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**HOUSE BILL NO. 642**

Offered January 13, 2016

Prefiled January 11, 2016

*A BILL to amend and reenact § 20-106 of the Code of Virginia, relating to submission of oral testimony or affidavits in a divorce proceeding.*

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Patron—Leftwich

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Referred to Committee for Courts of Justice

**Be it enacted by the General Assembly of Virginia:****1. That § 20-106 of the Code of Virginia is amended and reenacted as follows:****§ 20-106. Testimony may be required to be given orally; evidence by affidavit.**

A. In any suit for divorce, the trial court may require the whole or any part of the testimony to be given orally in open court, and if either party desires it, such testimony and the rulings of the court on the exceptions thereto, if any, shall be reduced to writing, and the judge shall certify that such evidence was given before him and such rulings made. When so certified the same shall stand on the same footing as a deposition regularly taken in the cause, provided, however, that no such oral evidence shall be given or heard unless and until after such notice to the adverse party as is required by law to be given of the taking of depositions, or when there has been no service of process within this Commonwealth upon, or appearance by the defendant against whom such testimony is sought to be introduced. However, a party may proceed to take evidence in support of a divorce by deposition or affidavit without leave of court only in support of a divorce on the grounds set forth in subdivision A (9) of § 20-91, where (i) the parties have resolved all issues by a written settlement agreement, (ii) there are no issues other than the grounds of the divorce itself to be adjudicated, or (iii) the adverse party has been personally served with the complaint and has failed to file a responsive pleading or to make an appearance as required by law.

B. The affidavit of a party submitted as evidence shall be based on the personal knowledge of the affiant, contain only facts that would be admissible in court, give factual support to the grounds for divorce stated in the complaint or counterclaim, and establish that the affiant is competent to testify to the contents of the affidavit. If either party is incarcerated, neither party shall submit evidence by affidavit without leave of court or the consent in writing of the guardian ad litem for the incarcerated party, or of the incarcerated party if a guardian ad litem is not required pursuant to § 8.01-9. The affidavit shall:

1. Give factual support to the grounds for divorce stated in the complaint or counterclaim, including that the parties are over the age of 18 and not suffering from any condition that renders either party legally incompetent;

2. Verify whether either party is incarcerated;

3. Verify the military status of the opposing party and advise whether the opposing party has filed an answer or a waiver of his rights under the federal Servicemembers Civil Relief Act (50 U.S.C. App § 501 et seq.);

4. Affirm that at least one party to the suit was at the time of the filing of the suit, and had been for a period in excess of six months immediately preceding the filing of the suit, a bona fide resident and domiciliary of the Commonwealth;

5. Affirm that the parties have lived separate and apart, continuously, without interruption and without cohabitation, and with the intent to remain separate and apart permanently, for the statutory period required by subdivision A (9) of § 20-91;

6. Affirm the affiant's desire to be awarded a divorce pursuant to subdivision A (9) of § 20-91;

7. State whether there were children born or adopted of the marriage and affirm that the wife is not known to be pregnant from the marriage; and

8. Be accompanied by the affidavit of at least one corroborating witness, which shall:

a. Verify that the affiant is over the age of 18 and not suffering from any condition that renders him legally incompetent;

b. Verify whether either party is incarcerated;

c. Give factual support to the grounds for divorce stated in the complaint or counterclaim;

d. Verify that at least one of the parties to the suit was at the time of the filing of the suit, and had been for a period in excess of six months immediately preceding the filing of the suit, a bona fide resident and domiciliary of the Commonwealth;

e. Verify whether there were children born or adopted of the marriage and verify that the wife is not

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59 known to be pregnant from the marriage; and

60 f. Verify the affiant's personal knowledge that the parties have not cohabitated since the date of  
61 separation alleged in the complaint or counterclaim and that it has been either party's intention since that  
62 date to remain separate and apart permanently.

63 C. If a party moves for a divorce pursuant to § 20-121.02, any affidavit may be submitted in support  
64 of the grounds for divorce set forth in subdivision A (9) of § 20-91.

65 D. A verified complaint shall not be deemed an affidavit for purposes of this section.

66 E. *Either party may submit the depositions or affidavits required by this section in support of the*  
67 *grounds for divorce requested by either party pursuant to the terms of this section.*