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HOUSE BILL NO. 2055

Offered January 13, 2021

Prefiled January 12, 2021

A BILL to amend and reenact §§ 20-108.1 and 63.2-1918 of the Code of Virginia, relating to child support obligations; party's incarceration not deemed voluntary unemployment or underemployment.

Patrons—Scott, Adams, D.M., Bagby, Bourne, Hope, Hurst, Jenkins, Price, Rasoul, Samirah, Simon and Simonds

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 20-108.1 and 63.2-1918 of the Code of Virginia are amended and reenacted as follows:

§ 20-108.1. Determination of child or spousal support.

A. In any proceeding on the issue of determining spousal support, the court shall consider all evidence presented relevant to any issues joined in that proceeding. The court's decision shall be rendered based upon the evidence relevant to each individual case.

B. In any proceeding on the issue of determining child support under this title, Title 16.1, or Title 63.2, the court shall consider all evidence presented relevant to any issues joined in that proceeding. The court's decision in any such proceeding shall be rendered upon the evidence relevant to each individual case. However, there shall be a rebuttable presumption in any judicial or administrative proceeding for child support, including cases involving split custody or shared custody, that the amount of the award that would result from the application of the guidelines set out in § 20-108.2 is the correct amount of child support to be awarded. Liability for support shall be determined retroactively for the period measured from the date that the proceeding was commenced by the filing of an action with any court provided the complainant exercised due diligence in the service of the respondent or, if earlier, the date an order of the Department of Social Services entered pursuant to Title 63.2 and directing payment of support was delivered to the sheriff or process server for service on the obligor.

In order to rebut the presumption, the court shall make written findings in the order, which findings may be incorporated by reference, that the application of such guidelines would be unjust or inappropriate in a particular case. The finding that rebuts the guidelines shall state the amount of support that would have been required under the guidelines, shall give a justification of why the order varies from the guidelines, and shall be determined by relevant evidence pertaining to the following factors affecting the obligation, the ability of each party to provide child support, and the best interests of the child:

1. Actual monetary support for other family members or former family members;
2. Arrangements regarding custody of the children, including the cost of visitation travel;
3. Imputed income to a party who is voluntarily unemployed or voluntarily ~~under-employed;~~ *underemployed*, provided that (i) income may not be imputed to a custodial parent when a child is not in school, child care services are not available, and the cost of such child care services are not included in the computation ~~and provided further, that;~~ (ii) any consideration of imputed income based on a change in a party's employment shall be evaluated with consideration of the good faith and reasonableness of employment decisions made by the party, including to attend and complete an educational or vocational program likely to maintain or increase the party's earning potential; *and (iii) a party's current incarceration, as defined in § 8.01-195.10, for 180 or more consecutive days, other than for failure to pay child support as ordered or for a crime against the child that is the subject of the child support order or the custodial parent of that child, shall not be deemed voluntary unemployment or voluntary underemployment. In addition, notwithstanding subsection F, a party's incarceration for 180 or more consecutive days, other than for failure to pay child support as ordered or for a crime against the child that is the subject of the child support order or the custodial parent of that child, shall be a material change in circumstances upon which a modification of child support may be based;*
4. Any child care costs incurred on behalf of the child or children due to the attendance of a custodial parent in an educational or vocational program likely to maintain or increase the party's earning potential;
5. Debts of either party arising during the marriage for the benefit of the child;
6. Direct payments ordered by the court for maintaining life insurance coverage pursuant to subsection D, education expenses, or other court-ordered direct payments for the benefit of the child;
7. Extraordinary capital gains such as capital gains resulting from the sale of the marital abode;
8. Any special needs of a child resulting from any physical, emotional, or medical condition;

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58 9. Independent financial resources of the child or children;
59 10. Standard of living for the child or children established during the marriage;
60 11. Earning capacity, obligations, financial resources, and special needs of each parent;
61 12. Provisions made with regard to the marital property under § 20-107.3, where said property earns
62 income or has an income-earning potential;
63 13. Tax consequences to the parties including claims for exemptions, child tax credit, and child care
64 credit for dependent children;
65 14. A written agreement, stipulation, consent order, or decree between the parties which includes the
66 amount of child support; and
67 15. Such other factors as are necessary to consider the equities for the parents and children.
68 C. In any proceeding under this title, Title 16.1, or Title 63.2 on the issue of determining child
69 support, the court shall have the authority to order either party or both parties to provide health care
70 coverage or cash medical support, as defined in § 63.2-1900, or both, for dependent children if
71 reasonable under all the circumstances and health care coverage for a spouse or former spouse.
72 D. In any proceeding under this title, Title 16.1, or Title 63.2 on the issue of determining child
73 support, the court shall have the authority to order a party to (i) maintain any existing life insurance
74 policy on the life of either party provided the party so ordered has the right to designate a beneficiary
75 and (ii) designate a child or children of the parties as the beneficiary of all or a portion of such life
76 insurance for so long as the party so ordered has a statutory obligation to pay child support for the child
77 or children.
78 E. Except when the parties have otherwise agreed, in any proceeding under this title, Title 16.1, or
79 Title 63.2 on the issue of determining child support, the court shall have the authority to and may, in its
80 discretion, order one party to execute all appropriate tax forms or waivers to grant to the other party the
81 right to take the income tax dependency exemption and any credits resulting from such exemption for
82 any tax year or future years, for any child or children of the parties for federal and state income tax
83 purposes.
84 F. Notwithstanding any other provision of law, any amendments to this section shall not be
85 retroactive to a date before the effective date of the amendment, and shall not be the basis for a material
86 change in circumstances upon which a modification of child support may be based.
87 G. Child support payments, whether current or arrears, received by a parent for the benefit of and
88 owed to a child in the parent's custody, whether the payments were ordered under this title, Title 16.1,
89 or Title 63.2, shall not be subject to garnishment. A depository wherein child support payments have
90 been deposited on behalf of and traceable to an individual shall not be required to determine the portion
91 of deposits that are subject to garnishment.
92 H. In any proceeding on the issue of determining child or spousal support or an action for separate
93 maintenance under this title, Title 16.1, or Title 63.2, when the earning capacity, voluntary
94 unemployment, or voluntary ~~under-employment~~ *underemployment* of a party is in controversy, the court
95 in which the action is pending, upon the motion of any party and for good cause shown, may order a
96 party to submit to a vocational evaluation by a vocational expert employed by the moving party,
97 including, but not limited to, any interviews and testing as requested by the expert. The order may
98 permit the attendance of the vocational expert at the deposition of the person to be evaluated. The order
99 shall specify the name and address of the expert, the scope of the evaluation, and shall fix the time for
100 filing the report with the court and furnishing copies to the parties. The court may award costs or fees
101 for the evaluation and the services of the expert at any time during the proceedings. The provisions of
102 this section shall not preclude the applicability of any other rule or law.
103 **§ 63.2-1918. Administrative establishment of obligations.**
104 The Department shall set child support at the amount resulting from computations pursuant to the
105 guideline set out in § 20-108.2 in determining the required monthly support obligation, the amount of
106 support obligation arrearage, if any, and the amount to be paid periodically against such arrearage. There
107 shall be a rebuttable presumption that the amount of the award which would result from the application
108 of the guidelines is the correct amount of child support to be awarded. In order to rebut the presumption
109 the Department shall make written findings in its order that the application of the guidelines would be
110 unjust or inappropriate in a particular case as determined by relevant evidence pertaining to support for
111 other children in the household or other children for whom any administrative or court order exists, or
112 relevant evidence pertaining to imputed income to a person who is voluntarily unemployed or who fails
113 to provide verification of income upon request of the Department; provided that income may not be
114 imputed to the custodial parent because (i) a child is not regularly attending school, (ii) child care
115 services are not available, or (iii) the cost of such child care services are not added to the basic child
116 support obligation. *In addition, a party's current incarceration, as defined in § 8.01-195.10, for 180 or*
117 *more consecutive days, other than for failure to pay child support as ordered or for a crime against the*
118 *child that is the subject of the child support order or the custodial parent of that child, shall not be*
119 *deemed voluntary unemployment or voluntary underemployment.* Additional factors that may lead to

120 rebuttal of the presumption shall be determined by Department regulation.