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HOUSE BILL NO. 818

Offered January 9, 2002

Prefiled January 9, 2002

A BILL to amend and reenact §§ 8.01-576.4 through 8.01-576.10, 8.01-576.12, 8.01-581.21, 8.01-581.22, and 8.01-581.23 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 21.2 of Title 8.01 sections numbered 8.01-581.24, 8.01-581.25, and 8.01-581.26, relating to mediation.

Patron—Almand

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-576.4 through 8.01-576.10, 8.01-576.12, 8.01-581.21, 8.01-581.22, and 8.01-581.23 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding in Chapter 21.2 of Title 8.01 sections numbered 8.01-581.24, 8.01-581.25, and 8.01-581.26 as follows:

CHAPTER 20.2

COURT-REFERRED DISPUTE RESOLUTION PROCEEDINGS

§ 8.01-576.4. Scope and definitions.

The provisions of this chapter apply only to court-referred dispute resolution services.

As used in this chapter:

"Conciliation" means a process in which a neutral facilitates settlement by clarifying issues and serving as an intermediary for negotiations in a manner which is generally more informal and less structured than mediation.

"Court" means any juvenile and domestic relations district court, general district court, circuit court, or appellate court, and includes the judges and any intake specialist to whom the judge has delegated specific authority under this chapter.

"Dispute resolution proceeding" means any structured process in which a neutral assists disputants in reaching a voluntary settlement by means of dispute resolution techniques such as mediation, conciliation, early neutral evaluation, nonjudicial settlement conferences or any other proceeding leading to a voluntary settlement conducted consistent with the requirements of this chapter. The term includes the ~~evaluation~~ *orientation* session.

"Dispute resolution program" means a program that offers dispute resolution services to the public, which is run by the Commonwealth or any private for-profit or not-for-profit organization, political subdivision, or public corporation, or a combination of these.

"Dispute resolution services" includes screening and intake of disputants, conducting dispute resolution proceedings, drafting agreements and providing information or referral services.

"Evaluation session" means a preliminary meeting during which the parties and the neutral assess the case and decide whether to continue with a dispute resolution proceeding or with adjudication.

"Intake specialist" means an individual who is trained in analyzing and screening cases to assist in determining whether a case is appropriate for referral to a dispute resolution proceeding.

"Mediation" means a process in which a neutral facilitates communication between the parties and, without deciding the issues or imposing a solution on the parties, enables them to understand and resolve to reach a mutually agreeable resolution to their dispute.

"Neutral" means an individual who is trained or experienced in conducting dispute resolution proceedings and in providing dispute resolution services.

"Orientation session" means a preliminary meeting during which the dispute resolution proceeding is explained to the parties and the parties and the neutral assess the case and decide whether to continue with a dispute resolution proceeding or adjudication.

§ 8.01-576.5. Referral of disputes to dispute resolution proceedings.

While protecting the right to trial by jury, a court, on its own motion or on motion of one of the parties, may refer any contested civil matter, or selected issues in a civil matter, to a ~~dispute resolution evaluation~~ *an orientation* session in order to encourage the early ~~settlement~~ *resolution* of disputes through the use of procedures that facilitate (i) open communication between the parties about the issues in the dispute, (ii) full exploration of the range of options to resolve the dispute, (iii) improvement in the relationship between the parties, and (iv) control by the parties over the outcome of the dispute. *The neutral or intake specialist conducting the orientation session shall provide information regarding dispute resolution options available to the parties, screen for factors that would make the case*

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59 *inappropriate for a dispute resolution proceeding, and assist the parties in determining whether their*
60 *case is suitable for a dispute resolution process such as mediation.* The court shall set a date for the
61 parties to return to court in accordance with its regular docket and procedure, irrespective of the referral
62 to an ~~evaluation~~ *orientation* session. The parties shall notify the court, in writing, if the dispute is
63 resolved prior to the return date.

64 Upon such referral, the parties shall attend one ~~evaluation~~ *orientation* session unless excused pursuant
65 to § 8.01-576.6. Further participation in a dispute resolution proceeding shall be by consent of all
66 parties. Attorneys for any party may ~~be present during~~ *participate in* a dispute resolution proceeding.

67 § 8.01-576.6. Notice and opportunity to object.

68 When a court has determined that referral to a ~~dispute resolution evaluation~~ *an orientation* session is
69 appropriate, an order of referral to a neutral or to a dispute resolution program shall be entered and the
70 parties shall be so notified as expeditiously as possible. The court shall excuse the parties from
71 participation in a ~~dispute resolution evaluation~~ *an orientation* session if, within fourteen days after entry
72 of the order, a written statement signed by any party is filed with the court, stating that the dispute
73 resolution process has been explained to the party and he objects to the referral.

74 § 8.01-576.7. Costs.

75 The ~~evaluation~~ *orientation* session shall be conducted at no cost to the parties. Unless otherwise
76 provided by ~~statute or law, the cost of any subsequent dispute resolution proceeding shall be as agreed~~
77 *to by the parties and the neutral, the court may set a reasonable fee for the services of any neutral to*
78 *whom a case is referred by the court as provided in § 8.01-576.8.* Prior to setting the rate and method of
79 payment pursuant to this chapter, the court shall determine whether any of the parties is indigent. If it is
80 determined that one or more of the parties is indigent and no agreement as to payment is reached
81 between the parties, the court shall refer the case to a dispute resolution program that offers services at
82 no charge to the parties or to a neutral who has agreed to accept cases on a pro bono or volunteer basis.
83 If it is determined that neither of the parties is indigent, and the parties have not selected a dispute
84 resolution program that offers services at no cost nor agreed with the neutral as to another method of
85 payment, the judge may assess the fees of the neutral as costs of suit.

86 § 8.01-576.8. Qualifications of neutrals; referral.

87 A neutral who provides dispute resolution services other than mediation pursuant to this chapter shall
88 provide the court with a written statement of qualifications, describing the neutral's background and
89 relevant training and experience in the field. ~~A mediator who desires to receive referrals from the court~~
90 ~~shall be certified pursuant to guidelines promulgated by the Judicial Council of Virginia.~~ A dispute
91 resolution program may satisfy the requirements of this section on behalf of its neutrals by providing the
92 court with a written statement of the background, training, experience, and certification, as appropriate,
93 of any neutral who participates in its program. ~~A neutral who desires to provide mediation and receive~~
94 ~~referrals from the court shall be certified pursuant to guidelines promulgated by the Judicial Council of~~
95 ~~Virginia.~~ The court shall maintain a list of *mediators certified pursuant to guidelines promulgated by the*
96 *Judicial Council and may maintain a list of* neutrals and dispute resolution programs which have met
97 the requirements of this section. The list may be divided among the areas of specialization or expertise
98 ~~maintained by~~ *of* the neutrals.

99 At the conclusion of the ~~evaluation~~ *orientation* session, or no later than ten days thereafter, parties
100 electing to continue with the dispute resolution proceeding may: (i) continue with the neutral who
101 conducted the ~~evaluation~~ *orientation* session, (ii) select any neutral or dispute resolution program from
102 the list maintained by the court to conduct such proceedings, or (iii) pursue any other alternative for
103 voluntarily resolving the dispute to which the parties agree. If the parties choose to proceed with the
104 dispute resolution proceeding but are unable to agree on a neutral or dispute resolution program during
105 that period, the court shall refer the case to a neutral or dispute resolution program *who accepts such*
106 *referrals*, on the list maintained by the court on the basis of a fair and equitable rotation, taking into
107 account the subject matter of the dispute and the expertise of the neutral, as appropriate. *If one or more*
108 *of the parties is indigent or no agreement as to payment is reached between the parties and a neutral,*
109 *the court shall set a reasonable fee for the service of any neutral who accepts such referral pursuant to*
110 *this paragraph.*

111 § 8.01-576.9. Standards and duties of neutrals; confidentiality; liability.

112 A neutral selected to conduct a dispute resolution proceeding under this chapter may encourage and
113 assist the parties in reaching a resolution of their dispute, but may not compel or coerce the parties into
114 entering into a settlement agreement. A neutral has an obligation to remain impartial and free from
115 conflict of interests in each case, and to decline to participate further in a case should such partiality or
116 conflict arise. Unless expressly authorized by the disclosing party, the neutral may not disclose to either
117 party information relating to the subject matter of the dispute resolution proceeding provided to him in
118 confidence by the other. In reporting on the outcome of the dispute resolution proceeding to the
119 referring court, the neutral shall indicate ~~only the terms of any~~ *whether an agreement was reached, or the*
120 *terms of the agreement if authorized by the parties, the fact that no agreement was reached, or the fact*

that the orientation session or mediation did not occur. The neutral shall not disclose information exchanged or observations regarding the conduct and demeanor of the parties and their counsel during the dispute resolution proceeding, unless the parties otherwise agree.

However, where the dispute involves the support of minor children of the parties, the parties shall disclose ~~between themselves to each other~~ and to the neutral the information to be used in completing the child support guidelines worksheet required by § 20-108.2. The guidelines computations and any reasons for deviation shall be incorporated in any written agreement between the parties.

With respect to liability, ~~the provisions of § 8.01-581.23 shall apply in claims arising out of services rendered by any neutral when mediation is provided by a mediator who is certified pursuant to guidelines promulgated by the Judicial Council of Virginia, then the mediator, mediation program for which the certified mediator is providing services, and a mediator co-mediating with a certified mediator shall be immune from civil liability for, or resulting from, any act or omission done or made while engaged in efforts to assist or conduct a mediation, unless the act or omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another. This language is not intended to abrogate any other immunity that may be applicable to a mediator.~~

§ 8.01-576.10. Confidentiality of dispute resolution proceeding.

All memoranda, work products ~~or~~ and other materials contained in the case files of a neutral or dispute resolution program are confidential. Any communication made in or in connection with the dispute resolution proceeding which relates to the controversy, *including screening, intake and scheduling a dispute resolution proceeding*, whether made to the neutral or dispute resolution program staff or to a party, or to any other person ~~if made at a dispute resolution proceeding~~, is confidential. However, a written settlement agreement *signed by the parties* shall not be confidential, unless the parties otherwise agree in writing.

Confidential materials and communications are not subject to disclosure *in discovery or* in any judicial or administrative proceeding except (i) where all parties to the dispute resolution proceeding agree, in writing, to waive the confidentiality, (ii) in a subsequent action between the neutral or dispute resolution program and a party to the dispute resolution proceeding for damages arising out of the dispute resolution proceeding, ~~or~~ (iii) statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the dispute resolution proceeding, (iv) *where a threat to inflict bodily injury is made*, (v) *where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime*, (vi) *where an ethics complaint is made against the neutral by a party to the dispute resolution proceeding to the extent necessary for the complainant to prove misconduct and the neutral to defend against such complaint*, (vii) *where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation*, (viii) *where communications are sought or offered to prove or disprove any of the grounds listed in § 8.01-576.12 in a proceeding to vacate a mediated agreement*, or (ix) *as provided by law or rule*. The use of attorney work product in a dispute resolution proceeding shall not result in a waiver of the attorney work product privilege.

Notwithstanding the provisions of this section, in any case where the dispute involves support of the minor children of the parties, financial information, including information contained in the child support guidelines worksheet, and written reasons for any deviation from the guidelines shall be disclosed to each party and the court for the purpose of computing a basic child support amount pursuant to § 20-108.2.

§ 8.01-576.12. Vacating orders and agreements.

Upon the filing of an independent action by a party, the court shall vacate a mediated agreement reached in a dispute resolution proceeding pursuant to this chapter, or vacate an order incorporating or resulting from such agreement, where:

1. The agreement was procured by fraud or duress, or is unconscionable;
2. If property or financial matters *in domestic relations cases involving divorce, property, support or the welfare of a child* are in dispute, the parties failed to provide substantial full disclosure of all relevant property and financial information; or

3. There was evident partiality or misconduct by the neutral, prejudicing the rights of any party.

For purposes of this section, "misconduct" includes failure of the neutral to inform the parties in writing at the commencement of the mediation process that: (i) the neutral does not provide legal advice, (ii) any mediated agreement ~~will~~ *may* affect the legal rights of the parties, (iii) each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so, and (iv) each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement ~~or should waive his opportunity to do so~~.

The fact that any provisions of a mediated agreement were such that they could not or would not be

182 granted by a court of law or equity is not, in and of itself, grounds for vacating an agreement.

183 A motion to vacate under this section shall be made within two years after the mediated agreement is
184 entered into, except that, if predicated upon fraud, it shall be made within two years after these grounds
185 are discovered or reasonably should have been discovered.

186 § 8.01-581.21. Definitions.

187 As used in this chapter:

188 "Mediation" means the process by which a mediator assists and facilitates two or more parties to a
189 controversy in reaching a mutually acceptable resolution of the controversy and includes all contacts
190 between the mediator and any party or parties, until such time as a resolution is agreed to by the parties
191 or the parties discharge the mediator a process in which a mediator facilitates communication between
192 the parties and, without deciding the issues or imposing a solution on the parties, enables them to
193 understand and to reach a mutually agreeable resolution to their dispute.

194 "Mediation program" means a program through which mediators or mediation is made available and
195 includes the director, agents and employees of the program.

196 "Mediator" means an impartial third party selected by agreement of the parties to a controversy to
197 assist them in mediation.

198 § 8.01-581.22. Confidentiality; exceptions.

199 All memoranda, work products and other materials contained in the case files of a mediator or
200 mediation program are confidential. Any communication made in or in connection with the mediation,
201 which relates to the controversy being mediated, *including screening, intake, and scheduling a*
202 *mediation*, whether made to the mediator ~~or~~ *mediation program staff*, to a party, or to any other person
203 *if made at a mediation session*, is confidential. However, a *written* mediated agreement *signed by the*
204 *parties* shall not be confidential, unless the parties otherwise agree in writing.

205 Confidential materials and communications are not subject to disclosure in *discovery or in any*
206 *judicial or administrative proceeding* except (i) where all parties to the mediation agree, in writing, to
207 waive the confidentiality, (ii) in a subsequent action between the mediator *or mediation program* and a
208 party to the mediation for damages arising out of the mediation, ~~or~~ (iii) statements, memoranda,
209 materials and other tangible evidence, otherwise subject to discovery, which were not prepared
210 specifically for use in and actually used in the mediation, (iv) *where a threat to inflict bodily injury is*
211 *made*, (v) *where communications are intentionally used to plan, attempt to commit, or commit a crime*
212 *or conceal an ongoing crime*, (vi) *where an ethics complaint is made against the mediator by a party to*
213 *the mediation to the extent necessary for the complainant to prove misconduct and the mediator to*
214 *defend against such complaint*, (vii) *where communications are sought or offered to prove or disprove a*
215 *claim or complaint of misconduct or malpractice filed against a party's legal representative based on*
216 *conduct occurring during a mediation*, (viii) *where communications are sought or offered to prove or*
217 *disprove any of the grounds listed in § 8.01-581.26 in a proceeding to vacate a mediated agreement, or*
218 *(ix) as provided by law or rule. The use of attorney work product in a mediation shall not result in a*
219 *waiver of the attorney work product privilege.*

220 Notwithstanding the provisions of this section, in any case where the dispute involves support of the
221 minor children of the parties, financial information, including information contained in the child support
222 guidelines worksheet, and written reasons for any deviation from the guidelines shall be disclosed to
223 each party and the court for the purpose of computing a basic child support amount pursuant to
224 § 20-108.2.

225 § 8.01-581.23. Civil immunity.

226 ~~Mediators and~~ When a mediation is provided by a mediator who is certified pursuant to guidelines
227 promulgated by the Judicial Council of Virginia, then the mediator, mediation programs for which the
228 certified mediator is providing services, and a mediator co-mediating with a certified mediator shall be
229 immune from civil liability for, or resulting from, any act or omission done or made while engaged in
230 efforts to assist or ~~facilitate~~ conduct a mediation, unless the act or omission was made or done in bad
231 faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or
232 property of another. *This language is not intended to abrogate any other immunity that may be*
233 *applicable to a mediator.*

234 § 8.01-581.24. Standards and duties of mediators; confidentiality; liability.

235 A mediator selected to conduct a mediation under this chapter may encourage and assist the parties
236 in reaching a resolution of their dispute, but may not compel or coerce the parties into entering into a
237 settlement agreement. A mediator has an obligation to remain impartial and free from conflicts of
238 interest in each case, and to decline to participate further in a case should such partiality or conflict
239 arise. Unless expressly authorized by the disclosing party, the mediator may not disclose to either party
240 information relating to the subject matter of the mediation provided to him in confidence by the other. A
241 mediator shall not disclose information exchanged or observations regarding the conduct and demeanor
242 of the parties and their counsel during the mediation, unless the parties otherwise agree.

243 However, where the dispute involves the support of minor children of the parties, the parties shall

disclose to each other and to the mediator the information to be used in completing the child support guidelines worksheet required by § 20-108.2. The guidelines computations and any reasons for deviation shall be incorporated in any written agreement by the parties.

§ 8.01-581.25. Effect of written settlement agreement.

If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract. If the mediation involves a case that is filed in court, upon request of all parties and consistent with law and public policy, the court shall incorporate the written agreement into the terms of its final decree disposing of a case. In cases in which the dispute involves support for the minor children of the parties, an order incorporating a written agreement shall also include the child support guidelines worksheet and, if applicable, the written reasons for any deviation from the guidelines. The child support guidelines worksheet shall be attached to the order.

§ 8.01-581.26. Vacating orders and agreements.

Upon the filing of an independent action by a party, the court shall vacate a mediated agreement reached in a mediation pursuant to this chapter, or vacate an order incorporating or resulting from such agreement, where:

1. The agreement was procured by fraud or duress, or is unconscionable;

2. If property or financial matters in domestic relations cases involving divorce, property, support or the welfare of a child are in dispute, the parties failed to provide substantial full disclosure of all relevant property and financial information; or

3. There was evident partiality or misconduct by the mediator, prejudicing the rights of any party.

For purposes of this section, "misconduct" includes failure of the mediator to inform the parties at the commencement of the mediation process that: (i) the mediator does not provide legal advice, (ii) any mediated agreement may affect the legal rights of the parties, (iii) each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so, and (iv) each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement.