



Proposed Revision to Texas Rule of Civil Procedure 145

Rule 145. Affidavit of Inability to Pay Costs

- (a) *Establishing Inability to Pay Costs by Affidavit.* A party who is unable to afford the costs of a case may proceed without advance payment of costs if the party files with the clerk of the court an affidavit of inability to pay costs in compliance with this rule and the affidavit is:
- (1) not contestable,
 - (2) not contested, or
 - (3) contested, but the contest is not sustained by a written order that complies with section (f)(5).

Upon the filing of the affidavit, whether or not a contest is filed as allowed in this rule, the clerk must docket the case, issue citations and notices and provide without payment such other customary services as are provided to any party.

- (b) *Definition of Party Unable to Afford Costs.* “A party who is unable to afford costs” for the purposes of this rule is a person to whom at least one of the following applies:
- (1) Party Receiving Government Entitlement. A party who is currently receiving benefits from a means-tested government entitlement program.
 - (2) Party Receiving Free Legal Services. A party who is currently receiving free legal services in this case through one of the following providers and has been determined to be eligible under that provider’s financial guidelines:
 - (A) a provider funded in part by the Texas Access to Justice Foundation;
 - (B) a provider funded in part by the Legal Services Corporation; or
 - (C) a Texas nonprofit that provides civil legal services to low-income people living at or below 200% of the federal poverty guidelines as published annually by the United States Department of Health and Human Services.
 - (3) Party Financially Eligible for Free Legal Services. A party who applied for free legal services through a provider listed in (b)(2) and was determined to be financially eligible but was declined representation .
 - (4) Party Income At or Below 200% of the Federal Poverty Guidelines. A party whose household income is at or below 200% of the federal poverty guidelines as published annually by the United States Department of Health and Human Services, and whose available assets, such as cash or certificates of deposit, but excluding their homestead and property exempt under Chapter 42 of the Texas Property Code, does not exceed \$2,000.

- (5) Other Parties. Any other party found to be unable to pay costs upon a review of the contents and attachments of the affidavit, or upon a review of a totality of the evidence, by the court at a contest hearing or at the final hearing.
- (c) *Contents of Affidavit*. The affidavit of inability to pay costs must identify the party filing the affidavit and contain the following statements: "I am unable to pay court costs. I verify that the statements made in this affidavit are true and correct." The affidavit must be sworn before a notary public or other officer authorized to administer oaths, or be signed under penalty of perjury pursuant to Texas Civil Practices and Remedies Code Section 132.001.
- (1) The affidavit must also state:
- (A) the affiant's current street address or other address where the court can contact the affiant;
 - (B) whether the affiant is currently receiving benefits from a means-tested government entitlement program, and if so the specific type of benefit received;
 - (C) whether the affiant is currently receiving free legal services in this case through one of the providers listed above in section (b)(2);
 - (D) whether the affiant has applied for free legal services through a provider listed above in section (b)(2) and was determined to be financially eligible but was declined representation;
 - (E) the nature and amount of the affiant's current employment income, government-entitlement cash income, and other income;
 - (F) the income of the affiant's spouse, if known, and whether that income is available to the affiant;
 - (G) the real and personal property owned by the affiant, excluding the affiant's homestead;
 - (H) the cash the affiant holds and amounts on deposit that the affiant may withdraw;
 - (I) the affiant's other assets;
 - (J) the number, ages and relationship to the affiant of any dependents and whether they are residing in the affiant's household;
 - (K) the nature and the amount of the affiant's debts;
 - (L) the nature and amount of the affiant's monthly expenses; and
 - (M) whether an attorney is providing free legal services in this case to the affiant without a contingency fee.

- (2) Affiant's Privacy Maintained. An affiant shall not be required to disclose personally identifying information about the affiant or the affiant's family members in the affidavit or in the attached proof or confirmation as set forth in (d). Such information includes, but is not limited to, a social security number, driver's license number, date of birth, home address, bank account numbers, or public benefit account numbers.
- (d) *Affidavits Not Contestable*. An affidavit accompanied by one of the following may not be contested.
 - (1) proof that the party is a current recipient of a means-tested government entitlement program;
 - (2) confirmation that the party is currently receiving free legal services in this case through a provider listed above in section (b)(2) and has been deemed eligible under that provider's income guidelines. The confirmation must be signed by the legal service provider or a pro bono attorney rendering legal services through the legal service provider; or
 - (3) confirmation that the party applied for free legal services through a provider listed above in section (b)(2) and was determined to be eligible but was declined representation. The confirmation must be signed by the legal service provider or a pro bono attorney rendering legal services through the legal service provider.
- (e) *Clerk to Provide Affidavit*. The clerk must provide, without charge, the affidavit of indigency form promulgated by the Supreme Court of Texas, or any successor form promulgated for the same purpose, to any person who states that he or she is unable to pay costs.
- (f) *Contests*.
 - (1) Effect of No Contest. Unless a contest is timely filed, the affidavit's allegations will be deemed true and the affiant will be allowed to proceed without payment of costs.
 - (2) Filing a Contest. The clerk or any party may challenge an affidavit for good cause, unless the affidavit is not contestable under section (d), by filing a written contest.
 - (A) *Good Faith Required*. Every contest must be filed in good faith and include the following sworn certification, which is subject to TRCP 13: "I certify that this contest is filed in good faith and that I have reason to believe that the affidavit of inability to pay costs filed in this case is not supported by evidence or fails to establish, on its face, that the affiant is unable to pay costs."

- (B) *Specificity Required.* Every contest must state specific facts as to why the affidavit is alleged to be insufficient.
 - (C) *Time for Filing.* A contest filed by the clerk of the court must be filed within 10 days of the date the affidavit was filed. A contest filed by an opposing party must be filed within 10 days of the date that the opposing party filed an answer or entered an appearance.
- (3) Notice and Hearing
- (A) *Notice and Hearing.* Notice of a contest hearing must include the specific grounds of the contest and be served on the affiant not less than 10 days before the date of the contest hearing. If a contest is properly filed, the court must consider the contest at the next hearing in the case that occurs after the 10 day notice period. The filing of a contest shall not be the basis for continuing a hearing in the case, but if needed, the court may continue a final hearing until after the 10 day notice period.
 - (B) *No Appearance by Contestant.* If the contestant does not appear at the contest hearing, the statements in the affidavit shall be deemed true and the affiant will be allowed to proceed without payment of costs.
- (4) Burden of Proof. If a contest is filed, the affiant must prove by a preponderance of the evidence that the affiant is unable to afford costs.
- (A) *Incarcerated Party.* If the affiant is incarcerated at the time the contest hearing is held, the affidavit must be considered as evidence and is sufficient to meet the affiant's burden to present evidence without the affiant attending the hearing.
 - (B) *Recipient of Government Entitlement Program.* If an affiant files an affidavit stating that the affiant is a current recipient of a means-tested government entitlement program and fails to attach proof, the only issue that may be contested is whether the affiant is actually receiving the entitlement. If the affiant is unable to provide such proof, the affiant may provide other evidence of inability to pay costs at the contest hearing.
- (5) Decision
- (A) *Whole Record Considered.* If a contest is properly filed, the court shall consider the record as a whole to determine whether the party who filed the affidavit is able or unable to afford costs.
 - (B) *Procedural Defects.* A contest shall not be sustained due to a procedural defect, including an affiant's failure to provide information on each of the items listed above in section (c), unless the affiant is first provided notice of the specific defect and a reasonable opportunity to correct the defect by affidavit or testimony.

- (C) *Findings.* The court shall sign a written order in accordance with this rule at the conclusion of a contest hearing. An order sustaining a contest must include specific reasons why the party must pay costs under section (g)(1)(B)-(E). .
- (D) *Time for Written Decision.* Unless the court signs an order sustaining the contest within five days of the date that the hearing was held, the affidavit's allegations will be deemed true, and the affiant will be allowed to proceed without payment of costs.

(g) Costs.

(1) Payment of Costs

- (A) If the court finds that the affiant is unable to afford costs, or the affiant is unable to pay costs as otherwise provided under this rule, the affiant has no costs to pay and may not be ordered to pay costs during the course of the case or after the case is concluded, except as allowable under (g)(2) .
- (B) If the court finds that the affiant is able to afford costs but special circumstances exist that make full payment of costs unreasonably burdensome, the court may allow the affiant to pay partial costs.
- (C) If the court finds that the affiant is able to afford costs and no special circumstances exist, the affiant must pay the costs of the case.
- (D) If the court finds that another party in the case can pay the costs of the case, the court may order that party to pay them.
- (E) The court may allow payment of costs to be made in installments but may not delay the case solely because the party has been allowed to pay in installments. A party who is current on his or her payment plan may not be penalized in any way. If a payment plan is past due at final hearing, the court may delay the final hearing until the account is current or paid in full, provided that the delay will not cause undue harm to the parties involved.

(2) Later Ability to Pay Costs

- (A) If, during the course of the case, an affiant who has proceeded without paying costs becomes able to pay some or all of the costs, the court may in the final order, and consistent with the guidance in this rule, require the affiant to pay costs to the extent of the affiant's ability to pay.
- (B) If an affiant's case results in a monetary award and the court finds sufficient evidence that the award is collectible and sufficient to reimburse costs, the court may order the affiant to pay some or all of the costs of the case.

- (3) Reimbursement of Costs. The clerk shall not seek reimbursement of costs from a party who filed an affidavit of inability to pay costs unless a contest was properly filed and sustained by a written order in compliance with this rule.
- (4) Award of Costs in Final Judgment. A final judgment may not contain a provision requiring an affiant to pay costs unless a contest on the affiant's affidavit was sustained or the affiant has become able to pay costs pursuant to section (g)(2). Any such provision shall be void and unenforceable.
- (5) Attorney's Fees and Costs. Nothing herein will prejudice any existing right to recover attorney's fees, expenses or costs from any other party.

(h) *Additional Definitions.*

- (1) Costs. "Costs" means any fees relating to the case in which the affidavit of inability to pay costs is filed that can be taxed in the bill of costs as set forth in the Texas Rules of Civil Procedure, including:
 - (A) filing fees;
 - (B) fees for issuance of legal process, income withholding for support orders, and official notices;
 - (C) fees for service and return of service of process, including the execution of process from another county in which an affidavit of inability to pay costs has been filed as set forth in TCRP 126 and service by publication;
 - (D) charges for one certified copy of final judgments, orders, and decrees; and
 - (E) fees awarded to court-appointed officers and professionals in that case.
- (2) Means-Tested Government Entitlement Program. A "*means-tested government entitlement program*" is any public benefit program in which the recipient must meet specific financial eligibility guidelines to obtain the benefit. It includes, but is not limited to, programs such as Aid to the Aged Blind and Disabled ("AABD"), Child Care Assistance under Child Care and Development Block Grant, Children's Health Insurance Program ("CHIPs"), Community Care through the Texas Department of Aging and Disability Services, County/City assistance or general assistance programs, County health care programs, emergency and disaster assistance programs such as relief through the Federal Emergency Management Agency ("FEMA"), low-income energy assistance programs, Medicaid, Medicare's Extra Help program (low income subsidy program for prescription drugs), public or subsidized housing, Supplemental Nutritional Assistance Program ("SNAP", a.k.a. "Food Stamps"), Supplemental Security Income ("SSI"), Temporary Assistance to Needy Families ("TANF") and its Emergency Assistance program, Women Infant Children program ("WIC"), or Needs-based Veteran's Administration pension.

- (3) Current Recipient. A “*current recipient*” is a party who is receiving a monetary, health care, or other benefit from a means-tested government entitlement program or who has been certified by such a program that the party is eligible to receive the benefit.
- (4) Proof. “*Proof*” that a party is a current recipient of a means-tested government entitlement program may be provided by:
- (A) a certification letter or notice of eligibility letter from the agency providing the benefit;
 - (B) a screenshot of the party’s current benefits obtained by logging onto www.yourtexasbenefits.com, its successor, or other state or federal website stating the party’s current benefits;
 - (C) a lease showing subsidized rent;
 - (D) personal knowledge by a witness who is familiar with the affiants’ financial condition; or
 - (E) any other reliable information that can assist the court in determining credibility of the affiant and their financial condition.
- (5) Household. Includes only those persons related to the affiant by blood or by law for whom the affiant has a legal responsibility to support.
- (6) Income. Total earned income before taxes plus total unearned income of all resident members of the household to the extent that such income is available to the household.
- (A) Earned Income. Money from work or employment.
 - (B) Unearned Income. Money not from work or employment, such as alimony, child support, or social security.
- (7) Available. Income or assets to which the affiant has actual and legal access without requiring the consent or cooperation of another person over whom the affiant does not have actual or legal control. A victim of domestic violence shall not be considered to have access to any income or assets of the alleged perpetrator that would require contact with the perpetrator, even if the perpetrator is a spouse or member of the affiant’s household.