STATE OF MICHIGAN
IN THE 43RD JUDICIAL CIRCUIT COURT

ADMINISTRATIVE ORDER 2011-02
(Rescinds Administrative Order 2004–4)

ORDER IMPLEMENTING SURCHARGE PROVISIONS OF PUBLIC ACT 193 OF 2009

IT IS ORDERED:

This administrative order is issued to implement Public Act 193 of 2009. That act changed the way surcharge is imposed on past due support orders. Some orders issued from this court contain language that is now in conflict with the public act.

1. A surcharge ordered in an order of this court entered before December 28, 2009, is terminated as of December 28, 2009.

2. Through a separate, case-specific order of this court, if the court determines that:

   a. The payer has failed to pay support under a support order, and
   b. The failure was willful,

   the court may order that on January 1 and July 1 of each year, a surcharge be added to support payments that are past due as of those dates, but the first assessment of such surcharge will not occur before January 1, 2011.

3. Any surcharge so assessed shall be calculated pursuant to state law.

4. All contrary surcharge provisions in support orders previously issued by this court are amended to conform to this administrative order.

Effective Date: 3-16-11

Date: 3-16-11 Chief Judge Signature: Michael E. Dodge

Michigan Supreme Court
State Court Administrative Office
Trial Court Services Division
Michigan Hall of Justice
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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

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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 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 suppport.

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.[1]

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.

[1] 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.[2] 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.[3]
- 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.[4]
- If the payer is complying with a surcharge payment plan.[5]

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.[6] 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.[7] 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

[2] MCL 552.603(13)
[3] MCL 552.603a(3)(a)
[4] MCL 552.603a(3)(b)
[5] MCL 552.603d
[6] MCL 552.602(ee)(iii)
[7] MCL 552.603(2)

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Subject: C43 2011-02 Approved

C43 2011-02 Approved
Order Implementing Surcharge Provisions of Public Act 193 of 2009
Rescinds C43 2004-04

This is to advise that we have reviewed the above referenced administrative order and find that it conforms to the requirements of MCR 8.112(B). This order is being accepted and filed until advised by your court of any change.

James Hughes
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