

Virginia Child Support Guidelines Review Panel
March 30, 2021
9:00 a.m. – 12:00 p.m.
Virtual Meeting via Zoom

Meeting Minutes

Members Present:

The Honorable Deborah V. Bryan
Craig M. Burschem, Deputy Commissioner of State Programs
Daniel L. Gray, Esq.
Valerie L’Herrou, Esq.
Dennis M. Hottell, Esq.
Ryan Johnston
Delegate James A. (Jay) Leftwich, Jr.
Yvonne J. Nageotte
Kim-Marie A. Piggott-Brown
Kimberlee H. Ramsey, Esq.
The Honorable Edward A. Robbins, Jr., Chair
Senator Scott A. Surovell

Members Not Present:

Shawn Edwards
Delegate Don L. Scott

Panel Staff Members Present:

Mitchell Broudy, Sr. Assistant Attorney General
Alice Burlinson, Sr. Assistant Attorney General
Jen Krajewski, Policy Program Consultant
Melody McKinley, Panel Administrator
Anne Prentice, Assistant Attorney General

Others Present:

Barbara Lacina, Director of Division of Child Support Enforcement

I. Welcome and Introductions

All

Judge Robbins welcomed the Panel and its newest member, Daniel L. Gray, Esq. Panel staff introduced themselves.

II. Federal Final Rule Requirements

Panel Staff

Panel staff presented on the four discussion points.

A. Low Income Adjustment – Alice Burlinson

Background: The federal final rule requires that guidelines take into consideration “the basic subsistence needs of the noncustodial parent...by incorporating a low-income adjustment.” DCSE asked the federal Office of Child Support Enforcement (OCSE) whether the language currently in Va. Code § 20-108.2(B) was sufficient to meet the federal requirement.

OCSE advised that the current language is sufficient. Nothing further is needed on this topic.

B. Imputing Income – Mitch Broudy

Background: The federal final rule requires that, if imputation is authorized, the guidelines must consider a long list of factors. The intent is to require a focus on fact-gathering and orders based on ability to pay. At the October meeting of the Panel the consensus was to recommend codifying case law requiring evidence for imputation.

Most states use one of three approaches:

1. Incorporating the final rule language into state law (Ex. Massachusetts)

2. Creating a hybrid model using federal rule language and minimum wage (Ex. North Carolina and Indiana)
3. Creating a hybrid model using federal rule, minimum wage, and data from the Bureau of Labor Statistics (BLS) (Ex. Delaware)

Mitch Broudy also demonstrated a prototype of an imputation calculator.

Panel Discussion:

The Panel emphasized keeping in mind pro se litigants and the burden of proof. There were some positive opinions on Delaware's statute, particularly the unemployment presumption and the ability for judicial notice of BLS data. The point was made that when dealing with higher incomes, data sets can be somewhat unreliable due to large bands. It will be important to very carefully craft the language. There was a concern about inadvertently shifting the burden of proof to the court. There must be evidence to impute income.

An issue was also presented about parents getting paid under the table. This is a problem for both the court and DCSE. The idea was presented about developing some sort of a "pro se litigant filing kit."

Concern was raised about the prototype tool. It does not account for decisions on reasonableness.

Question to be answered: Can a person be denied unemployment even though they were not dismissed for cause?

Consensus: The Panel would like to go with a hybrid solution along the lines of Delaware's approach. Staff will draft language and provide to the panel 30 days before the next meeting.

C. Incarceration as Voluntary Unemployment – Alice Burlinson

Background: The federal final rule requires that states not treat incarceration as voluntary unemployment. At the October meeting of the Panel the consensus was to move forward with some form of relief and recommend overturning current case law.

Ms. Burlinson provided an overview on the variety of approaches used by other states. In addition, she provided a summary of House Bill 2055 and its journey through the 2021 General Assembly session. OCSE has advised that the bill in its current form on the Governor's desk does not bring Virginia into compliance with federal law. The Governor's deadline to act on the bill is March 31, 2021. Ms. Burlinson also reminded the Panel what is at stake if Virginia is not in compliance with federal law.

Panel Discussion:

There was discussion as to whether the child support order is a vested right that cannot be taken away and that, absent a material change in circumstances, it is a final judgment. The final judgment comes into play when the support is not paid and an arrears balance accrues. This legislation does not affect arrearages.

Beyond the issue of support arrears, the Panel also discussed the federal rule effectively creating a retroactive substantial change in circumstances to support motions to amend support. Modifications of support orders currently require the moving party to establish a substantial change in circumstances before modification of support amounts can be considered. House Bill 2055 Line 117 provides that the provisions of the legislation, if enacted, cannot be used as a material change in circumstances to support

a motion to modify. DCSE advises that this provision of the legislation will not bring Virginia into compliance with the federal rule pertaining to incarceration as voluntary unemployment. Further discussion was had on the subject and no consensus was reached on this portion of House Bill 2055.

Judge Robbins and Judge Bryan took no part in the Panel discussion concerning the policy aspects of this issue.

Judge Robbins and Judge Bryan proposed that any change in current statutes expressly set out how courts are to determine that the 180 days of confinement threshold has been reached. Is it the confinement sentence adjudged? Is it the confinement actually served? Or something else altogether?

Panel members also expressed concerns about the amendment made by Senator Morrissey to remove the exception for cases where incarceration was due to a failure to pay child support.

The point was emphasized that the Panel should keep in mind the dollars at stake versus the small number of cases that would be affected.

Consensus: The Panel does not support the amendment proposed by Senator Morrissey. The Panel asked DCSE to make a recommendation on behalf of the Panel to the Governor's Office that the amendment be removed. (DSS sent the Panel's recommendation to the Governor's Office on March 30, 2021.)

D. Health Care Coverage – Anne Prentice

Background: The federal final rule amended health care requirements to allow for a child's eligibility for Medicaid to be considered sufficient to meet the child's health care needs. A legislative change will be necessary to ensure consistent processes across the state and to clarify that a change in health care coverage must be considered as a material change in circumstances. Example language was presented from Minnesota, Texas and Utah.

Panel Discussion:

There was a discussion as to what the intent was behind this change. Staff opined that the intent is to ensure that all children are covered by health insurance. In addition, courts should not be denying requests for review on the basis of no change in circumstances if health coverage needs to be addressed.

Consensus: Staff will draft two proposals using Texas and Utah's approaches to be provided to the Panel 30 days before the next meeting.

III. Other Issues

All

Is a statutory change required to deal with the new \$300 per month child tax credit? In the immediate term, the court can use the catchall deviation factor. This item will be added to the agenda for the next meeting. Staff will prepare an outline of the topic for discussion.

IV. Administrative Matters

All

For future meetings, PowerPoint presentations and any other materials will be provided 30 days in advance of the meeting.

In person versus remote meetings: The Panel's goal is for the September 2021 meeting to take place in person. Anyone who does not feel comfortable or is unable to meet in person may join the meeting virtually.

V. Adjourn

All

The Panel adjourned at 11:10 a.m.

Action Items for Panel Members:

- Respond to Doodle poll regarding next meeting date.

Action Items for Staff:

- Send a Doodle survey to the Panel members to select a date for the next meeting in September.
- Research unemployment question (Can a person be denied unemployment even though they were not dismissed for cause?).
- Prepare draft language for imputing income using a hybrid solution.
- Make recommendation to the Governor's Office regarding HB 2055.
- Prepare two draft proposals for possible health care coverage language.
- Research and prepare a presentation to provide background for discussion of the child tax credit.