

## ACLU-PA FAQs | Probation: Payment of Fines, Costs, and Restitution

Despite three decades of consistent case law, attorneys and judges frequently misunderstand the legal principles regarding extending and revoking probation for nonpayment of fines or restitution. This guide answers the most frequently asked questions regarding how to legally and constitutionally impose court costs, fines, and restitution on Pennsylvanians sentenced to probation.

**Q: Can payment of fines or restitution be required as a condition of probation?**

**A: Yes, BUT payments MUST be based on a defendant's ability to pay.**

Payment of fines or restitution may be a condition of probation, and such payments are authorized by [42 Pa.C.S. § 9754](#). However, under current law, any restitution imposed as a condition of probation **must be based on the defendant's ability to pay**.<sup>1</sup>

- If a court imposes a payment amount that exceeds the probationer's ability to pay, then any "rehabilitative purpose of the order is disserved, especially where the restitution payment is a condition of probation, for in such a case the defendant is told that he will not be imprisoned only if he somehow satisfies a condition he cannot hope to satisfy."<sup>2</sup>
- Therefore, courts **must not impose** financial obligations that exceed the defendant's means while the defendant is on probation, or the court risks defeating/undermining the rehabilitative goal of probation.

**Q: Can payment of costs be a required condition of probation?**

**A: Generally, no.**

In contrast to fines and restitution, the payment of costs **cannot** be a lawful condition of probation because costs are "a mere incident to judgment" and "are not part of the criminal's sentence."<sup>3</sup>

- In [Commonwealth v. Rivera](#), the Pennsylvania Superior Court held that payment of costs is not a proper condition of probation because it serves no rehabilitative purpose — costs are essentially a reimbursement to the government for the expense of prosecution and therefore **are not punishment**. As a result, an order to pay costs is "not 'reasonably related to the rehabilitation of the defendant'" and a court cannot order that a defendant pay costs as a condition of probation.<sup>4</sup>
- The only possible exception are probation supervision fees, which are a type of cost charged to the defendant each month he or she is on probation.<sup>5</sup>

**Q: Can non-payment of fines or restitution be considered a technical violation of probation?**

**A: Yes, BUT ONLY IF the defendant 1) has the ability to pay, and 2) has willfully refused to pay.**

The Superior Court has explained that nonpayment of fines or restitution is a technical violation of probation **only if** the defendant has the ability to pay and has willfully refused to pay. The threshold question of whether nonpayment is willful comes from [Bearden v. Georgia](#),<sup>6</sup> a 1983 U.S. Supreme Court decision that held it would

<sup>1</sup> See [§ 9754\(c\)\(11\)](#); [Commonwealth v. Melnyk](#), 548 A.2d 266, 268 (Pa. Super. 1988) (explaining that restitution imposed under § 9754 cannot exceed the defendant's ability to pay).

<sup>2</sup> See [Commonwealth v. Fuqua](#), 407 A.2d 24, 26 (Pa. Super. Ct. 1979).

<sup>3</sup> See [Commonwealth v. Rivera](#), 95 A.3d 913, 917 (Pa. Super. Ct. 2014).

<sup>4</sup> The only possible exception would be probation supervision fees authorized by [18 P.S. § 11.1102](#). No court has ever addressed whether payment of those costs, which per the statute must be made a condition of probation unless waived, is rehabilitative or if they somehow fall outside the scope of the *Rivera* decision due to the specific statutory language.

<sup>5</sup> [18 P.S. § 11.1102](#).

<sup>6</sup> See [Bearden v. Georgia](#), 461 U.S. 660, 672 (1983).

violate the “fundamental fairness” protected by the Fourteenth Amendment to punish defendants solely because they lack the ability to pay.

- Without a finding of willfulness, the defendant has not committed a technical violation of probation or parole<sup>7</sup> and therefore cannot be incarcerated or have the length of probation extended.<sup>8</sup>
- This is such a fundamental component of probation revocation hearings that the Pennsylvania Superior Court has ruled that when the defendant fails to “offer any evidence concerning his indigency,” a trial court unconstitutionally revokes probation if it does not “inquire into the reasons for appellant’s failure to pay or... make any findings pertaining to the willfulness of appellant’s omission as required by *Bearden*.”<sup>9</sup>
- As a result, [Bearden](#) places an affirmative obligation on the Court to inquire into the defendant’s financial resources, even when the defendant does not raise inability to pay as a defense.

<b>Q:</b>	<b>Can probation be <u>extended</u> to ensure payment of fines or restitution?</b>
<b>A:</b>	<b>No. Without a court finding, probation extensions are unlawful and unnecessary.</b>

Under ***no circumstances*** may a defendant be punished—which includes an extension of probation—for nonpayment unless the court has first determined whether the defendant has the ability, but has willfully failed to pay. As described above, to do so would be ***unconstitutional*** and inconsistent with established case law.

- Any extension of probation can occur only ***after*** finding that the defendant is able to pay and willfully refusing to do so.<sup>10</sup> To do otherwise would risk restricting the defendant’s liberty by subjecting her to lengthier probation merely due to poverty, even while a defendant with means would be able to end probation.<sup>11</sup>
- Extending probation to ensure payment is also unnecessary, as is explained below.

***Recommended language:*** *Such a provision could be constitutional ONLY if paired with a statutory requirement that the court first determine whether the defendant has willfully failed to pay. “The court may not extend the period of supervision due to nonpayment of fines, costs or restitution unless the court makes a finding on the record that the defendant is financially able to pay and has willfully refused to do so.”*

<b>Q:</b>	<b>Do fines, costs, or restitution disappear if the defendant does not pay them before the end of probation?</b>
<b>A:</b>	<b>No. The defendant’s obligation to pay unpaid fines, costs, or restitution remains even after probation terminates.</b>

Courts across Pennsylvania properly allow defendants to end supervision despite still having outstanding balances of fines, costs, and restitution, often by converting their remaining financial obligations to civil

<sup>7</sup> See [Commonwealth ex rel. Powell v. Rosenberry, 645 A.2d 1328, 1331 \(Pa. Super. Ct. 1994\)](#). *Powell* is consistent with at least two other Superior Court opinions that left no question about the applicable legal standard necessary to find a probation violation. See [Commonwealth v. Dorsey, 476 A.2d 1308, 1311-12 \(Pa. Super. Ct. 1984\)](#) (holding for the first time that probation may not be revoked for less than willful conduct); [Commonwealth v. Eggers, 742 A.2d 174, 175-76 \(Pa. Super. Ct. 1999\)](#) (*Bearden* requires that “the revocation court to inquire into the reasons for a defendant’s failure to pay and to make findings pertaining to the willfulness of the party’s omission”).

<sup>8</sup> See [Commonwealth v. Smalls, CP-46-CR-0005242-2013, 2018 WL 4112648 at \\*2 \(Montgomery Co. Ct. Pa. Com. Pl. Aug. 7, 2018\)](#) (pursuant to *Dorsey*, the question of willfulness “is the critical question as to whether a violation occurred in the first place”). The *Rosenberry* decision explicitly overturned a trial court’s decision to extend a defendant’s parole both because the order was untimely *and* because the trial court did not make the requisite findings. [Rosenberry](#), 645 A.2d at 1331.

<sup>9</sup> [Dorsey](#), 476 A.2d at 1312. The same standards apply to the analogous scenario of defendants who are held in contempt for nonpayment of fines, costs, or restitution. See [Commonwealth v. Mauk, 185 A.3d 406, 411 \(Pa. Super. 2018\)](#) (willful nonpayment has a “mens rea element of specifically intending to defy the underlying court order”).

<sup>10</sup> [Commonwealth ex rel. Powell v. Rosenberry, 645 A.2d at 1331 \(Pa. Super. Ct. 1994\)](#)

<sup>11</sup> While [Bearden](#) suggests that courts could extend the period of time to make payments as an option once a defendant has defaulted—in addition to other options, such as reducing the total amount owed or allowing the defendant to perform community service—the Court certainly did not suggest that the trial court could simply extend the period of probation. 461 U.S. at 672.

judgments. While each county’s collection process is different, they have effective means of putting defendants on affordable payment plans that allow people to meet those obligations without remaining under criminal supervision. And if necessary, courts may use their contempt authority to compel payment from a defendant who refuses to pay.

Q:	Can terminating probation be dependent upon whether fines, costs, or restitution have been paid?
A:	No, UNLESS the court makes a finding on the record that the defendant 1) is financially able to pay, and 2) has willfully refused to do so.

Without considering a defendant’s ability to pay, it is **unconstitutional** to deny termination of probation (early or otherwise) to a defendant who is “delinquent” in paying fines, costs, or restitution and otherwise eligible to have probation terminated.

- Such a provision would be unconstitutional (violating [Bearden](#) and the Superior Court cases interpreting it) because it would permit defendants who have the ability to pay restitution to terminate supervision early, while indigent defendants who are unable to pay will be forced to stay on supervision solely because they cannot afford to pay the restitution.

**Recommended language:** “A defendant may have probation terminated early unless the defendant has defaulted on payment of fines, costs, or restitution and the court makes a finding on the record that the defendant is financially able to pay and has willfully refused to do so.”

Q:	Can defendants perform community service in lieu of fines or costs?
A:	Yes, BUT ONLY with provisions that avoid inadvertently punishing defendants.

Allowing the court to accept community service as payment towards fines and costs may be a good idea, but any provision that offers service in lieu of payments should avoid inadvertently punishing defendants by including clarifying language that:

1. **Requires the court to approve the community service.** Without such a requirement, a defendant could complete community service without consulting with the court, only for the court to then reject it. Clarifying language will avoid such an unintended outcome.
2. **Ensures that the community service provision is consistent with the Thirteenth Amendment**, which prohibits involuntary servitude, except as punishment for a crime. If a defendant defaults on payments due to an inability to pay and is compelled by the court to complete community service, that community service would constitute punishment *not for a crime, but for involuntarily failing to pay*. In other words, absent an adjudication such as criminal contempt, **community service must be voluntary**.<sup>12</sup>
3. **Prevents a defendant from being punished if s/he is ultimately unable to complete community service**, provided that the defendant has not both failed to complete the community service and has willfully refused to pay.

**Recommended language:** “The court may also accept proof of community service as payment towards fines and costs if the court first approves of the community service and the defendant volunteers to complete it. No defendant shall have his or her period of supervision extended or revoked for failing to complete community service.”

<sup>12</sup> See [United States v. Kozminski, 487 U.S. 931, 944 \(1988\)](#) (explaining that “our precedents clearly define a Thirteenth Amendment prohibition of involuntary servitude enforced by the use or threatened use of physical or legal coercion”).

## Terminology to Avoid

### “Special” vs. “general” conditions of probation

While there is a recognized distinction between ‘[general](#)’ and ‘[special](#)’ conditions of parole, there is **no meaningful or procedural distinction** between those terms in the context of probation. Any attempt to create this distinction within PA’s probation system will only further complicate Pennsylvania’s already complex probation system and worse, may be an attempt to give the appearance of reform (e.g., reforming “general conditions” of probation) while creating loopholes for those reforms (e.g., providing exceptions under “special conditions” of probation).

### “Solely”

Avoid using “solely” as a qualifier. For example, permitting an extension of probation as long as it is not based “solely” on nonpayment would create a **dangerous**, not to mention **unconstitutional**, loophole. In a scenario where a defendant has failed to report to her probation officer **and** failed to make payments, she may be punished for **both** even if she—for example—was homeless and destitute.

### “Delinquent”

Avoid using “delinquent” in reference to failure to pay. Introducing the term “delinquent” would create unnecessary confusion. Clarity is key. If the intent is to describe a defendant who has willfully failed to pay, then this qualifier is preferable: “...unless the defendant has defaulted on payment of fines, costs, or restitution and the court makes a finding on the record that the defendant is financially able to pay and has willfully refused to do so.”

## Data Detail: Rates of Payments in Full

**Any procedure or provision that permits courts to extend probation or otherwise punish those who have failed to pay will disproportionately affect the poorest defendants.**

Data from the Administrative Office of Pennsylvania Courts (AOPC) show that indigent and low-income defendants are, unsurprisingly, often unable to pay fines and costs:

- Courts impose fines in about 30% of cases with public defender clients, but they impose costs in 89% of such cases. The median amount of a fine is \$300 and \$1,072 in costs. After five years, public defender clients had paid their fines in just 27% of cases and paid costs in 29% of cases.
- Defendants with more means—those who are represented by private counsel—have by contrast paid their fines in full in 57% of cases and their costs in 55% of cases.<sup>13</sup>

## Additional Resources

Visit our [Modern Debtors’ Prisons: Fines, Costs, and Restitution](#) page to find the resources below (and more):

- [ACLU-PA | Chart of Statutes Imposing Court Costs](#) (updated January 1, 2020)
- [ACLU-PA Guide | Probation/Parole Revocation Hearings for Nonpayment of Fines, Costs, or Restitution](#) (updated February 17, 2021)
- [ACLU-PA Legal Guide | Fines, Costs, and Restitution at Sentencing](#) (updated March 25, 2021)
- [ACLU-PA Legal Guide | Determining Ability to Pay](#) (updated February 17, 2021)
- [ACLU-PA Report | Pennsylvania Court Debt - Imposition and Collection of Court Fines and Costs in Pennsylvania Criminal Cases](#) (2020)

<sup>13</sup> ACLU-PA Report, [Pennsylvania Court Debt - Imposition and Collection of Court Fines and Costs in Pennsylvania Criminal Cases](#) (2020).