

# VIRGINIA ACTS OF ASSEMBLY -- 2021 RECONVENED SPECIAL SESSION I

## CHAPTER 541

*An Act 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.*

[H 2055]

Approved April 7, 2021

**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 alone, as defined in § 8.01-195.10, for 180 or more consecutive days, other than 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;
9. Independent financial resources of the child or children;
10. Standard of living for the child or children established during the marriage;
11. Earning capacity, obligations, financial resources, and special needs of each parent;
12. Provisions made with regard to the marital property under § 20-107.3, where said property earns income or has an income-earning potential;

13. Tax consequences to the parties including claims for exemptions, child tax credit, and child care credit for dependent children;

14. A written agreement, stipulation, consent order, or decree between the parties which includes the amount of child support; and

15. Such other factors as are necessary to consider the equities for the parents and children.

C. In any proceeding under this title, Title 16.1, or Title 63.2 on the issue of determining child support, the court shall have the authority to order either party or both parties to provide health care coverage or cash medical support, as defined in § 63.2-1900, or both, for dependent children if reasonable under all the circumstances and health care coverage for a spouse or former spouse.

D. In any proceeding under this title, Title 16.1, or Title 63.2 on the issue of determining child support, the court shall have the authority to order a party to (i) maintain any existing life insurance policy on the life of either party provided the party so ordered has the right to designate a beneficiary and (ii) designate a child or children of the parties as the beneficiary of all or a portion of such life insurance for so long as the party so ordered has a statutory obligation to pay child support for the child or children.

E. Except when the parties have otherwise agreed, in any proceeding under this title, Title 16.1, or Title 63.2 on the issue of determining child support, the court shall have the authority to and may, in its discretion, order one party to execute all appropriate tax forms or waivers to grant to the other party the right to take the income tax dependency exemption and any credits resulting from such exemption for any tax year or future years, for any child or children of the parties for federal and state income tax purposes.

F. Notwithstanding any other provision of law, any amendments to this section shall not be retroactive to a date before the effective date of the amendment, and shall not be the basis for a material change in circumstances upon which a modification of child support may be based.

G. Child support payments, whether current or arrears, received by a parent for the benefit of and owed to a child in the parent's custody, whether the payments were ordered under this title, Title 16.1, or Title 63.2, shall not be subject to garnishment. A depository wherein child support payments have been deposited on behalf of and traceable to an individual shall not be required to determine the portion of deposits that are subject to garnishment.

H. In any proceeding on the issue of determining child or spousal support or an action for separate maintenance under this title, Title 16.1, or Title 63.2, when the earning capacity, voluntary unemployment, or voluntary ~~under employment~~ *underemployment* of a party is in controversy, the court in which the action is pending, upon the motion of any party and for good cause shown, may order a party to submit to a vocational evaluation by a vocational expert employed by the moving party, including, but not limited to, any interviews and testing as requested by the expert. The order may permit the attendance of the vocational expert at the deposition of the person to be evaluated. The order shall specify the name and address of the expert, the scope of the evaluation, and shall fix the time for filing the report with the court and furnishing copies to the parties. The court may award costs or fees for the evaluation and the services of the expert at any time during the proceedings. The provisions of this section shall not preclude the applicability of any other rule or law.

#### **§ 63.2-1918. Administrative establishment of obligations.**

The Department shall set child support at the amount resulting from computations pursuant to the guideline set out in § 20-108.2 in determining the required monthly support obligation, the amount of support obligation arrearage, if any, and the amount to be paid periodically against such arrearage. There shall be a rebuttable presumption that the amount of the award which would result from the application of the guidelines is the correct amount of child support to be awarded. In order to rebut the presumption the Department shall make written findings in its order that the application of the guidelines would be unjust or inappropriate in a particular case as determined by relevant evidence pertaining to support for other children in the household or other children for whom any administrative or court order exists, or relevant evidence pertaining to imputed income to a person who is voluntarily unemployed or who fails to provide verification of income upon request of the Department; provided that income may not be imputed to the custodial parent because (i) a child is not regularly attending school, (ii) child care services are not available, or (iii) the cost of such child care services are not added to the basic child support obligation. *In addition, a party's current incarceration alone, as defined in § 8.01-195.10, for 180 or more consecutive days, other than 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.* Additional factors that may lead to rebuttal of the presumption shall be determined by Department regulation.

**2. That the provisions of this act shall only apply to petitions for child support commenced on or after July 1, 2021, and petitions for modifications of such orders, and that the provisions of this act shall not be construed to create a material change in circumstances for the purposes of modifying an existing child support order.**

**3. That the provisions of this act shall not become effective unless reenacted by the 2022 Session of the General Assembly.**