

NEWS FLASH

Senate Bill 1913 and House Bill 351 Require all Judges to Determine a Defendant's Ability to Pay Fines, Court Costs, and Restitution at Sentencing

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In the 2017 Legislative Session, the Texas Legislature passed Senate Bill 1913 (by Senator Judith Zaffirini) and House Bill 351 (by Representative Terry Canales). Governor Abbott signed both of these long and complex bills and their key provisions went into effect on September 1, 2017.

Perhaps the most significant provision is Section 4 of both bills which adds Subsection (a-1) to **Article 42.15** of the Code of Criminal Procedure. Except for one small difference, both versions of Subsection (a-1) read identically. The version in Senate Bill 1913 is set out on the next page:

Notwithstanding any other provision of this article, during or immediately after imposing a sentence in a case in which the defendant entered a plea in open court as provided by Article 27.13, 27.14(a), or 27.16(a), a court shall inquire whether the defendant has sufficient resources or income to immediately pay all or part of the fine and costs. If the court determines that the defendant does not have sufficient resources or income to immediately pay all or part of the fine and costs, the court shall determine whether the fine and costs should be:

- (1) subject to Subsection (c), required to be paid at some later date or in a specified portion at designated intervals;
- (2) discharged by performing community service under, as applicable, Article 43.09(f), Article 45.049, Article 45.0492, as added by Chapter 227 (H.B. 350), Acts of the 82nd Legislature, Regular Session, 2011, or Article 45.0492, as added by Chapter 777 (H.B. 1964), Acts of the 82nd Legislature, Regular Session, 2011;
- (3) waived in full or in part under Article 43.091 or 45.0491; or
- (4) satisfied through any combination of methods under Subdivisions (1) – (3).

To facilitate judges' understanding of the new law, the Texas Office of Court Administration (OCA) has published two separate Bench Cards. The Bench Card for district and county-level courts follows on the next page. (You can also access this Bench Card online at sb-1913-district-county-court.pdf.) The Bench Card for justice and municipal courts follows after that. (You can access this Bench Card online at sb-1913-justice-municipal.pdf.)

Bench Card for Judicial Processes Relating to the Collection of Fines and Costs

District and County Court Version – Applies to Jailable Offenses

The U.S. Supreme Court has held that courts may not incarcerate a person for nonpayment of fines or fees without first establishing that the person's failure to pay was willful.¹

There is new law in Texas which affects the imposition and collection of fines and court costs and impacts trial courts at all levels.² [Senate Bill 1913](#) and [House Bill 351](#) were passed by the 85th Legislature, Regular Session, and became effective on September 1, 2017.

Key procedural elements of the new law are as follows:³

⇒ **NEW REQUIREMENT FOR ASSESSING ABILITY TO PAY DURING OR IMMEDIATELY AFTER SENTENCING** (Art. 42.15)

- At the sentencing of a defendant who enters a plea in open court, when imposing a fine and costs **the judge is required to inquire whether the defendant has sufficient resources or income** to immediately pay all or part of the fine and costs.
- At this time, **the judge shall also consider** the defendant's financial history and other relevant ability to pay information.
- If the judge determines that the defendant does not have sufficient resources or income, **the judge is required** to determine whether the fine and costs should be:
 - ☐ required to be paid at some later date or in a specified portion at designated intervals;
 - ☐ discharged through the performance of community service;
 - ☐ waived in full or part; or
 - ☐ satisfied through any combination of these methods.

⇒ **NEW REQUIREMENTS AND OPTIONS FOR COMMUNITY SERVICE** (Art. 43.09)

- Any **order requiring a defendant's performance of community service must:**
 - ☐ specify the number of hours to be performed;
 - ☐ designate which agency will perform the administrative duties associated with defendant's placement in a community service program; and
 - ☐ include the date by which a defendant must submit proof of completion of the community service hours to the court.
- **Community service options have been expanded** to include not only service provided to a governmental entity or certain nonprofit organizations, but also:
 - ☐ attending a work and job skills training program, a preparatory class for the GED, an alcohol or drug abuse program, a rehabilitation program, a counseling program, a mentoring program, or any similar activity; or performing community service for an educational institution or any organization that provides services to the general public that enhances social welfare and the well-being of the community.

¹ *Bearden v. Georgia*, 461 U.S. 660 (1983).

² Jurisdictions required to operate a collection improvement program must also follow [rules](#) promulgated by the Texas Judicial Council. See [1 Tex. Admin. Code § 175](#).

³ Statutory references are to the Texas Code of Criminal Procedure.

Texas Office of Court Administration

Bench Card for Judicial Processes Relating to the Collection of Fines and Costs

District and County Court Version – Applies to Jailable Offenses

(Art. 43.09) cont'd

- A **16-hour limit applies to the amount of community service** that a defendant may perform each week, unless the court allows additional hours after determining that additional hours will not impose an undue hardship on the defendant or the defendant's dependents.
- **Credit for each eight hours of community service** performed is **\$100 per day**.

⇒ **NEW WAIVER OF PAYMENT OPTION** (Art. 43.091)

- **Courts may waive all or part of a fine or costs and must no longer wait for a defendant to default** in payment to exercise this option if:
 - ☐ the court determines that the defendant is indigent; or the defendant does not have sufficient resources or income to pay all or part of the fine or costs or was a child at the time of the offense.

⇒ **NEW REQUIREMENTS FOR PROVIDING NOTICE TO DEFENDANTS FROM COLLECTIONS VENDORS** (Art. 103.0031(j))

- **Communication to a defendant from a public or private vendor contracted to provide collection services** for unpaid fines and court costs **must include**:
 - ☐ notice of the person's right to enter a plea or to demand trial on any offense; and
 - ☐ a statement that if the person is unable to pay the full amount that is acceptable to the court to resolve the case, the person should contact the court regarding alternatives to full payment.

⇒ **NEW REQUIREMENTS FOR ISSUING A CAPIAS PRO FINE; DUTY TO RECALL** (Art. 43.05)

- While a **court can issue a capias pro fine for unpaid fines and costs** after judgment and sentence, **a court may not issue a capias pro fine** unless:
 - ☐ the court first holds a hearing on the defendant's ability to pay; and
 - ☐ based on evidence presented at the hearing, the court determines that the capias pro fine should be issued; or the defendant fails to appear at the hearing.
- In addition, the court must **recall a capias pro fine** if:
 - ☐ the defendant voluntarily appears to resolve the amount owed; and
 - ☐ the amount owed is resolved in any manner authorized by the law.

⇒ **NEW JAIL CREDIT RATES** (Art. 43.09)

- A defendant who is placed in jail for failure to pay the fine and costs imposed should be given **credit of not less than \$100** of the amount owed for each day served.



The U.S. Supreme Court has held that courts may not incarcerate a person for nonpayment of fines or fees without first establishing that the person's failure to pay was willful.¹

There is new law in Texas which affects the imposition and collection of fines and court costs and impacts trial courts at all levels.² [Senate Bill 1913](#) and [House Bill 351](#) were passed by the 85th Legislature, Regular Session, and became effective on September 1, 2017.

Key procedural elements of the new law are as follows:³

⇒ **NEW REQUIREMENTS FOR PROVIDING NOTICE TO DEFENDANTS**

- **Citations must include information regarding alternatives to the full payment** of any fine or costs assessed against the person if the person is convicted of the offense and is unable to pay that amount. (Art. 14.06(b))
- When a defendant fails to appear at the initial court setting, including failure to appear as required by a citation, **a justice or judge may no longer issue an arrest warrant for the defendant's failure to appear**, unless the justice or judge provides by telephone or regular mail to the defendant notice that includes: (Art. 45.014)
 - ☐ a date and time, within the 30-day period following the date that notice is provided, when the defendant must appear
 - ☐ the name and address of the court with jurisdiction in the case;
 - ☐ information regarding alternatives to the full payment of any fine or costs owed by the defendant; *and*
 - ☐ an explanation of the consequences of defendant's failure to appear as required.
 - ☐ If the defendant is unable to appear at the designated time, the defendant may request an alternative date or time to appear.
- **Upon receiving a plea of "guilty" or "nolo contendere" and a waiver of jury trial** in a misdemeanor punishable by fine only, **a court must provide notice** to a defendant in person or by regular mail of: (Art. 27.14(b))
 - ☐ the amount of any fine or costs assessed in the case;
 - ☐ if requested by the defendant, the amount of any appeal bond that the court will approve; *and*
 - ☐ information regarding the alternatives to the full payment of any fine or costs assessed, if the defendant is unable to pay the full amount.
- **Communication to a defendant from a public or private vendor contracted to provide collection services** for unpaid fines and court costs **must include:** (Art. 103.0031(j))
 - ☐ notice of the person's right to enter a plea or to demand trial on any offense; *and*
 - ☐ a statement that if the person is unable to pay the full amount that is acceptable to the court to resolve the case, the person should contact the court regarding alternatives to full payment.

⇒ **NEW REQUIREMENT TO RECALL AN ARREST WARRANT FOR FAILURE TO APPEAR** (Art. 45.014)

- **If a defendant voluntarily appears** and makes a good faith effort to resolve the warrant before it is executed **a justice or judge must recall the arrest warrant.**

⇒ **NEW PROVISIONS RELATING TO BAIL, BOND, AND PRETRIAL RELEASE IN A JUSTICE OR MUNICIPAL COURT** (Arts. 17.42, 45.016)

- **A justice or judge may require** a defendant to give a **personal bond** to secure the defendant's appearance (without the assessment of a personal bond fee); however, **the justice or judge may not**, either instead of or in addition to the personal bond, **require a defendant to post a bail bond (cash or surety) unless:**
 - ☐ the defendant fails to appear; *and*
 - ☐ the justice or judge determines that:
 - ☐ the defendant has sufficient resources or income to give a bail bond; and a bail bond is necessary to secure the defendant's appearance in court.
- If a defendant does not post a required bail bond within 48 hours following the court's order to do so, **the justice or judge must reconsider the bail bond and presume that the defendant does not have sufficient resources** or income to give the bond, in which event, the justice or judge may require the defendant to give a personal bond.

⇒ **NEW REQUIREMENT FOR ASSESSING ABILITY TO PAY DURING OR IMMEDIATELY AFTER SENTENCING** (Art. 45.041)

- At the sentencing of a defendant who enters a plea in open court, when imposing a fine and costs, **a judge or justice is required to inquire whether the defendant has sufficient resources or income** to immediately pay all or part of the fine and costs.

¹ *Bearden v. Georgia*, 461 U.S. 660 (1983).

² Jurisdictions required to operate a collection improvement program must also follow [rules](#) promulgated by the Texas Judicial Council. See [1 Tex. Admin. Code § 175](#).

³ Statutory references are to the Texas Code of Criminal Procedure.

Bench Card for Judicial Processes Relating to the Collection of Fines and Costs
Justice and Municipal Court Version – Applies to Fine-Only Offenses

(Art. 45.041) cont'd

- If the judge or justice determines that the defendant does not have sufficient resources or income, the judge or justice is required to **determine whether the fine and costs should be:**
 - ☐ required to be paid at some later date or in a specified portion at designated intervals;
 - ☐ discharged through the performance of community service;
 - ☐ waived in full or part; or satisfied through any combination of these methods.

⇒ **NEW REQUIREMENTS AND OPTIONS FOR COMMUNITY SERVICE** (Arts. 45.049, 45.0492)

- Any **order requiring a defendant's performance of community service must:**
 - ☐ specify the number of hours to be performed; and
 - ☐ include the date by which a defendant must submit proof of completion of the community service hours to the court.
- **Community service options have been expanded** to include not only service provided to a governmental entity or certain nonprofit organizations, but also:
 - ☐ attending a work and job skills training program, a preparatory class for the GED, an alcohol or drug abuse program, a rehabilitation program, a counseling program, a mentoring program, or any similar activity;
 - ☐ attending a tutoring program (for certain juvenile defendants only); and performing community service for an educational institution or any organization that provides services to the general public that enhances social welfare and the well-being of the community.
- A **16-hour limit applies to the amount of community service** that a defendant may perform each week, unless the court allows additional hours after determining that additional hours will not impose an undue hardship on the defendant or the defendant's dependents.
- **Credit for each eight hours of community service performed is \$100 per day.**

⇒ **NEW WAIVER OF PAYMENT OPTION; PRESUMPTION OF INDIGENCE FOR CERTAIN CHILDREN** (Art. 45.0491)

- **Courts may waive all or part of a fine or costs** and **must no longer wait for a defendant to default** in payment to exercise this option if:
 - ☐ the court determines that the defendant is indigent; or the defendant does not have sufficient resources or income to pay all or part of the fine or costs or was a child at the time of the offense; and
 - ☐ discharging the fine or costs would impose an undue hardship on the defendant.
- **A defendant is presumed to be indigent** or to not have sufficient resources or income to pay all or part of the fine or costs if the defendant:
 - ☐ is in conservatorship of the Department of Family and Protective Services (i.e. CPS) or was in the conservatorship of that department at the time of the offense; or is designated as a homeless child or youth or an unaccompanied youth, or was so designated at the time of the offense.

⇒ **NEW REQUIREMENTS FOR ISSUING A CAPIAS PRO FINE; DUTY TO RECALL** (Art. 45.045)

- While a **court can issue a capias pro fine for unpaid fines and costs** after judgment and sentence, **a court may not issue a capias pro fine** unless:
 - ☐ the court first holds a hearing on the defendant's ability to pay, and;
 - ☐ the defendant fails to appear at the hearing; or
 - ☐ based on evidence presented at the hearing, the court determines that the capias pro fine should be issued.
- In addition, **the court must recall a capias pro fine** if:
 - ☐ the defendant voluntarily appears to resolve the amount owed; and
 - ☐ the amount owed is resolved in any manner authorized by the law.

⇒ **NEW PROVISION REGARDING COMMITMENT AFTER DEFAULT IN DISCHARGING A JUDGMENT** (Art. 45.046(a))

- Upon a defendant's default in the discharge of a judgment, a justice or judge may order the defendant **confined in jail if the justice or judge finds** at a hearing that:
 - ☐ the defendant is not indigent and has failed to make a good faith effort to discharge fines and costs; or the defendant is indigent; and
 - ☐ the defendant has failed to make good faith effort to discharge the fines and costs; and
 - ☐ the defendant could have discharged the fines and costs without undue hardship.

⇒ **NEW JAIL CREDIT RATES** (Art. 45.048)

- A defendant who is placed in jail for failure to pay the fine and costs imposed should be **given credit of not less than \$100** of the amount owed for each period of confinement (between 8-24 hours as determined by a justice or judge) served.

Judges should make an ability-to-pay inquiry without being prompted. After all, the statute says the judge “shall inquire whether the defendant has sufficient resources or income to immediately pay all or part of the fine and costs.” But SB 1913 and HB 351 have been the law for well over a year and judges are not performing these inquiries. So defense counsel will have to ask the judge to perform the inquiries – at least for a while. Defense counsel should be able to make this request orally, but two written motions (and accompanying explanations) are provided on the following two pages anyway. The first motion is for use in felony cases and the second motion is to be used in misdemeanor cases.

CAUSE NO. _____

THE STATE OF TEXAS

v.

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§
§
§
§

IN THE _____

DISTRICT COURT

HARRIS COUNTY, TEXAS

MOTION FOR COURT TO MAKE ABILITY-TO-PAY INQUIRY

TO THE HONORABLE JUDGE OF SAID COURT:

_____, Defendant, by and through the undersigned attorney, requests that this Court perform the inquiry required by Tex. Code Crim. Proc. Art. 42.15(a-1). Specifically, the statute says the Court "shall inquire whether the defendant has sufficient resources or income to immediately pay all or part of the fine and costs." The inquiry is to be made "immediately after imposing a sentence."

At the outset of this case, this Court found Defendant to be indigent and, accordingly, appointed counsel to represent Defendant. Defendant's financial situation has not appreciably changed since that finding. Defendant does not have sufficient resources or income to "immediately pay" the fine and court costs assessed in this case. Accordingly, Defendant requests that this Court waive the assessed fine and court costs.

Respectfully Submitted,

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that a true and correct copy of the foregoing motion was delivered by fax, certified mail, e-mail, or hand delivery to the Harris County District Attorney on _____.

CAUSE NO. _____

THE STATE OF TEXAS

§

IN THE _____

§

v.

§

DISTRICT COURT

§

§

HARRIS COUNTY, TEXAS

ORDER ON MOTION FOR COURT TO MAKE ABILITY-TO-PAY INQUIRY

The Court has considered the Defendant's Motion and has conducted the ability-to-pay inquiry required by Tex. Code Crim. Proc. Art. 42.15(a-1). The Court now:

- ☐ orders that the fine and court costs assessed against Defendant be waived.
- ☐ finds that the Defendant has sufficient resources or income to immediately pay the assessed fine and court costs.

Signed and Entered on _____

Judge Presiding

CAUSE NO. _____

THE STATE OF TEXAS

§

IN THE COUNTY CRIMINAL

§

v.

§

COURT AT LAW NO. _____

§

§

HARRIS COUNTY, TEXAS

MOTION FOR COURT TO MAKE ABILITY-TO-PAY INQUIRY

TO THE HONORABLE JUDGE OF SAID COURT:

_____, Defendant, by and through the undersigned attorney, requests that this Court perform the inquiry required by Tex. Code Crim. Proc. Art. 42.15(a-1). Specifically, the statute says the Court "shall inquire whether the defendant has sufficient resources or income to immediately pay all or part of the fine and costs." The inquiry is to be made "immediately after imposing a sentence."

At the outset of this case, this Court found Defendant to be indigent and, accordingly, appointed counsel to represent Defendant. Defendant's financial situation has not appreciably changed since that finding. Defendant does not have sufficient resources or income to "immediately pay" the fine and court costs assessed in this case. Accordingly, Defendant requests that this Court:

- ☐ order Defendant to perform community service to satisfy the assessed fine and court costs at the rate of \$100 for each eight hours of community service.
- ☐ waive the assessed fine and court costs.

Respectfully Submitted,

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that a true and correct copy of the foregoing motion was delivered by fax, certified mail, e-mail, or hand delivery to the Harris County District Attorney on _____.

CAUSE NO. _____

THE STATE OF TEXAS

§

IN THE COUNTY CRIMINAL

§

v.

§

COURT AT LAW NO. _____

§

§

HARRIS COUNTY, TEXAS

ORDER ON MOTION FOR COURT TO MAKE ABILITY-TO-PAY INQUIRY

The Court has considered the Defendant's Motion and has conducted the ability-to-pay inquiry required by Tex. Code Crim. Proc. Art. 42.15(a-1). The Court now orders:

- ☐ Defendant to perform community service to satisfy the assessed fine and court costs at the rate of \$100 for every eight hours of service. Given that the assessed fine and court costs total \$_____, Defendant is ordered to perform _____ hours of community service. The agency that will direct Defendant in the performance of community service is the _____. Defendant must submit proof of completion of the required community service hours to this Court by _____.
- ☐ that the fine and court costs assessed against Defendant be waived.
- ☐ Defendant to pay the total amount of the assessed fine and court costs:
- ☐ by the following date: _____
- ☐ by making payments of \$_____ at each of the following intervals:

- ☐ Defendant to satisfy the assessed fine and court costs by the following combination of the above alternatives: _____

- ☐ Defendant to pay the assessed fine and court costs because he or she has sufficient resources or income to immediately pay them.

Signed and Entered on _____

Judge Presiding

Explanation of Motion for Court to Make Ability-to-Pay Inquiry

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August 9, 2018

On September 1, 2017, a new state law went into effect. The law requires judges to inquire as to a defendant's ability to pay the assessed fine and court costs. This inquiry is to be made "during or immediately after imposing a sentence." The new statute is Article 42.15(a-1) of the Code of Criminal Procedure which, in pertinent part, reads as follows:

[D]uring or immediately after imposing a sentence in a case . . . a court shall inquire as to whether the defendant has sufficient resources or income to immediately pay all or part of the fine and costs

Despite the new law having been in place for nearly a year now, courts in Harris County are not performing these inquiries. This is mainly because no one is requesting that the courts perform them and the judges may not even be aware of the new law. Under the new law, a request should not be necessary – the courts are required to make an ability-to-pay inquiry in every conviction. But right now, the courts apparently will need to be nudged into making these inquiries. This is the purpose of the "Motion for Court to Make Ability-to-Pay Inquiry." The motion simply requests the judge to perform the inquiry that is he or she is already required to make under the new law.

The first step for the judge is to determine if the defendant can afford to "immediately pay" the assessed fine and court costs. The word "immediately" is important. The judge must examine what the defendant can pay now – not what the defendant can possibly pay in the future. In the case of indigent defendants, their financial situation has typically not appreciably changed since they were found indigent and an attorney was appointed for them. These defendants should usually be found to be unable to immediately pay their assessed fine and court costs.

Once the judge finds the defendant cannot immediately pay, the judge can choose from four options. First, the judge can simply choose to waive the fine and costs. Second, the judge can order the defendant to perform community service to satisfy the fine and costs. Third, the judge can order that the fine and costs be paid at some later date or at designated intervals. Fourth, the judge can order that the obligation to pay the assessed fine and costs be satisfied through some combination of the first three options. These options are detailed in the new statute.

A judge choosing the community service option, must specify the number of hours to be performed. The judge must also specify the agency that will perform the administrative duties associated with directing the defendant's community service. And the judge must also specify the date by which the defendant must submit proof that the community service has been

completed. See CCP, art. 43.09. The order associated with the motion is designed to facilitate the judge's specification of these details.

Significantly, community service options have been expanded. See CCP, art. 43.09. Now, community service can include attending a job skills training program or a GED-preparation class. Community service can also include attending a drug or alcohol abuse program, a rehabilitation program, a counseling program or a mentoring program.

The Texas Office of Court Administration has published a bench card for judges dealing with the new law. The bench card is entitled "Bench Card for Judicial Processes Relating to the Collection of Fines and Costs." You can access the bench card online at www.txcourts.gov/media/1440389/sb-1913-district-county-court.pdf. This bench card can be shown to judges who may need a little more persuading that they are required to conduct an ability-to-pay inquiry. (A different bench card is available for municipal judges and justices of the peace - www.txcourts.gov/media/1440393/sb-1913-justice-municipal.pdf.)

Everyone is encouraged to use the "Motion for Court to Make Ability-to-Pay Inquiry" in every case in which an indigent defendant is convicted. The State Legislature has now recognized that many defendants cannot afford to pay the fines and court costs assessed against them. This new law provides a mechanism for many defendants to get out from under the burden of these fines and costs. But because the new law is still in its infancy and is not being widely followed, defense attorneys must file a proper motion to aid their clients.

Actually, two separate model motions have been designed. The motion for felony cases simply requests that the judge waive the assessed fine and costs. This is because felony defendants are typically headed to prison and will not have the ability to perform community service. Similarly, the proposed judge's order in felony cases limits the judge's options to waiving the fine and costs or finding that the defendant actually does have the ability to immediately pay.

The motion for misdemeanor cases is designed with checkboxes to ask the judge for the exact remedy desired in regard to the defendant. Similarly, the judge's order is designed with checkboxes so that he or she may choose the appropriate option in response to a motion. Under CCP, article 43.091, a judge must find a defendant cannot perform community service without "undue hardship" before waiving the fine and court costs. So a request for community service in lieu of paying the fine and court costs may often be more appropriate than a request for a waiver. However, misdemeanor defendants with a severe mental illness or intellectual disability may not be able to perform community service without undue hardship. A request that the fine and costs be waived for these defendants would certainly be appropriate and the motion allows for such a request.

If you have questions, feel free to contact Ted Wood at ted.wood@pdo.hctx.net.