
From: Charles Goedert <cgoedert@hazelpark43rdcourt.com>
Sent: Monday, December 14, 2015 2:41 PM
To: ADMcomment
Cc: Judge Joe Longo; Ed Klobucher (eklobucher@hazelpark.org)
Subject: Proposed amendments to court rules regarding ability to pay

Dear Administrative Counsel: I am requesting 2 amendments to the proposed amended language of MCR 6.425 that adds MCR 6.425(E)(3). The first requested amendment is to add community service or similar alternatives to the payment alternatives language in MCR 6.425(E)(3)(b) and the second requested amendment is to add prior failures to appear, pay or comply to the manifest hardship willfulness language of MCR 6.425(E)(3)(c)(iii). For your consideration, I have inserted these 2 requests in the language of MCR 6.425(E)(3) below and highlighted the requested additions by underlining the additions and putting them in italics:

(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, or community service (or similar alternatives) for, 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, including prior failure(s) to appear, pay or otherwise comply.

(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.

As to the first request, I am frequently asked by defendants to be able to do community service in lieu of paying money for fines and I often do order community service (or similar alternatives such as pursuing education) as an alternative to paying money. Moreover, the Michigan Supreme Court Administrative Office Ability to Pay Workgroup April 20, 2015 Report entitled, "Tools and Guidance for Determining and Addressing an Obligor's Ability to Pay" ("Workgroup Report") states on page 3, in relevant part:

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 I).

Appendix I states, in relevant part:

Payment alternatives to consider include, but are not limited to, the following:

- Community service
 - The court does not have to provide court-supervised community service. The court can order the obligor to perform community service at a non-profit agency and provide the court with proof of hours worked.
 - See attached best practices from the 8th District Court, 61st District Court, and 8th Circuit Court, Family Division.
- Good grades on a report card
- Progress/completion of a class/program (e.g., completion of GED)
- Attendance at school

Despite this acknowledgement of the use of, and need for, community service as a payment alternative option, the current proposed language for MCR 6.425(E)(3) to address payment alternative options fails to address community service at all, leaving courts without direction as to whether or not it is within a court's discretion to utilize community service (and similar options) as a payment alternative.

As to the second request, a person's prior record of failing to pay, appear or otherwise comply is clearly relevant information when considering whether or not that individual can be trusted with time to pay and it should be expressly included in the manifest hardship criteria. Other court rules recognize similar criteria. For example, MCR 6.106(F)(1)(a) and (b) provide that a defendant's record of criminal offenses and/or nonappearances is relevant information in setting bond and bond conditions. Moreover, the Workgroup Report provides that an individual's payment history is relevant. See, for example, Appendix A, the "Ability to Pay Checklist", numbered paragraph 4, which includes as relevant an individual's "Payment history". That being the case, it should be expressly included in the proposed language of MCR 6.425(E)(3) in order to provide direction to the trial courts regarding the proper exercise of discretion. Instead, the current language of MCR 6.425(E)(3)(c) fails to do so and appears to treat individuals with a prior record of failing to pay or appear or otherwise comply differently (i.e., more favorably) if they can meet the criteria for a manifest hardship than individuals who cannot meet the manifest hardship criteria. In addition, individuals who meet the criteria for a manifest hardship in the current proposed language can ignore a court ordered payment plan with impunity since incarceration will not be an alternative under the express language of MCR 6.425(E)(3)(a). This situation may be compounded in the case of an individual who has unreported income or other financial resources who fails to disclose such income or resources under MCR 6.425(E)(3)(c)(iv), thereby being rewarded for being disingenuous with a court despite prior failures to pay, appear or otherwise comply. Without expressly including the discretion of the court to consider as relevant information an individual's prior record of failing to pay, appear or comply, the current version of MCR 6.425(E)(3) may result in a court (i) having a strong factual basis to believe that time to pay will only result in a failure to do so, (ii) needing to then issue an order to show cause when the individual fails to pay, (iii) having to then issue a bench warrant when the individual fails to appear at the show cause hearing, and (iv) being required to go through the process all over again if the individual is ever apprehended. This is inconsistent with Appendix A to the Workgroup Report and other court rules such as MCR 6.106(F) and neither serves the interests of justice nor represents a wise expenditure of taxpayer's money.

Please include these 2 requested clarification additions to the proposed language of MCR 6.425(E)(3) prior to the court rule being adopted.

Sincerely,

Charles G. Goedert
District Court Judge
43rd District Court
Hazel Park Division