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HOUSE BILL NO. 824

Offered January 10, 2024

Prefiled January 9, 2024

A BILL to amend and reenact §§ 16.1-267, 17.1-275.5, 19.2-159, 19.2-163, and 19.2-163.4:1 of the Code of Virginia, relating to abolition of fees; legal representation of indigent defendant.

Patrons—Cousins, Rasoul, Shin, Bennett-Parker, Callsen, Clark, Cohen, Glass, Henson, Martinez, McQuinn, Simonds and Ward

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 16.1-267, 17.1-275.5, 19.2-159, 19.2-163, and 19.2-163.4:1 of the Code of Virginia are amended and reenacted as follows:

§ 16.1-267. Compensation of appointed counsel.

A. When the court appoints counsel to represent a child pursuant to subsection A of § 16.1-266 and, after an investigation by the court services unit, finds that the parents are financially able to pay for the attorney and refuse to do so, the court shall assess costs against the parents for such legal services in the maximum amount of that awarded the attorney by the court under the circumstances of the case, considering such factors as the ability of the parents to pay and the nature and extent of the counsel's duties in the case. Such amount shall not exceed the maximum amount specified in subdivision 1 of § 19.2-163 if the action is in district court.

When the court appoints counsel to represent a child pursuant to subsection B or C of § 16.1-266 and, after an investigation by the court services unit, finds that the parents are financially able to pay for the attorney in whole or in part and refuse to do so, the court shall assess costs in whole or in part against the parents for such legal services in the amount awarded the attorney by the court. Such amount shall not exceed \$100 if the action is in circuit court or the maximum amount specified in subdivision 1 of § 19.2-163 if the action is in district court. In determining the financial ability of the parents to pay for an attorney to represent the child, the court shall utilize the financial statement required by § 19.2-159.

In all other cases, except as provided in § 16.1-343, counsel appointed to represent a child shall be compensated for his services pursuant to § 19.2-163.

B. When the court appoints counsel to represent a parent, guardian or other adult pursuant to § 16.1-266, such counsel shall be compensated for his services pursuant to § 19.2-163.

C. 1. In any proceeding in which the court appoints a guardian ad litem to represent a child pursuant to § 16.1-266, the court shall order the parent, or other party with a legitimate interest who has filed a petition in such proceeding, to reimburse the Commonwealth the costs of such services in an amount not to exceed the amount awarded the guardian ad litem by the court. If the court determines that such party is unable to pay, the required reimbursement may be reduced or eliminated. No party whom the court determines to be indigent pursuant to § 19.2-159 shall be required to pay reimbursement ~~except where the court finds good cause to do so~~. The Executive Secretary of the Supreme Court shall administer the guardian ad litem program and shall report August 1 and January 1 of each year to the Chairmen of the House Committee on Appropriations and the Senate Committee on Finance and Appropriations on the amounts paid for guardian ad litem purposes, amounts reimbursed, savings achieved, and management actions taken to further enhance savings under this program.

2. For good cause shown, or upon the failure by the guardian ad litem to substantially comply with the standards adopted for attorneys appointed as guardians ad litem pursuant to § 16.1-266.1, the court may adjust the cost sought by the guardian ad litem of such services.

3. For the purposes of this subsection, "other party with a legitimate interest" shall not include child welfare agencies or local departments of social services.

§ 17.1-275.5. Amounts to be added; judgment in favor of the Commonwealth.

A. The clerk shall assess, in addition to the fees provided for by § 17.1-275.1, 17.1-275.2, 17.1-275.3, 17.1-275.4, 17.1-275.7, 17.1-275.8, 17.1-275.9, 17.1-275.10, 17.1-275.11, 17.1-275.11:1, or 17.1-275.12, the following costs:

1. Any amount paid by the Commonwealth for legal representation of the defendant;

2. Any amount paid for trial transcripts;

3. 2. Extradition costs;

4. 3. Costs of psychiatric evaluation;

5. 4. Costs taxed against the defendant as appellant under Rule 5A:30 of the Rules of the Supreme

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58 Court;

59 ~~6.~~ 5. Any fee for a returned check or disallowed credit card charge assessed pursuant to subdivision
60 A 28 of § 17.1-275;

61 ~~7.~~ 6. Any jury costs;

62 ~~8.~~ 7. Any assessment made pursuant to subdivision A 10 of § 17.1-275;

63 ~~9.~~ 8. Any fees prescribed in §§ 18.2-268.8 and 46.2-341.26:8;

64 ~~10.~~ 9. Any court costs related to an ignition interlock device;

65 ~~11.~~ 10. Any fee for testing for HIV;

66 ~~12.~~ 11. Any fee for processing an individual admitted to jail as prescribed in § 15.2-1613.1;

67 ~~13.~~ 12. Any fee for courthouse security personnel as prescribed in § 53.1-120;

68 ~~14.~~ 13. Any fee for a DNA sample as prescribed in § 19.2-310.2;

69 ~~15.~~ 14. Reimbursement to the Commonwealth of medical fees as prescribed in § 19.2-165.1;

70 ~~16.~~ 15. Any fee for a local criminal justice training academy as prescribed in § 9.1-106;

71 ~~17.~~ 16. Any fee prescribed by §§ 16.1-69.48:1.01 and 17.1-275.11;

72 ~~18.~~ 17. Any expenses charged pursuant to subsection B or F of § 19.2-187.1; and

73 ~~19.~~ 18. Any fee for an electronic summons system as prescribed in § 17.1-279.1.

74 B. The total amount of assessments described in subsection A, including (i) the fees provided for by
75 § 17.1-275.1, 17.1-275.2, 17.1-275.3, 17.1-275.4, 17.1-275.7, 17.1-275.8, 17.1-275.9, 17.1-275.10,
76 17.1-275.11, 17.1-275.11:1, or 17.1-275.12 and (ii) all other fines and costs, shall be docketed by the
77 clerk as a judgment against the defendant in favor of the Commonwealth in accordance with § 8.01-446.

78 *C. No fee shall be assessed by the clerk to the defendant for any amount paid by the Commonwealth*
79 *for legal representation of the defendant if the court has determined such defendant to be indigent*
80 *pursuant to § 19.2-159.*

81 **§ 19.2-159. Determination of indigency; guidelines; statement of indigence; appointment of**
82 **counsel.**

83 A. If the accused shall claim that he is indigent, and the charge against him is a criminal offense that
84 may be punishable by confinement in the state correctional facility or jail, subject to the provisions of §
85 19.2-160, the court shall determine from oral examination of the accused or other competent evidence
86 whether or not the accused is indigent within the contemplation of law pursuant to the guidelines set
87 forth in this section.

88 B. In making its finding, the court shall determine whether or not the accused is a current recipient
89 of a state or federally funded public assistance program for the indigent. If the accused is a current
90 recipient of such a program and does not waive his right to counsel or retain counsel on his own behalf,
91 he shall be presumed eligible for the appointment of counsel. This presumption shall be rebuttable where
92 the court finds that a more thorough examination of the financial resources of the defendant is
93 necessary. If the accused shall claim to be indigent and is not presumptively eligible under the
94 provisions of this section, then a thorough examination of the financial resources of the accused shall be
95 made with consideration given to the following:

96 1. The net income of the accused, which shall include his total salary and wages minus deductions
97 required by law. The court also shall take into account income and amenities from other sources
98 including but not limited to social security funds, union funds, veteran's benefits, other regular support
99 from an absent family member, public or private employee pensions, dividends, interests, rents, estates,
100 trusts, or gifts.

101 2. All assets of the accused which are convertible into cash within a reasonable period of time
102 without causing substantial hardship or jeopardizing the ability of the accused to maintain home and
103 employment. Assets shall include all cash on hand as well as in checking and savings accounts, stocks,
104 bonds, certificates of deposit, and tax refunds. All personal property owned by the accused which is
105 readily convertible into cash shall be considered, except property exempt from attachment. Any real
106 estate owned by the accused shall be considered in terms of the amounts which could be raised by a
107 loan on the property. For purposes of eligibility determination, the income, assets, and expenses of the
108 spouse, if any, who is a member of the accused's household, shall be considered, unless the spouse was
109 the victim of the offense or offenses allegedly committed by the accused.

110 3. Any exceptional expenses of the accused and his family which would, in all probability, prohibit
111 him from being able to secure private counsel. Such items shall include but not be limited to costs for
112 medical care, family support obligations, and child care payments.

113 The available funds of the accused shall be calculated as the sum of his total income and assets less
114 the exceptional expenses as provided in the first paragraph of this subdivision 3. If the accused does not
115 waive his right to counsel or retain counsel on his own behalf, counsel shall be appointed for the
116 accused if his available funds are equal to or below 125 percent of the federal poverty income
117 guidelines prescribed for the size of the household of the accused by the federal Department of Health
118 and Human Services. The Supreme Court of Virginia shall be responsible for distributing to all courts
119 the annual updates of the federal poverty income guidelines made by the Department.

If the available funds of the accused exceed 125 percent of the federal poverty income guidelines and the accused fails to employ counsel and does not waive his right to counsel, the court may, in exceptional circumstances, and where the ends of justice so require, appoint an attorney to represent the accused. However, in making such appointments, the court shall state in writing its reasons for so doing. The written statement by the court shall be included in the permanent record of the case.

C. If the court determines that the accused is indigent as contemplated by law pursuant to the guidelines set forth in this section, the court shall provide the accused with a statement which shall contain the following:

"I have been advised this _____ day of _____, 20__, by the (name of court) court of my right to representation by counsel in the trial of the charge pending against me; I certify that I am without means to employ counsel and I hereby request the court to appoint counsel for me."

_____ (signature of accused)

The court shall also require the accused to complete a written financial statement to support the claim of indigency and to permit the court to determine whether or not the accused is indigent within the contemplation of law. The accused shall execute the said statements under oath, and the said court shall appoint competent counsel to represent the accused in the proceeding against him, including an appeal, if any, until relieved or replaced by other counsel.

The executed statements by the accused and the order of appointment of counsel shall be filed with and become a part of the record of such proceeding.

All other instances in which the appointment of counsel is required for an indigent shall be made in accordance with the guidelines prescribed in this section.

D. Except in jurisdictions having a public defender, or unless (i) the public defender is unable to represent the defendant by reason of conflict of interest or (ii) the court finds that appointment of other counsel is necessary to attain the ends of justice, counsel appointed by the court for representation of the accused shall be selected by a fair system of rotation among members of the bar practicing before the court whose names are on the list maintained by the Indigent Defense Commission pursuant to § 19.2-163.01. If no attorney who is on the list maintained by the Indigent Defense Commission is reasonably available, the court may appoint as counsel an attorney not on the list who has otherwise demonstrated to the court's satisfaction an appropriate level of training and experience. The court shall provide notice to the Commission of the appointment of the attorney.

E. No person who is found to be indigent pursuant to this section shall have fees assessed against him for any amount paid by the Commonwealth for legal representation.

§ 19.2-163. Compensation of court-appointed counsel.

Upon submission to the court, for which appointed representation is provided, of a detailed accounting of the time expended for that representation, made within 30 days of the completion of all proceedings in that court, counsel appointed to represent an indigent accused in a criminal case shall be compensated for his services on an hourly basis at a rate set by the Supreme Court of Virginia in a total amount not to exceed the amounts specified in the following schedule:

1. In a district court, a sum not to exceed \$120, provided that, notwithstanding the foregoing limitation, the court in its discretion, and subject to guidelines issued by the Executive Secretary of the Supreme Court of Virginia, may waive the limitation of fees up to (i) an additional \$120 when the effort expended, the time reasonably necessary for the particular representation, the novelty and difficulty of the issues, or other circumstances warrant such a waiver; or (ii) an amount up to \$650 to defend, in the case of a juvenile, an offense that would be a felony if committed by an adult that may be punishable by confinement in the state correctional facility for a period of more than 20 years, or a charge of violation of probation for such offense, when the effort expended, the time reasonably necessary for the particular representation, the novelty and difficulty of the issues, or other circumstances warrant such a waiver; or (iii) such other amount as may be provided by law. Such amount shall be allowed in any case wherein counsel conducts the defense of a single charge against the indigent through to its conclusion or a charge of violation of probation at any hearing conducted under § 19.2-306; thereafter, compensation for additional charges against the same accused also conducted by the same counsel shall be allowed on the basis of additional time expended as to such additional charges;

2. In a circuit court (i) to defend a Class 1 felony charge, compensation for each appointed attorney in an amount deemed reasonable by the court; (ii) to defend a felony charge that may be punishable by confinement in the state correctional facility for a period of more than 20 years, or a charge of violation of probation for such offense, a sum not to exceed \$1,235, provided that, notwithstanding the foregoing limitation, the court in its discretion, and subject to guidelines issued by the Executive Secretary of the Supreme Court of Virginia, may waive the limitation of fees up to an additional \$850 when the effort expended, the time reasonably necessary for the particular representation, the novelty and difficulty of the issues, or other circumstances warrant such a waiver; (iii) to defend any other felony charge, or a

charge of violation of probation for such offense, a sum not to exceed \$445, provided that, notwithstanding the foregoing limitation, the court in its discretion, and subject to guidelines issued by the Executive Secretary of the Supreme Court of Virginia, may waive the limitation of fees up to an additional \$155 when the effort expended, the time reasonably necessary for the particular representation, the novelty and difficulty of the issues, or other circumstances warrant such a waiver; and (iv) in the circuit court only, to defend any misdemeanor charge punishable by confinement in jail or a charge of violation of probation for such offense, a sum not to exceed \$158. In the event any case is required to be retried due to a mistrial for any cause or reversed on appeal, the court may allow an additional fee for each case in an amount not to exceed the amounts allowable in the initial trial. In the event counsel is appointed to defend an indigent charged with a felony that is punishable as a Class 1 felony, each attorney appointed shall continue to receive compensation as provided in this paragraph for defending such a felony, regardless of whether the charge is reduced or amended to a lesser felony, prior to final disposition of the case. In the event counsel is appointed to defend an indigent charged with any other felony, such counsel shall receive compensation as provided in this paragraph for defending such a felony, regardless of whether the charge is reduced or amended to a misdemeanor or lesser felony prior to final disposition of the case in either the district court or circuit court.

Counsel appointed to represent an indigent accused in a criminal case, who are not public defenders, may request an additional waiver exceeding the amounts provided for in this section. The request for any additional amount shall be submitted to the presiding judge, in writing, with a detailed accounting of the time spent and the justification for the additional amount. The presiding judge shall determine, subject to guidelines issued by the Executive Secretary of the Supreme Court of Virginia, whether the request for an additional amount is justified in whole or in part, by considering the effort expended and the time reasonably necessary for the particular representation, and, if so, shall forward the request as approved to the chief judge of the circuit court or district court for approval. If the presiding judge determines that the request for an additional amount is not justified in whole or in part, such presiding judge shall provide to the requesting attorney, in writing, the reasons for such determination and shall, if such request has been approved in part, include a copy of such writing when forwarding the request as approved to the chief judge of the circuit court or district court for approval. If the chief judge of the circuit court or district court, upon review of the request as approved, determines, subject to the guidelines issued by the Executive Secretary of the Supreme Court of Virginia, that any part of the request for an additional amount is not justified, such chief judge shall provide to the requesting attorney and to the presiding judge, in writing, the reason for such determination.

If at any time the funds appropriated to pay for waivers under this section become insufficient, the Executive Secretary of the Supreme Court of Virginia shall so certify to the courts and no further waivers shall be approved.

The circuit or district court shall direct the payment of such reasonable expenses incurred by such court-appointed counsel as it deems appropriate under the circumstances of the case. Counsel appointed by the court to represent an indigent charged with repeated violations of the same section of the Code of Virginia, with each of such violations arising out of the same incident, occurrence, or transaction, shall be compensated in an amount not to exceed the fee prescribed for the defense of a single charge, if such offenses are tried as part of the same judicial proceeding. The trial judge shall consider any guidelines established by the Supreme Court but shall have the sole discretion to fix the amount of compensation to be paid counsel appointed by the court to defend a felony charge that is punishable as a Class 1 felony.

The circuit or district court shall direct that the foregoing payments shall be paid out by the Commonwealth, if the defendant is charged with a violation of a statute, or by the county, city, or town, if the defendant is charged with a violation of a county, city, or town ordinance, to the attorney so appointed to defend such person as compensation for such defense.

Counsel representing a defendant charged with a Class 1 felony may submit to the court, on a monthly basis, a statement of all costs incurred and fees charged by him in the case during that month. Whenever the total charges as are deemed reasonable by the court for which payment has not previously been made or requested exceed \$1,000, the court may direct that payment be made as otherwise provided in this section.

When such directive is entered upon the order book of the court, the Commonwealth, county, city or town, as the case may be, shall provide for the payment out of its treasury of the sum of money so specified. If the defendant is convicted, the amount allowed by the court to the attorney appointed to defend him shall be taxed against the defendant as a part of the costs of prosecution and, if collected, the same shall be paid to the Commonwealth, or the county, city or town, as the case may be. In the event that counsel for the defendant requests a waiver of the limitations on compensation, the court shall assess against the defendant an amount equal to the pre-waiver compensation limit specified in this section for each charge for which the defendant was convicted. An abstract of such costs shall be docketed in the judgment docket and execution lien book maintained by such court.

Any statement submitted by an attorney for payments due him for indigent representation or for representation of a child pursuant to § 16.1-266 shall, after the submission of the statement, be forwarded forthwith by the clerk to the Commonwealth, county, city, or town, as the case may be, responsible for payment. *If the court has determined such child's parents to be indigent pursuant to § 19.2-159, no such amount allowed by the court to the attorney appointed to defend him shall be taxed against such child as part of the costs of prosecution.*

For the purposes of this section, the defense of a case may be considered conducted through to its conclusion and an appointed counsel entitled to compensation for his services in the event an indigent accused fails to appear in court subject to a capias for his arrest or a show cause summons for his failure to appear and remains a fugitive from justice for one year following the issuance of the capias or the summons to show cause, and appointed counsel has appeared at a hearing on behalf of the accused.

Effective July 1, 2007, the Executive Secretary of the Supreme Court of Virginia shall track and report the number and category of offenses charged involving adult and juvenile offenders in cases in which court-appointed counsel is assigned. The Executive Secretary shall also track and report the amounts paid by waiver above the initial cap to court-appointed counsel. The Executive Secretary shall provide these reports to the Governor, members of the House Committee on Appropriations, and members of the Senate Committee on Finance and Appropriations on a quarterly basis.

§ 19.2-163.4:1. Taxation of convicted persons for representation costs prohibited.

In any case in which an attorney from a public defender office represents an indigent person charged with an offense and such person is convicted, the sum that would have been allowed a court-appointed attorney as compensation and as reasonable expenses shall *not* be taxed against the person defended as a part of the costs of the prosecution; ~~and, if collected, shall be paid to the Commonwealth or, if payment was made to the Commonwealth by a locality for defense of a local ordinance violation, to the appropriate county, city or town. An abstract of such costs shall be docketed in the judgment lien docket and execution book of the court.~~