

## An ACLU-PA Guide to Determining Whether a Defendant is “Able to Pay” Fines, Costs, or Restitution

Whether a defendant is able to pay fines, costs, or restitution is a critical issue that arises in three contexts:

- 1) at sentencing, when imposing fines and costs;
- 2) when creating a payment plan either at or after sentencing; and
- 3) at a contempt or violation of probation hearing after default under Pa.R.Crim.P. 456 (for summary cases) or 706 (for non-summary criminal cases).

The question courts must ask is whether the defendant is financially able to pay. Indigent defendants who cannot afford to pay cannot be penalized for nonpayment. If the defendant is able to pay, then the court must determine how much the defendant can pay.<sup>1</sup>

### Determining ability to pay.

The Rules of Criminal Procedure ensure that only those who have an ability to pay without hardship have the duty to do so.<sup>2</sup> To determine whether and what a defendant is able to pay, the court must hold a hearing, look at the defendant’s entire present financial picture and “life circumstances,”<sup>3</sup> and make findings on the record.<sup>4</sup>

- It is not enough to know that the defendant is employed; instead, the court must look at all of the defendant’s present income and expenses, even if the court is “well acquainted” with the defendant.<sup>5</sup>
- When evaluating the defendant’s finances, the court cannot ignore “the ordinary expenses attendant on everyday life.”<sup>6</sup> Instead, the court must view “all the facts and circumstances of the situation, both financial and personal.”<sup>7</sup>

---

<sup>1</sup> This Guide addresses Pennsylvania law on how to assess ability to pay; a separate ACLU-PA Guide addresses the law regarding contempt proceedings after default.

<sup>2</sup> *Commonwealth v. Hernandez*, 917 A.2d 332, 337 (Pa. Super. Ct. 2007) (Pa.R.Crim.P. 706, enforces the constitutional requirement that there is a “duty of paying costs ‘only against those who actually become able to meet it without hardship.’” (quoting *Fuller v. Oregon*, 417 U.S. 40, 54 (1974)). The Pennsylvania Supreme Court has explained that there is no “no basis in logic or law” to draw distinctions between fines, costs, or restitution for purposes of payment plans and the prohibition against jailing the indigent for nonpayment. *Commonwealth ex. rel. Parrish v. Cliff*, 304 A.2d 158, 162 (Pa. 1973).

<sup>3</sup> See, e.g., *Commonwealth v. Mauk*, 185 A.3d 406, 411 (Pa. Super. Ct. 2018); *Commonwealth v. Ruiz*, 470 A.2d 1010, 1012 (Pa. Super. Ct. 1984) (mere knowledge that a defendant is employed “cannot alone provide a sufficient picture of appellant’s finances so that an intelligent finding as to his ability to pay the fines and costs imposed can be made.”); *Commonwealth v. Martin*, 335 A.2d 424, 426 n.3 (Pa. Super. Ct. 1975) (en banc) (court erred in determining ability to pay fine based only on information “available in appellant’s original application for counsel”); *Commonwealth v. Schwartz*, 418 A.2d 637, 640 (Pa. Super. Ct. 1980) (at sentencing, information that the defendant “sold \$980 worth of drugs to the undercover agents the previous year and was currently working with his father in the construction industry, ‘bringing home approximately \$150 per week,’” was insufficient to determine ability to pay fine).

<sup>4</sup> *Commonwealth v. Diaz*, 2018 PA Super 175 (Pa. Super. Ct. 2018) (court must make findings on defendant’s ability to pay when either imposing a payment plan or holding a defendant in contempt); *Commonwealth v. Smetana*, 2018 PA Super 176 (Pa. Super. Ct. 2018) (same).

<sup>5</sup> *Commonwealth ex rel. Bashore v. Leininger*, 2 Pa. D. & C. 3d 523, 528-29 (1977).

<sup>6</sup> *Crosby Square Apartments v. Henson*, 666 A.2d 737, 738-39 (Pa. Super. Ct. 1995).

<sup>7</sup> *Stein Enterprises, Inc. v. Golla*, 426 A.2d 1129, 1132 (Pa. 1981).

- The court must look at the defendant's day-to-day expenses,<sup>8</sup> including rent, utilities, the cost of health insurance,<sup>9</sup> and the cost of transportation.<sup>10</sup> Those expenses may include dependent care: children "obviously need to eat and be clothed."<sup>11</sup>
- Pennsylvania's appellate courts have looked at other debts the defendant owes,<sup>12</sup> as well as assets such as automobiles and whether they are used for basic life needs such as transportation to obtain food and medical care.<sup>13</sup>
- Whether a defendant will be or has been recently incarcerated is also relevant to determining that individual's ability to pay.<sup>14</sup>
- Courts should have the defendant complete an ability-to-pay evaluation form to have enough information to evaluate the defendant's finances.<sup>15</sup>

The relevant inquiry must focus only on the *defendant's* finances.<sup>16</sup> While it is appropriate to consider household support from other individuals, courts cannot ordinarily impute income from friends or family.<sup>17</sup>

### **Payment plans for non-indigent defendants must be tailored to the defendant's individual financial circumstances.**

Courts are required to set payment plans when defendants cannot afford to pay in full at sentencing.<sup>18</sup> While the defendant can agree to a payment plan, the court must follow the procedures set forth by the Rules of Criminal Procedure:

- Payment plans must be "reasonable" in light of the defendant's financial circumstances.<sup>19</sup>
- A court can impose a payment plan only after an ability to pay hearing.<sup>20</sup> Without a hearing, the court would lack any information about the defendant's finances and what is an appropriate plan.

---

<sup>8</sup> *Commonwealth ex rel. Bashore v. Leininger*, 2 Pa. D. & C. 3d 523, 528-29 (1977).

<sup>9</sup> *Amrhein v. Amrhein*, 903 A.2d 17, 22 (Pa. Super. Ct. 2006).

<sup>10</sup> *Crosby Square Apartments*, 666 A.2d at 739.

<sup>11</sup> *Amrhein v. Amrhein*, 903 A.2d 17, 22 (Pa. Super. Ct. 2006); see also *Crosby Square Apartments v. Henson*, 666 A.2d 737, 739 (Pa. Super. Ct. 1995).

<sup>12</sup> *Schoepple v. Schoepple*, 361 A.2d 665, 667 (Pa. Super. Ct. 1976) (en banc) (television installment payments); *Gerlitzki v. Feldser*, 307 A.2d 307, 308 (Pa. Super. Ct. 1973) (en banc) (station wagon, truck, and television set); *Amrhein*, 903 A.2d at 23 (considering the person's "major debt obligations").

<sup>13</sup> *Stein Enterprises*, 426 A.2d at 1132-33. But see *Commonwealth v. Madron*, 488 A.2d 331, 332-33 (Pa. Super. Ct. 1985) (important purpose of making victim whole may require defendant to sell "capital assets" to pay restitution).

<sup>14</sup> *Commonwealth v. Martin*, 335 A.2d 424, 426 n.3 (Pa. Super. Ct. 1975) (en banc) (defendant's "ability to pay a fine in the immediate future was seriously curtailed by the imposition of a prison term").

<sup>15</sup> Courts in Armstrong, Chester, Lebanon, Montgomery, Philadelphia, and Westmoreland counties, among others, use such forms. ACLU-PA has created a model form, which is available at:

[https://www.aclupa.org/index.php/download\\_file/view/3112/1074/](https://www.aclupa.org/index.php/download_file/view/3112/1074/).

<sup>16</sup> Pa.R.Crim.P. 706 (the question is whether "the defendant is financially able to pay"); 42. Pa. Cons. Stat. § 9730(b) (same).

<sup>17</sup> *Smetana*, 2018 PA Super 176 ("Although Appellant indicated that he could potentially borrow money from a sibling, the court failed to find—as our law requires—that he alone had the financial ability to pay the outstanding fines and costs such that imprisonment was warranted.").

<sup>18</sup> Pa.R.Crim.P. 706(B); Pa.R.Crim.P. 454(F).

<sup>19</sup> *Parrish*, 304 A.2d at 161.

<sup>20</sup> Pa.R.Crim.P. 706(B) (court may impose payment plan "after hearing"); 42 Pa. Cons. Stat. § 9730(b) (same).

- At that hearing, the court must consider the defendant's "financial resources" and the "nature of the burden" that the payments will impose on the defendant's finances.<sup>21</sup>
- The court cannot impose a payment plan that the evidence shows the defendant cannot afford.<sup>22</sup>
- Payment plans can be any amount that the defendant can afford, and there are no minimums.<sup>23</sup> Many defendants will be able to make regular payments of \$5 or \$10 per month but cannot afford to pay \$50 or \$100 consistently. With higher payments, some defendants fail to pay anything because they are worried that they will be jailed for not paying enough or have been told by court staff that there is no flexibility. Instead, each payment plan must be individually tailored for that defendant's financial circumstances.

If a defendant defaults or otherwise requests a change to an existing payment plan, the defendant has the burden to show he cannot afford to pay at the existing rate.<sup>24</sup> Once the defendant meets that burden, however, the court still has an obligation to ensure that it does not place the defendant on a new payment plan that is unaffordable.<sup>25</sup>

For individuals who are incarcerated, the sentencing court—while not able to order the Department of Corrections to stop deducting funds, as is required by 42 Pa.C.S. § 9728(b)(5)—can specify in an order that the defendant's obligation to make payments does not begin until he is released. Such an order has the effect of preventing deductions from the person's inmate account while incarcerated.<sup>26</sup>

### **Indigent defendants cannot afford to pay and cannot be penalized for nonpayment.**

The Superior Court has established two presumptions of indigence, which can be overcome if there is evidence to show that the defendant is not indigent:<sup>27</sup>

- Defendants are presumed indigent if they receive the services of the public defender.
- Defendants who receive means-based public assistance such as food stamps through the Supplemental Nutrition Assistance Program ("SNAP"), Medicaid, Supplemental Security

---

<sup>21</sup> Pa.R.Crim.P. 706(B); 42 Pa. Cons. Stat. § 9730(b)(3).

<sup>22</sup> *Diaz*, 2018 PA Super 175 (invalidating \$100 per month fines and costs payment plan when the court failed to make findings on the record that the defendant was able to afford to pay the amount); *Smetana*, 2018 PA Super 176 (same); *Commonwealth v. Wood*, 446 A.2d 948, 950 (Pa. Super. Ct. 1982) (rehabilitative goal of restitution may require that the defendant make "substantial sacrifices" to pay, but that rehabilitative goal is defeated "when the payments ordered by the court are so unreasonable in view of the defendant's financial circumstances and ability to work that, despite good faith efforts, the defendant cannot hope to comply").

<sup>23</sup> *Lawson v. Commonwealth*, 524 A.2d 1053, 1056-57 (Pa. Commw. Ct. 1987) (approving monthly \$5 payment plan where the defendant provided no evidence he was indigent).

<sup>24</sup> Pa.R.Crim.P. 706(D); 42 Pa. Cons. Stat. § 9730(b)(3).

<sup>25</sup> *Id.* (once the defendant shows he is unable to pay, "the court may extend or accelerate the payment schedule or leave it unaltered, as the court finds to be just and practicable under the circumstances of record.").

<sup>26</sup> *Lambing v. Dep't of Corrections*, 488 M.D. 2017, 2020 WL 4219715 (Pa. Commw. Ct. July 23, 2020) (unpublished) ("Here, the March 17, 2008 sentencing court's orders state that Lambing "shall pay the total due in monthly installments during the period of parole[.]" . . . Thus, it is clear that the sentencing court did not authorize the Department to make deductions for court-ordered costs while Lambing is incarcerated.").

<sup>27</sup> *Commonwealth v. Eggers*, 742 A.2d 174, 176 n.1 (Pa. Super. Ct. 1999) (receiving public assistance and the services of the public defender's office "invite the presumption of indigence"); *Koziatek v. Marquett*, 484 A.2d 806, 808 (Pa. Super. Ct. 1984) (plaintiff established "prima facie case of impoverishment" when the "sole source of support was a monthly disability payment").

Assistance (“SSI”), or Temporary Assistance for Needy Families (“TANF”) are presumed indigent.<sup>28</sup>

In addition to those presumptions, a defendant is indigent if he cannot afford to meet his basic life needs.<sup>29</sup> Those include housing, utilities, food, healthcare, transportation, and dependent care. If a defendant is indigent, then that defendant is by definition unable to pay anything, and the defendant’s obligation to make payments must be suspended if the defendant provides evidence of indigence and tells the court that he or she cannot pay. Otherwise, the court would force the person to pay even when experiencing a “hardship.”<sup>30</sup>

- That standard comes from the *in forma pauperis* line of cases, which are “established processes for assessing indigency” in criminal cases.<sup>31</sup>
- Criminal case law establishes that when a defendant has no “financial assets [or] liabilities” and has been “living from hand to mouth,” the defendant cannot be assessed a fine.<sup>32</sup>
- Even if a defendant has some “‘excess’ income or unencumbered assets,” an indigent defendant is not necessarily able to make payments to the court without hardship.<sup>33</sup> That is because the question is “not whether petitioners are unable to pay the costs but whether they are in poverty. If they are in poverty, it follows that they are unable to pay.”<sup>34</sup>
  - Our appellate courts have found that individuals are indigent and unable to pay even if they are paying for a television set on monthly installments<sup>35</sup> or have a car<sup>36</sup>—if the person still cannot meet his basic expenses, which is the relevant legal question.
- One helpful benchmark endorsed by the Superior Court is the Federal Poverty Guidelines. Defendants who are at or below 125% of the Federal Poverty Level—\$15,175 for an individual in 2018—are almost certainly indigent.<sup>37</sup>

---

<sup>28</sup> These standards are also used in the model bench card endorsed in *Diaz*, 2018 PA Super 175 at n. 23, and *Smetana*, 2018 PA Super 176 at n. 10.

<sup>29</sup> *Gerlitzki*, 307 A.2d at 308 (whether a person can pay depends on “whether he is able to obtain the necessities of life.”); *Stein Enterprises*, 426 A.2d at 1132 (“if the individual can afford to pay court costs only by sacrificing some of the items and services which are necessary for his day-to-day existence, he may not be forced to prepay costs in order to gain access to the courts, despite the fact that he may have some ‘excess’ income or unencumbered assets.”).

<sup>30</sup> *Hernandez*, 917 A.2d at 337. Accordingly, the *Hernandez* court cited with approval *Alexander v. Johnson*, 742 F.2d 117, 124 (4th Cir. 1984), which held that a court must consider “the other demands on [the defendant’s] own and family’s finances, and the hardships he or his family will endure if repayment is required. The purpose of this inquiry is to assure repayment is not required as long as he remains indigent.” See also *People v. Jackson*, 789 N.W.2d 630, 639 (Mich. 2009) (noting that *Alexander* “requires that a truly indigent defendant never be required to pay the fee”). See also *Diaz*, 2018 PA Super 175 at n.24 (a finding of indigence “preclude[s] any determination” that the defendant’s nonpayment “was willful” because the defendant lacks the ability to pay).

<sup>31</sup> *Commonwealth v. Cannon*, 954 A.2d 1222, 1226 (Pa. Super. Ct. 2008); *Commonwealth v. Lepre*, 18 A.3d 1225, 1226 (Pa. Super. Ct. 2011). See also *Commonwealth v. Carlson*, --A.3d--, 2020 WL 7487227 at \*6 (Pa. Super. Ct. Dec. 21, 2020) (referencing the *in forma pauperis* standards as they relate to the right to counsel in criminal cases).

<sup>32</sup> *Commonwealth v. Gaskin*, 472 A.2d 1154, 1157-58 (Pa. Super. Ct. 1984).

<sup>33</sup> *Stein Enterprises*, 426 A.2d at 1132.

<sup>34</sup> *Gerlitzki*, 307 A.2d at 308.

<sup>35</sup> *Schoepple*, 361 A.2d at 667.

<sup>36</sup> *Stein Enterprises*, 426 A.2d at 1132-33.

<sup>37</sup> See *Diaz*, 2018 PA Super 175 at n. 23 (endorsing the use of the model bench card released by the Conference of Chief Justices and Conference of State Court Administrators’ National Task Force on Fines, Fees and Bail Practices, available at [http://www.nesc.org/~media/Images/Topics/Fines%20Fees/BenchCard\\_FINAL\\_Feb2\\_2017.ashx](http://www.nesc.org/~media/Images/Topics/Fines%20Fees/BenchCard_FINAL_Feb2_2017.ashx),

As long as the defendant is making a good-faith effort to look for work, the defendant cannot be penalized for being without means.<sup>38</sup>

---

which uses 125% of the federal poverty guidelines as a benchmark for determining indigence). *See also Stein Enterprises*, 426 A.2d at 1131 (granting in forma pauperis status for individual whose annual income in 2017 dollars was \$13,652); *Gerlitzki*, 307 A.2d at 308 (granting in forma pauperis status for a couple whose annual income in 2017 dollars was \$29,531).

<sup>38</sup> *Bearden v. Georgia*, 461 U.S. 660, 671 (1983); *Commonwealth ex rel. Wright v. Hendrick*, 312 A.2d 402, 404 (Pa. 1973) (defendant who was “penniless,” had been unemployed for more than six months “despite efforts to gain employment,” and was being supported by family was not in willful noncompliance with a support order).