  
Court Administrator  
30th Circuit Court

Mr. Bob Gillett  
Executive Director  
Legal Services of South Central Michigan

The Honorable Elizabeth Pollard Hines  
15th District Court

Ms. Debra Kubitskey  
Court Administrator  
53rd District Court

Ms. Deborah Nehil  
Business Office Manager  
Isabella County Trial Court

Ms. Valerie R. Newman  
Assistant Defender  
State Appellate Defender Office

Ms. Stacy Parke  
Deputy Court Administrator  
47th District Court

Ms. Jennifer Phillips  
Court Administrator  
16th Circuit Court

The Honorable Thomas Slagle  
41st Circuit Court, Family Division

Ms. Carol Stocking  
Court Administrator  
86th District Court

Ms. Ines Straube  
Court Administrator  
Barry County Trial Court

The Honorable Paul Stutesman  
45th Circuit Court

The Honorable Robert Sykes, Jr.  
8th Circuit Court, Family Division

Ms. Claudia Wilson  
Collections Coordinator  
3rd Circuit Court

The following tools, best practices, and guidance are intended to assist judges and court staff with determining an obligor's ability to pay and establishing payment plans, providing payment alternatives, enforcing court-ordered financial obligations, and identifying uncollectible debts. Because courts deal with diverse obligors and collections situations, some tools and best practices may have limited application in certain courts and/or cases.

In the three decades since the United States Supreme Court issued its decision in *Bearden v Georgia*, 461 US 660 (1983), judges have been required to address the issue of ability to pay before incarcerating a person for failure to pay court-ordered financial obligations. Michigan law is also clear that a judge may not incarcerate someone who lacks the ability to pay court-ordered financial obligations.

### **WHEN TO DETERMINE ABILITY TO PAY**

Whenever a court attempts to enforce a court-ordered financial obligation, the obligor must be given an opportunity to contest the enforcement on the basis of indigency and the court must assess the obligor's ability to pay (*People v Jackson*, 483 Mich 271 (2009)). Generally, this means at the time of a show cause hearing, probation violation hearing, or at the time a conditional sentence is enforced. The ultimate determination of the ability to pay rests with the judge. The judge should review the applicable statutes and court rules to determine which factors to consider and place the appropriate findings on the record. Enforcement of court-ordered financial obligations by incarceration should only occur when the court has determined that the obligor has the ability or resources to pay the ordered monetary assessments and has not made a good faith effort to do so.

### **REFERENCE MATERIAL AND TOOLS TO ASSIST WITH DETERMINING ABILITY TO PAY**

The workgroup created a variety of ability to pay checklists that are intended to assist judges with determining which factors to consider when placing the appropriate findings on the record with regard to ability to pay. Checklists may also assist court staff with establishing payment plans and providing recommendations to judges about payment alternatives and enforcement. Sample ability to pay checklists may be found in Appendix A.

Courts must comply with various statutes, court rules, and case law when making determinations of ability to pay. The ability to pay determination can and should be made in circuit court cases (including juvenile cases [abuse and neglect and delinquency proceedings]) and district court cases.

- Statutory requirements are listed in Appendix B.
- Court rule requirements are listed in Appendix C.
- Case law requirements are listed in Appendix D.

Probation violation proceedings are a useful tool to enforce court orders. When a court grants probation, a probationer agrees to the terms and conditions ordered by the court. Failure to pay court-ordered financial obligations is a violation of the terms of probation. Upon failure to pay, the probation officer should prepare a *Motion and Summons Regarding Probation Violation* (SCAO form MC 246) or a *Motion, Affidavit, and Bench Warrant* (SCAO form MC 229), depending on the court's preference. At the hearing, the probationer may contest the probation violation due to an inability to pay the court-ordered financial obligations. If the court considers contempt or incarceration as a penalty for violating probation, the court must offer probationer legal representation. A decision to revoke probation cannot be based on an indigent probationer's inability to make payments as ordered as a condition of probation (*People v Courtney*, 104 Mich App 454 (1981); *People v Baker*, 120 Mich App 89 (1982)). The court may, however, require a probationer to make a good-faith effort to find a job to make ordered payments.

Show cause dockets are also a useful tool for courts to enforce their orders and for reviewing an obligor's ability to pay. If an obligor fails to respond to initial collections efforts, the court should issue a *Motion and Order to Show Cause* (SCAO form MC 230) that requires the obligor to come into court to explain why he or she has not paid the court-ordered financial obligations. The order should inform the obligor that ability to pay will be considered at the show cause hearing. Appendix E contains sample ability to pay language for inclusion on the order. If the court considers contempt or incarceration as a penalty for violating the court's order, the court must offer obligor legal representation. Bench warrants should not be used unless an obligor fails to appear for court. Because case law requires a court determine an obligor's ability to pay before incarceration, courts should discontinue the use of bench warrants for failure to pay.

Courts may find it useful to review video examples of show cause hearings at <http://courts.mi.gov/Administration/admin/op/TCC/Pages/Resources.aspx> (contact Trial Court Collections at 517-373-4987 for the passcode to view the videos). Courts may also contact Judge Stutesman at the 45th Circuit Court and Judge Brady at the 47th District Court for additional information on the use of show cause dockets to enforce court-ordered financial obligations.

There are numerous methods to determine reasonable payment plans for obligors. Payment plan calculators are designed to help courts create installment payment agreements (see Appendix F; contact Trial Court Collections at 517-373-4987 for the calculator in Excel format). These calculators assist courts in setting reasonable payment plan amounts by taking into consideration an individual's "other" obligations. Obligor have the same rights as civil debtors (*Fuller v Oregon*, 417 US 40 (1974)); therefore, the amount ordered paid cannot exceed 25 percent of disposable earnings. The obligor may agree to pay more than this amount. Calculators may be used to verify whether the payment amount is reasonable and/or if there is an ability to pay (for enforcement purposes). Payment plan calculators are not necessary in every

case. In addition, these calculators should not be used if the only source of income is public assistance or exempt income; payments made with these limited resources are strictly voluntary.

Courts should consider using calculators in the following situations:

- The “Actual Payment Plan Calculator” should be used when the court has an earnings statement for the obligor.
- The “Estimated Payment Plan Calculator” should be used when the court does not have an earnings statement for the obligor or if the obligor does not work a standard number of hours.
- The “Juvenile Payment Plan Calculator” should be used for juveniles that are working. Do not use this tool if the juvenile is emancipated.

Other resources that may assist the court are the federal poverty guidelines (see Appendix G) and the means test (see Appendix H). The federal poverty guidelines may be used to determine the threshold of whether an obligor has the ability to pay any amount toward court-ordered financial obligations. The federal means test is a method for determining the financial well-being of an obligor and the obligor’s necessary expenses and disposable earnings. This tool can be beneficial when determining how much income an obligor has to meet his or her court-ordered financial obligations after necessary expenses are paid.

## **ENFORCEMENT ALTERNATIVES**

If the court determines there are appropriate alternatives or that additional time will enable an obligor with a documented need to pay court-ordered financial obligations, the court should explore those alternatives or grant additional time. Payment plans should require amounts that the obligor can successfully make, considering the amount owed and the obligor’s ability to pay. If the court finds that additional time to pay and/or installment payment plans would not enable the obligor to pay due to his or her proven inability to pay the court-ordered financial obligations, the court should consider alternatives for discretionary assessments imposed.

Payment alternatives should be considered if the obligor is in jeopardy of failing to comply with the court order and has demonstrated that he or she has exercised due diligence in attempting to comply. Payment alternatives such as community service, earning a GED, and youth-oriented projects may be used. A wide variety of payment alternatives may be considered by the court that would allow the obligor to reduce his or her financial obligations owed to the court while also serving or “paying back” his or her community (see best practices in Appendix D).

Incentives and waivers may also be considered by the court to reduce an obligor’s court-ordered financial obligations. If the court finds that an obligor has made a good faith effort and is unable to pay, then it may waive those monetary assessments that are not mandated by statute.

The 3rd Circuit Court, Family Division instituted an incentive and waiver policy that can be found, along with the court's forms, in Appendix J.

If the court determines that court-ordered financial obligations are uncollectible debts, it should consider whether those debts should be inactivated or discharged. The Model Debt Inactivation Policy may be found in Appendix K and at <http://courts.mi.gov/Administration/SCAO/Resources/Documents/Collections/Policies/ModelDebtInactivationPolicy.pdf>.

### **TRAINING – JUDICIAL AND STAFF**

Instruction related to the issues and procedures regarding ability to pay should be a key component of training for newly elected and appointed judges. The training should include a discussion of the variety of alternatives and tools that are available. In addition, all existing members of the judiciary should receive periodic instruction on the issues and procedures regarding ability to pay, including a discussion of the variety of alternatives and tools that are available.

In addition to judges receiving ability to pay instruction, appropriate court staff should also be afforded training. This instruction should include a discussion of the variety of alternatives and tools that are available, and it should be provided to staff regularly and upon request, and as court staff changes occur.

### **POSSIBLE STATUTORY AND COURT RULE AMENDMENTS**

During review of statutory and court rule requirements, the workgroup drafted possible statutory and court rule amendments. The following are possible statutory amendments (see Appendix L):

- Sentence/Conditional Sentence
  - MCL 769.2 (sentence; solitary confinement or hard labor – repeal)
  - MCL 769.3 (conditional sentence; payment of fine; probation – require ability to pay determination before finding payer in default of payment; setting amounts of credit toward financial obligations when incarcerated)
  - MCL 769.4 (conditional sentence; execution – execution of conditional sentence shall not occur until court has complied with MCL 769.3 as amended)
  - MCL 769.5 (alternative or combined penalties; power of court – require ability to pay determination before ordering incarceration for nonpayment; setting amounts of credit toward financial obligations when incarcerated)
  - MCL 801.201 *et seq.* (work farms, factories, and shops – repeal)

- Credit per day for commitment for civil contempt
  - MCL 257.908 (default as civil contempt; penalty – to ensure consistency, update credit amount when incarcerated)
  - MCL 600.8729 (payment of fine, costs, assessment, damages, or expenses; default as civil contempt – to ensure consistency, update credit amount when incarcerated)
  - MCL 600.8829 (default in payment of fines, costs, assessment, or installment – to ensure consistency, update credit amount when incarcerated)

The following are possible court rule amendments (see Appendix M):

- Collection
  - MCR 3.605 Collection of Penalties, Fines, Forfeitures, and Forfeited Recognizances (allowance of waiver of certain costs and expenses)
- Contempt
  - MCR 3.606 Contempts Outside Immediate Presence of Court (require court to make ability to pay determination before incarceration for nonpayment)
  - MCR 3.928 Contempt of Court (require court to make ability to pay determination before detainment or incarceration of a juvenile/parent for nonpayment)
- Probation violation/revocation
  - MCR 3.944 Probation Violation (require court to make ability to pay determination before detainment or incarceration of a juvenile/parent for nonpayment)
  - MCR 3.956 Review Hearings; Probation Violation (require court to make ability to pay determination before detainment or incarceration of a juvenile/parent for nonpayment)
  - MCR 6.445 Probation Revocation (require court to make ability to pay determination before incarceration for nonpayment)
  - MCR 6.933 Juvenile Probation Revocation (require court to make ability to pay determination before detainment or incarceration of juvenile/parent for nonpayment)
- Other
  - MCR 6.001 Scope; Applicability of Civil Rules; Superseded Rules and Statutes (refers to MCR 6.425(E)(3) ability to pay requirement)
  - MCR 6.425 Sentencing; Appointment of Appellate Counsel (require court to make ability to pay determination before incarceration for nonpayment)
  - MCR 6.610 Criminal Procedures Generally (require court to make ability to pay determination before incarceration for nonpayment)



## **CONCLUSION**

The “ability to pay” must be determined and applied on an individual basis. Each judge, for each obligor brought before the court for failure to pay a court-ordered financial obligation, must review the required facts and circumstances and make an individual determination of the obligor’s ability and resources to pay the ordered monetary assessments and whether the obligor has made a good-faith effort to pay. Judges may have differing philosophies regarding ability to pay and may weigh facts in a given case differently. A judge’s discretion is tempered by the confines of the law and should be exercised with fairness and restraint. Ultimately, each decision is up to the individual judge.

## **Appendices**

<a href="#">Appendix A:</a>	Ability to Pay Checklists
<a href="#">Appendix B:</a>	Statutory Requirements
<a href="#">Appendix C:</a>	Court Rule Requirements
<a href="#">Appendix D:</a>	Case Law Summary
<a href="#">Appendix E:</a>	Ability to Pay Language
<a href="#">Appendix F:</a>	Payment Plan Calculators
<a href="#">Appendix G:</a>	Federal Poverty Guidelines Charts
<a href="#">Appendix H:</a>	Means Test
<a href="#">Appendix I:</a>	Payment Alternatives
<a href="#">Appendix J:</a>	Incentives/Waivers
<a href="#">Appendix K:</a>	Model Debt Inactivation Policy
<a href="#">Appendix L:</a>	Possible Statutory Amendments
<a href="#">Appendix M:</a>	Possible Court Rule Amendments