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CLERK SUPREME COURT

In the Iowa Supreme Court

In the Matter of Interim Procedures Governing Ability to Pay Determinations and Conversion of Restitution Orders	))))	**July 7, 2020 Order**

On June 25, 2020, Governor Reynolds signed into law S.F. 457, passed by the legislature on June 15, 2020. Certain divisions of S.F. 457 were added at the end of the legislative session related to restitution ordered in criminal cases. Many of them have an immediate effective date, such that they went into effect on June 25, 2020, with Governor Reynolds' signature. The legislation requires rules and forms to be developed by the judicial branch. The legislation will also require significant technology programming by the judicial branch to accomplish some of its mandates.

As soon as the court learned of the legislation, it began the significant task of identifying and implementing changes required by the legislation and appointed an advisory committee of judges, court staff, and members of the bar to identify needed changes in rules, practices, procedures, and technology programming to comply with the legislation. The court anticipates engaging in the rule-making process to draft rules needed to properly implement the legislation.

The legislation makes a number of significant changes to the manner in which restitution related to criminal convictions[1] is determined and ordered. Among the changes with immediate effective dates requiring action by the judicial branch, the legislation:

- Requires specific restitution orders to be immediately converted to "permanent restitution orders" within the meaning of the new legislation.

[1] This supervisory order addresses only those divisions of S.F. 457 affecting restitution related to criminal convictions and does not address non-conviction court debt.

- Removes jail fees from criminal restitution and requires a county to seek reimbursement of jail fees through a separately filed civil case.
- Requires the court to develop a financial affidavit as a requirement for defendants to use in requesting an ability-to-pay determination from the court with respect to certain court-ordered restitution.
- Requires financial affidavits to be filed in cases beyond the case for which an ability-to-pay determination is requested, including every case in any Iowa district court that has an outstanding balance of restitution owed.

In the interim and until the advisory committee is able to diligently complete the rule-making process, the court enters the following interim order. This order will be in effect until further order of the court. To the extent this order is inconsistent with rules contained in Chapter 26 of the Iowa Court Rules, this order supersedes Chapter 26.

A. Conversion of current "non-final" orders

Section 73 of S.F. 457 enacted new Iowa Code section 910.2B. Subsection (1) of section 910.2B provides:

> All of the following, if entered by a district court prior to the effective date of this Act, shall be converted to permanent restitution orders:
>
> a. A temporary restitution order.
>
> b. A supplemental restitution order.
>
> c. A restitution order that does not contain a determination of the defendant's reasonable ability to pay the restitution ordered.

Subsection (2) of section 910.2B further provides: "The only means by which a defendant may challenge the conversion of a restitution order is through the filing of a petition pursuant to section 910.7."

Under prior statutory and case law, a district court could not make a determination of a defendant's ability to pay the "second category" restitution items as listed in Iowa Code section 910.2(1)(a)(1)-(6) until the

court had the total amounts of all items of restitution that would be potentially assessed against the defendant. Additionally, the Iowa Code contemplates that not all restitution items will necessarily be available to the court at the time of sentencing. *See* Iowa Code § 910.3. Thus, prior law expressly provided for "temporary" and "supplemental" orders of restitution. *Id.* Hence, in a number of cases that were pending when S.F. 457 became effective, the district court has not entered a final restitution order. Under pre-S.F. 457 law, such orders, whether denominated as temporary, supplemental, or otherwise, were not enforceable until the court had all the restitution items before it, at which point the court would be required to make a reasonable ability-to-pay determination. *See State v. Davis,* __ N.W.2d __, __ (Iowa 2020); *State v. Gross,* 935 N.W.2d 695, 701-02 (Iowa 2019); *State v. Albright*, 925 N.W.2d 144, 160–61 (Iowa 2019).

New section 910.2B(1) converts those non-final restitution orders, in which the court is awaiting information on the total amounts of restitution items, into "permanent restitution orders," a term defined as "an enforceable restitution order entered either at the time of sentencing or at a later date determined by the court" in new subsection 910.1.3A. *See* S.F. 457, § 69. These previously unenforceable orders are now automatically enforceable as of June 25, 2020.

To implement section 910.2B, the court orders the following:

1. Any order entered in a case of criminal conviction that by its terms purported to order the immediate payment of any form of restitution shall be deemed a permanent restitution order and immediately enforceable.
2. Any restitution order entered in a case of criminal conviction that by its express terms is not enforceable, e.g., the order states its

enforceability shall await a final order of restitution or an ability-to-pay determination, shall have the contingency language removed by the district court on motion by the State and shall thereafter be deemed a permanent restitution order. This paragraph shall apply to any case in which the district court would otherwise have jurisdiction to enter further restitution-related orders.

3. Any defendant (a) subject to paragraph 2 above or (b) subject to a restitution order as to which the appeal deadline has not run where there has not been a reasonable-ability-to-pay determination may request an ability-to-pay determination by filing a request within that criminal proceeding and following the procedures in paragraph C of this supervisory order. The deadline for doing so shall be thirty days from this supervisory order or thirty days from the date when the district court removes the contingency pursuant to paragraph 2, whichever is later. Counsel will be appointed for an indigent defendant who is entitled to an ability-to-pay determination under this paragraph. The provisions in Paragraph C of this supervisory order concerning financial affidavits and the ability-to-pay determination will apply to the request for a determination under this paragraph A.3.
4. Otherwise, a defendant may only challenge the conversion of his or her restitution order to a permanent restitution order, including the ability-to-pay determination, through a section 910.7 petition brought no later than June 25, 2021.

B. Jail fees

Effective immediately, S.F. 457 removes the ability of the sheriff to seek administrative jail fees allowed under Iowa Code section 356.7 as a part of criminal restitution and requires a county to seek reimbursement

for such administrative jail fees through a separately filed civil case. *See* S.F. 457, §§ 59-63. The court orders the following with respect to administrative jail fees:

1. For any order of restitution subject to paragraph A.3. of this supervisory order in which administrative jail fees pursuant to section 356.7 had been ordered as part of a restitution order prior to June 25, 2020, but no ability-to-pay determination had been made, if the defendant requests an ability-to-pay determination under the provisions of paragraph A.3. of this supervisory order, the court shall apply its determination to the administrative jail fees previously ordered. This paragraph B does not impact any civil judgments for administrative jail fees entered in criminal cases prior to June 25, 2020. This paragraph B also does not impact prior restitution orders where paragraph A.3. of this supervisory order does not apply (i.e., the appeal deadline has run).
2. Any order of restitution entered on or after June 25, 2020, shall not include payment for the reimbursement of any administrative jail fees identified in the pre-S.F. 457 version of Iowa Code section 356.7.

C. Financial affidavits and requesting an ability-to-pay determination.

A defendant sentenced on or after June 25, 2020, shall be subject to the requirements of S.F. 457. To implement newly enacted section 910.2A, the following interim rules shall apply to a defendant who is sentenced on or after June 25, 2020:

1. The court shall provide written notice prior to any proceeding that may involve the assessment of Category B restitution that the defendant has the right to request a determination of his or her

ability to pay certain types of restitution. Such notice may be incorporated into a notice provided in advance of such proceeding or the court may develop an additional form. The language included in the notice shall be substantially similar to the following:

> At the end of this case, you may be assessed restitution. This may include three different categories of restitution: monetary damages to victims (referred to as pecuniary damages); fines, penalties, or surcharges (referred to as Category A restitution); and repayment for your legal defense, crime victim assistance reimbursement, court costs, contribution to a local anticrime organization, or restitution to the medical assistance program pursuant to chapter 249A (referred to as Category B restitution).
>
> **With respect to Category B restitution items, you may request the court to determine whether you have the reasonable ability to pay the full amount of those items. If you do not request the court to make that determination, the court will presume you have the ability to pay the full amount of Category B restitution and will order you to do so. You will also lose any chance to challenge your ability to pay the full amount of the Category B restitution ordered.**

2. At sentencing, the court will issue a permanent restitution order that includes all amounts of restitution that are known at the time of sentencing. The permanent restitution order will direct payment in full of all pecuniary damages to the victim or victims of the offense of conviction and all Category A restitution. Category A restitution includes all fines, penalties, and surcharges related to the offense of conviction.
3. The permanent restitution order entered at sentencing will also identify the known amounts of Category B restitution and direct payment of Category B restitution, subject to a defendant's request for a determination of his or her reasonable ability to pay the full amount of Category B restitution. Category B restitution includes:

a. The contribution of funds to a local anticrime organization, which provided assistance to law enforcement in a defendant's case.
b. The payment of crime victim compensation program reimbursements.
c. Payment of restitution to public agencies pursuant to section 321J.2, subsection 13, paragraph "b."
d. Court costs.
e. Court-appointed attorney fees ordered pursuant to section 815.9, including the expense of a public defender.
f. Payment to the medical assistance program pursuant to chapter 249A for expenditures paid on behalf of the victim resulting from the defendant's criminal activities including investigative costs incurred by the Medicaid fraud control unit pursuant to section 249A.50.

4. To request the court to make a determination of a defendant's reasonable ability to make payments toward the full amount of category B restitution, the defendant is encouraged to make the request at or before sentencing so that the determination can be made at the sentencing hearing. In all events, the defendant must make the request at sentencing or within 30 days of the court's entry of a permanent restitution order.
    a. The request may be made in person at the sentencing hearing or by filing the Financial Affidavit in Support of Request for Reasonable Ability-to-Pay Determination Form. Alternatively, a defendant may file a separate Ability-to-Pay Determination Request Form, or similar request but the

defendant must also timely file the required financial affidavit as addressed in paragraph C.5.

b. Failure to timely request a determination waives the defendant's right to challenge a permanent restitution order that directs the defendant to pay Category B restitution in full except as allowed under Iowa Code § 910.7.

5. A defendant who requests an ability-to-pay determination must file a completed financial affidavit under penalty of perjury.

   a. The financial affidavit may serve as the request for a determination. If the financial affidavit is not filed as the request for a determination, the financial affidavit must be filed within the time for making the request for a determination, i.e., at sentencing or within 30 days of entry of a permanent restitution order.

   b. The defendant must use the Financial Affidavit in Support of Request for Reasonable Ability-to-Pay Determination form for the financial affidavit and may attach additional information to that form. The financial affidavit must include information about the defendant's:

      i. Income.
      ii. Physical and mental health.
      iii. Age.
      iv. Education.
      v. Employment.
      vi. Inheritance.
      vii. Other debts.
      viii. Other amounts of restitution owed.
      ix. Family circumstances.

x. Any assets subject to execution, *see, e.g.,* Iowa Code § 627.6, including but not limited to cash, accounts at financial institutions, stocks, bonds, and any other property that may be applied to the satisfaction of judgments.

c. Failure of the defendant to file a completed financial affidavit waives the defendant's claim that he or she lacks the ability to pay Category B restitution in full.

d. If the defendant makes a timely request for an ability-to-pay determination after a permanent restitution order has been entered, no payment toward the restitution will be due until the court makes a determination of the total amount of restitution the defendant will be ordered to pay as reflected in a subsequently issued permanent restitution order. The date of the subsequent permanent restitution order determining the defendant's ability to pay will be considered the date of "assessment" of court debt for that case to determine delinquency under Iowa Code § 602.8107(2)(d).

6. Upon the timely request for a determination and timely filing of a completed financial affidavit, the court will hold a hearing to determine the defendant's ability to make payments toward the full amount of Category B restitution. The determination will be made at the sentencing hearing if the financial affidavit is on file at the time of sentencing.

   a. In determining whether the defendant has the ability to reasonably make payments toward the full amount of Category B restitution, the court shall:

i. Start with a presumption that the defendant has the reasonable ability to make payments toward the full amount of Category B restitution. The defendant has the burden of showing by a preponderance of the evidence that he or she lacks the reasonable ability to make payments toward the full amount of Category B restitution.

ii. The prosecuting attorney, defense attorney, and court shall be given an opportunity to question the defendant about his or her ability to pay Category B restitution, including but not limited to questions related to the filed financial affidavit.

b. In determining the defendant's reasonable ability to pay Category B restitution, the court should consider all evidence presented at the hearing, including but not limited to the financial affidavit and the information identified in paragraph C(5)(b) of this supervisory order.

c. A court that makes a determination under this section is presumed to have properly exercised its discretion. A court is not required to state its reasons for making a determination.

7. If the court determines that a person lacks the financial ability to pay Category B in full, the court should determine the amount, if any, of Category B restitution the defendant can pay and include that amount in the permanent restitution plan.

a. Additionally, the court may determine whether the defendant can perform community service in lieu of paying any Category B restitution pursuant to Iowa Code section 910.2(2) and

include an order for community service in the permanent restitution plan.

b. If the court has previously entered an order that includes Category B restitution items prior to the ability-to-pay determination hearing, and the court determines that the defendant is not able to make payments toward the full amount of Category B restitution, the court shall modify its prior order as appropriate.

8. The permanent restitution order shall direct that any plan of payment require payments to be made in the following order of priority:
    a. Pecuniary damages to the victim of the offense.
    b. Category A restitution.
    c. Category B restitution in the following order:
        i. Crime victim compensation program reimbursement.
        ii. Public agencies.
        iii. Court costs.
        iv. Court-appointed attorney fees ordered pursuant to section 815.9, including the expense of a public defender.
        v. Contribution to a local anticrime organization.
        vi. The medical assistance program.
9. The court may also include in the permanent restitution order the restitution plan of payment, ordering the defendant to pay a certain amount of money each month to repay the outstanding restitution.
    a. The plan of payment may be included in the permanent restitution order entered as part of the sentencing hearing or

as part of the court's determination of the defendant's ability to pay the full amount of Category B restitution.

b. Regardless of whether the defendant requests a determination of his or her ability to pay the full Category B restitution, any plan of payment shall be based on all information pertinent to the defendant's reasonable ability to pay, including but not limited to the following considerations:
    i. The defendant's employment history and opportunities.
    ii. The defendant's household income compared to the poverty level and receipt of means-tested public assistance.
    iii. The defendant's financial resources and liabilities.
    iv. The defendant's basic living expenses.
    v. The defendant's financial obligations regarding dependents, if any.
    vi. Additional barriers that may prevent the defendant from having sufficient funds to pay court debt.
    vii. Any other factor that may negatively affect the defendant's ability to pay.
c. If the court does not include a plan of payment in the permanent restitution order, the relevant entity having supervision over the defendant shall prepare a plan of payment, consistent with the requirements in this supervisory order, and file it with the court.
d. The first monthly payment under a plan of payment shall be made within thirty days of the approval of the plan of payment.

10. The permanent restitution order entered at the time of sentencing shall be part of the final judgment and be considered in a properly perfected appeal.

11. Any restitution orders, including plans of payment, entered after sentencing may be challenged only through a petition for hearing pursuant to section 910.7.

D. Filing financial affidavits in other cases

Section 72 of S.F. 457 adds new Iowa Code section 910.2A(4), which provides: "If an offender requests that the court make a determination pursuant to subsection 2, the offender's financial affidavit shall be filed of record in all criminal cases for which the offender owes restitution and the affidavit shall be accessible by a prosecuting attorney or attorney for the offender without court order or appearance."

It is not currently practicable for courts to provide for financial affidavits to be filed in all criminal cases for which a defendant owes restitution. Clerks of court do not have access to cases outside of their district without special authorization on a case-by-case basis. In addition to access issues, case records relating to a given individual are not entered and stored in Iowa's Electronic Document Management System (EDMS) under a unique identifier for that individual. Furthermore, there is no standard naming convention by which county attorneys are required to identify defendants in their charging documents or pleadings. A defendant may be charged as "Robert Brown" in one county, "Robert A. Brown" in another county, and "Robert A. Brown, Jr." in the third county. Clerks of court have no way of knowing that all three are one in the same person. Nor does EDMS account for aliases. Thus, it is not possible to conduct a reliable statewide search to identify a defendant's other criminal cases to determine whether an individual has unpaid restitution.

It would take significant time and expense to develop and implement the technology and processes needed to comply with this legislation. Until such time as the judicial branch has that capability, the court orders as follows:

1. The State may file the defendant's financial affidavit in any other criminal case in Iowa involving the defendant where restitution has not been paid in full. The clerk of court shall docket the affidavit as filed and make it accessible to the prosecuting attorney, defense counsel, or a self-represented defendant without court order or appearance.
2. Because the Financial Affidavit in Support of Request for Reasonable Ability-to-Pay Determination form requires disclosure of numerous items of protected information within the meaning of Chapter 16 of the Iowa Court Rules, such financial affidavits that are filed in a case shall be docketed with a security level #1 to protect the confidential information from public access.

THE SUPREME COURT OF IOWA

By
Susan Larson Christensen, Chief Justice

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Iowa Clerks Association
Iowa County Attorneys Association
Iowa Organization of Women Attorneys
Thomson Reuters (Westlaw)
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Legislative Services Agency

In the Iowa District Court for _____ County

State of Iowa or **_____,** **Plaintiff/Petitioner,** **vs.** **_____,** **Defendant/Respondent.**	)))))))	**No. _____** **Financial Affidavit and Request for Reasonable Ability to Pay Determination for Category B Restitution** **Clerk: Set document security at level # 1**

In support of my request for a determination of my reasonable ability to pay Category B restitution ordered in this case, and under penalty of perjury, I provide as follows:

1. My date of birth is: _____

2. Do you have prior convictions, in Iowa or elsewhere, that required you to pay any fines, penalties, victim restitution, or other monetary amounts that you have not paid in full? □ Yes □ No.

If yes, what is the total amount that is unpaid? If you have a payment plan set up with the court, what are your monthly payments?

_____
_____
_____

3. Total amount of restitution owed in this case, if any has been ordered:

_____
_____
_____

4. What is your highest level of education obtained (high school, GED, bachelor's degree, etc.)?

_____
_____
_____

5. Are you employed? □ Yes □ No.

If yes, name of employer and date employment began:

_____

Continued on next page

6. Do you work less than full-time, such as part-time or seasonal? □ Yes □ No.

If yes, hours per week or months per year you work:

_____
_____
_____

7. How much is your current take-home pay?_____

per □ hour □ month □ year.

8. List all other money you have coming (social security, SSI, unemployment, etc.):

_____
_____
_____
_____

9. List amounts you owe monthly, including mortgages, rent, car loans, credit cards, utilities, child support, court debt, and any other debts:

_____
_____
_____
_____

10. List your other monthly expenses, including child care, school expenses, medical expenses, food, clothing, transportation, etc.

_____
_____
_____
_____

11. How many dependents or family members are supported by or live with you?

_____

12. Do you have any unpaid judgments against you? □ Yes □ No.

If yes, how much is owed?

_____

Continued on next page

13. Are your wages being garnished? □ Yes □ No.

If yes, how much is garnished from each check and how often are you paid?

_____
_____
_____
_____

14. List what you own, including cash, money in banks or other financial institutions, stocks, bonds, cars, trucks, other vehicles, land, houses, buildings, interests in a business, or anything else worth more than $100:

_____
_____
_____
_____
_____
_____

15. List balance of all outstanding debts you have, identifying the amount of any liens on your property for the debt (for example, mortgage debt with lien on house, bank loan with lien on vehicle, etc.):

_____
_____
_____
_____
_____
_____

16. Do you expect to receive any property or money in the near future, such as inheritance, gifts, etc? □ Yes □ No.

If so, identify the source and list its expected value.

_____
_____
_____
_____

17. Describe any other personal or family circumstances, including physical or mental health issues, that affect your ability to repay the restitution ordered in this case:

_____
_____
_____
_____

Continued on next page

18. List any additional information you think is important for the court to know in determining your ability to pay the Category B restitution ordered in this case.

_____
_____
_____
_____
_____
_____
_____
_____

You may attach to this form any additional information to support your request.

By making this financial affidavit, I am asking the court to determine that I am not able to reasonably make payments toward the full amount of Category B restitution ordered in this case. I understand that if I fail to complete a financial affidavit, I waive any claim regarding my reasonable ability to pay.

Continued on next page

Attorney Help

A. ☐ An attorney did not help me prepare or fill in this Financial Affidavit.

B. ☐ An attorney helped me prepare or fill in this Financial Affidavit.
If you check B*, you must fill in the following information:*

_____
Name of attorney or organization, if any

_____
Business address of attorney or organization

_____ _____ _____
City *State* *ZIP code*

(_____)_____ _____
Phone number *Fax number*

_____ _____
Email address *Additional email address, if applicable*

Oath and signature

I,_____, have read this financial affidavit, and I
Print your full name: first, middle, last

certify under penalty of perjury and pursuant to the laws of the State of Iowa that the information I have provided in this financial affidavit is complete, true, and correct to the best of my knowledge.

_____
*Defendant's signature**

_____
Mailing address

_____ _____ _____
City *State* *ZIP code*

(_____)_____ _____
Phone number *Fax number, if applicable*

_____ _____
Email address *Additional email address, if applicable*

** You must handwrite your signature on this form, scan it, and then file electronically.*

In the Iowa District Court for _____ County

State of Iowa or	)	**No. _____**
_____,	)	**Request for Reasonable Ability**
Plaintiff/Petitioner,	)	**to Pay Determination for**
	)	**Category B Restitution**
vs.	)	
	)	
_____,	)	
Defendant/Respondent.		

I, _____, hereby request the court make a determination of my reasonable ability to pay in full the Category B restitution ordered in this case, which includes repayment for my legal defense, crime victim assistance reimbursement, court costs, contribution to a local anticrime organization, or restitution to the medical assistance program pursuant to chapter 249A. I understand I must show I do not have the ability to pay the full amount of Category B restitution and must provide the court with a financial affidavit to support my request for a determination, as well as any other evidence I may want to provide as to my ability to pay.

Notice: You must also file the Financial Affidavit for Reasonable Ability to Pay Determination for Category B Restitution form, or you will automatically be ordered to pay all Category B restitution in full. (You will lose your request.)

/s/ _____
Filing Defendant/Respondent or Attorney

_____
Law firm, if applicable

_____
Mailing address

_____
Telephone number

_____
Email address

_____
Additional email address, if applicable