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SENATE BILL NO. 348

Offered January 12, 2022

Prefiled January 11, 2022

A *BILL to amend and reenact §§ 16.1-244, 20-78.2, 20-103, 20-108.1, and 63.2-1918 of the Code of Virginia, relating to child support and spousal support; retroactivity; child support obligations; party's incarceration not deemed voluntary unemployment or underemployment.*

Patron—Surovell

Referred to Committee on the Judiciary

Be it enacted by the General Assembly of Virginia:

1. That §§ 16.1-244, 20-78.2, 20-103, 20-108.1, and 63.2-1918 of the Code of Virginia are amended and reenacted as follows:

§ 16.1-244. Concurrent jurisdiction; exceptions.

A. Nothing contained in this law shall deprive any other court of the concurrent jurisdiction to determine the custody of children upon a writ of habeas corpus under the law, or to determine the custody, guardianship, visitation or support of children when such custody, guardianship, visitation or support is incidental to the determination of causes pending in such courts, nor deprive a circuit court of jurisdiction to determine spousal support in a suit for separate maintenance. However, when a suit for divorce has been filed in a circuit court, in which the custody, guardianship, visitation or support of children of the parties or spousal support is raised by the pleadings and a hearing, including a pendente lite hearing, is set by the circuit court on any such issue for a date certain or on a motions docket to be heard within 21 days of the filing, the juvenile and domestic relations district courts shall be divested of the right to enter any further decrees or orders to determine custody, guardianship, visitation or support when raised for such hearing and such matters shall be determined by the circuit court unless both parties agreed to a referral to the juvenile court. *In any case in which the jurisdiction of the juvenile and domestic relations district court has been divested pursuant to this section and no final support order has been entered, any award for child support or spousal support in the circuit court shall be retroactive to the date on which the proceeding was commenced by the filing of the action in the juvenile and domestic relations district court, provided that the petitioner exercised due diligence in the service of the respondent.* Nothing in this section shall deprive a circuit court of the authority to refer any such case to a commissioner for a hearing or shall deprive the juvenile and domestic relations district courts of the jurisdiction to enforce its valid orders prior to the entry of a conflicting order of any circuit court for any period during which the order was in effect or to temporarily place a child in the custody of any person when that child has been adjudicated abused, neglected, in need of services or delinquent subsequent to the order of any circuit court.

B. Jurisdiction of cases involving violations of federal law by a child shall be concurrent and shall be assumed only if waived by the federal court or the United States attorney.

§ 20-78.2. Attorney fees and interest on support arrearage.

The entry of an order or decree of support for a spouse or for support and maintenance of a child under the provisions of this chapter or §§ 20-107.1 through 20-109 shall constitute a final judgment for any sum or sums in arrears. This order shall also include an amount for interest on the arrearage *including from the date support is established or retroactively modified* at the judgment interest rate as established by § 6.2-302 unless the obligee, in a writing submitted to the court, waives the collection of interest; and may include reasonable ~~attorneys'~~ attorney fees if the total arrearage for support and maintenance, excluding interest, is equal to or greater than three months of support and maintenance.

§ 20-103. Court may make orders pending suit for divorce, custody or visitation, etc.

A. In suits for divorce, annulment and separate maintenance, and in proceedings arising under subdivision A 3 or subsection L of § 16.1-241, the court having jurisdiction of the matter may, at any time pending a suit pursuant to this chapter, in the discretion of such court, make any order that may be proper (i) to compel a spouse to pay any sums necessary for the maintenance and support of the petitioning spouse, including (a) an order that the other spouse provide health care coverage for the petitioning spouse, unless it is shown that such coverage cannot be obtained, or (b) an order that a party pay secured or unsecured debts incurred jointly or by either party, (ii) to enable such spouse to carry on the suit, (iii) to prevent either spouse from imposing any restraint on the personal liberty of the other spouse, (iv) to provide for the custody and maintenance of the minor children of the parties, including an order that either party or both parties provide health care coverage or cash medical support, or both, for the children, (v) to provide support, calculated in accordance with § 20-108.2, for any child of the

parties to whom a duty of support is owed and to pay or continue to pay support for any child over the age of 18 who meets the requirements set forth in subsection C of § 20-124.2, (vi) for the exclusive use and possession of the family residence during the pendency of the suit, (vii) to preserve the estate of either spouse, so that it be forthcoming to meet any decree which may be made in the suit, (viii) to compel either spouse to give security to abide such decree, or (ix) (a) to compel a party to maintain any existing policy owned by that party insuring the life of either party or to require a party to name as a beneficiary of the policy the other party or an appropriate person for the exclusive use and benefit of the minor children of the parties and (b) to allocate the premium cost of such life insurance between the parties, provided that all premiums are billed to the policyholder. Nothing in clause (ix) shall be construed to create an independent cause of action on the part of any beneficiary against the insurer or to require an insurer to provide information relating to such policy to any person other than the policyholder without the written consent of the policyholder. The parties to any petition where a child whose custody, visitation, or support is contested shall show proof that they have attended within the 12 months prior to their court appearance or that they shall attend within 45 days thereafter an educational seminar or other like program conducted by a qualified person or organization approved by the court except that the court may require the parties to attend such seminar or program in uncontested cases only if the court finds good cause. The seminar or other program shall be a minimum of four hours in length and shall address the effects of separation or divorce on children, parenting responsibilities, options for conflict resolution and financial responsibilities. Once a party has completed one educational seminar or other like program, the required completion of additional programs shall be at the court's discretion. Parties under this section shall include natural or adoptive parents of the child, or any person with a legitimate interest as defined in § 20-124.1. The fee charged a party for participation in such program shall be based on the party's ability to pay; however, no fee in excess of \$50 may be charged. Whenever possible, before participating in mediation or alternative dispute resolution to address custody, visitation or support, each party shall have attended the educational seminar or other like program. The court may grant an exemption from attendance of such program for good cause shown or if there is no program reasonably available. Other than statements or admissions by a party admitting criminal activity or child abuse, no statement or admission by a party in such seminar or program shall be admissible into evidence in any subsequent proceeding.

A1. Any award or order made by the court pursuant to subsection A shall be paid from the post-separation income of the obligor unless the court, for good cause shown, orders otherwise. Upon the request of either party, the court may identify and state in such order or award the specific source from which the financial obligation imposed is to be paid.

A2. *In any case in which the jurisdiction of the juvenile and domestic relations district court has been divested pursuant to § 16.1-244 and no final support order has been entered, any award for child support or spousal support in the circuit court pursuant to subsection A shall be retroactive to the date on which the proceeding was commenced by the filing of the action in the juvenile and domestic relations district court, provided that the petitioner exercised due diligence in the service of the respondent.*

B. In addition to the terms provided in subsection A, upon a showing by a party of reasonable apprehension of physical harm to that party by such party's family or household member as that term is defined in § 16.1-228, and consistent with rules of the Supreme Court of Virginia, the court may enter an order excluding that party's family or household member from the jointly owned or jointly rented family dwelling. In any case where an order is entered under this paragraph, pursuant to an ex parte hearing, the order shall not exclude a family or household member from the family dwelling for a period in excess of 15 days from the date the order is served, in person, upon the person so excluded. The order may provide for an extension of time beyond the 15 days, to become effective automatically. The person served may at any time file a written motion in the clerk's office requesting a hearing to dissolve or modify the order. Nothing in this section shall be construed to prohibit the court from extending an order entered under this subsection for such longer period of time as is deemed appropriate, after a hearing on notice to the parties. If the party subject to the order fails to appear at this hearing, the court may extend the order for a period not to exceed six months.

C. In cases other than those for divorce in which a custody or visitation arrangement for a minor child is sought, the court may enter an order providing for custody, visitation or maintenance pending the suit as provided in subsection A. The order shall be directed to either parent or any person with a legitimate interest who is a party to the suit.

D. Orders entered pursuant to this section which provide for custody or visitation arrangements pending the suit shall be made in accordance with the standards set out in Chapter 6.1 (§ 20-124.1 et seq.). Orders entered pursuant to subsection B shall be certified by the clerk and forwarded as soon as possible to the local police department or sheriff's office which shall, on the date of receipt, enter the name of the person subject to the order and other appropriate information required by the Department of State Police into the Virginia crime information network system established and maintained by the

Department of State Police pursuant to Chapter 2 (§ 52-12 et seq.) of Title 52. If the order is later dissolved or modified, a copy of the dissolution or modification shall also be certified, forwarded and entered in the system as described above.

E. There shall be a presumption in any judicial proceeding for pendente lite spousal support and maintenance under this section that the amount of the award that would result from the application of the formula set forth in this section is the correct amount of spousal support to be awarded. The court may deviate from the presumptive amount as provided in subsection H.

F. If the court is determining both an award of pendente lite spousal support and maintenance and an award of child support, the court shall first make a determination of the amount of the award of pendente lite spousal support, if any, owed by one party to the other under this section.

G. If the parties have minor children in common, the presumptive amount of an award of pendente lite spousal support and maintenance shall be the difference between 26 percent of the payor spouse's monthly gross income and 58 percent of the payee spouse's monthly gross income. If the parties have no minor children in common, the presumptive amount of the award shall be the difference between 27 percent of the payor spouse's monthly gross income and 50 percent of the payee spouse's monthly gross income. For the purposes of this section, monthly gross income shall have the same meaning as it does in section § 20-108.2.

H. The court may deviate from the presumptive amount for good cause shown, including any relevant evidence relating to the parties' current financial circumstances or the impact of any tax exemption and any credits resulting from such exemptions that indicates the presumptive amount is inappropriate.

I. The presumptive formula set forth in this section shall only apply to cases where the parties' combined monthly gross income does not exceed \$10,000.

J. An order entered pursuant to this section shall have no presumptive effect and shall not be determinative when adjudicating the underlying cause.

§ 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 any case in which the jurisdiction of the juvenile and domestic relations district court has been divested pursuant to § 16.1-244 and no final child support order has been entered, any award for child support in the circuit court shall be retroactive to the date on which the proceeding was commenced by the filing of the action in the juvenile and domestic relations district court, provided that the petitioner exercised due diligence in the service of the respondent.

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

182 *party's current incarceration alone, as defined in § 8.01-195.10, for 180 or more consecutive days, other*
183 *than for failure to pay child support as ordered or for a crime against the child who is the subject of*
184 *the child support order or the custodial parent of that child, shall not be deemed voluntary*
185 *unemployment or voluntary underemployment. In addition, notwithstanding subsection F, a party's*
186 *incarceration for 180 or more consecutive days, other than for failure to pay child support as ordered*
187 *or for a crime against the child who is the subject of the child support order or the custodial parent of*
188 *that child, shall be a material change in circumstances upon which a modification of child support may*
189 *be based;*

190 4. Any child care costs incurred on behalf of the child or children due to the attendance of a
191 custodial parent in an educational or vocational program likely to maintain or increase the party's
192 earning potential;

193 5. Debts of either party arising during the marriage for the benefit of the child;

194 6. Direct payments ordered by the court for maintaining life insurance coverage pursuant to
195 subsection D, education expenses, or other court-ordered direct payments for the benefit of the child;

196 7. Extraordinary capital gains such as capital gains resulting from the sale of the marital abode;

197 8. Any special needs of a child resulting from any physical, emotional, or medical condition;

198 9. Independent financial resources of the child or children;

199 10. Standard of living for the child or children established during the marriage;

200 11. Earning capacity, obligations, financial resources, and special needs of each parent;

201 12. Provisions made with regard to the marital property under § 20-107.3, where said property earns
202 income or has an income-earning potential;

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

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

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

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

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

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

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

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

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

243 **§ 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 failure to pay child support as ordered or for a crime against the child who 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 amending subdivision B 3 of § 20-108.1 and § 63.2-1918 of the Code of Virginia shall apply only to petitions for child support and petitions for modifications of child support orders commenced on or after July 1, 2022, 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 if a parent was incarcerated prior to July 1, 2022, and the incarcerated party cannot establish a material change in circumstances other than incarceration.

3. That if the Office of Child Support Enforcement of the U.S. Department of Health and Human Services determines in writing that the second enactment of this act is not compliance with 42 C.F.R. Part 433, the second enactment of this act shall immediately be vacated on such date, the Virginia Division of Child Support Enforcement shall certify the same, notify the Chairmen of the Senate Committee on the Judiciary and House Committee for Courts of Justice, and prominently publish notice of the same on its website for 180 days.