



Commonwealth of Virginia
CHILD SUPPORT GUIDELINES REVIEW PANEL

The Honorable Edward A. Robbins, Jr., Chair

December 8, 2021

TO: The Honorable Ralph S. Northam,
Governor
and
Members of the Virginia General Assembly

FROM: The Honorable Edward A. Robbins, Jr.
Chair, Child Support Guidelines Review Panel

A handwritten signature in black ink, appearing to be "E. Robbins, Jr.", written over the text of the "FROM:" line.

SUBJECT: Transmittal of Panel Report for 2021

Va. Code §§ 20-108.1 and 20-108.2 set forth the Commonwealth's guidelines for the determination of child support obligations. In accordance with § 20-108.2(H), I am privileged to submit the Child Support Guidelines Review Panel's report of its review of Virginia's guidelines during the 2017-2021 quadrennium.

Whether appointed by the Governor or the General Assembly, the fifteen of us are grateful for the opportunity to serve the Commonwealth on a subject so vital to so many of our citizens.

cc: The Honorable Glenn Youngkin, Governor-Elect
The Honorable Daniel Carey, M.D., Secretary of Health and Human Resources

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Meetings

The Panel met four times from September 2019 through September 2021. The first meeting on September 19, 2019, was in person. Due to the state of emergency declared by Governor Northam during the COVID-19 pandemic, the second and third meetings on October 26, 2020, and March 30, 2021, were held virtually via the Zoom platform. The fourth meeting on September 29, 2021, was a hybrid, with a quorum of members attending in person and other members attending virtually via Zoom. Pursuant to Virginia law, only votes by in-person attendees were counted.¹ All meetings were public, announced on the Commonwealth Calendar, and posted on the General Assembly calendar and the Panel's page on the Division of Legislative Services' website.

Communications

Website

The Panel continued to use its webpage posted on the Division of Legislative Services' website (http://dls.virginia.gov/interim_studies_child_support.html) so that its activities would be transparent and available to the public through the internet. The website contains information about the Panel's membership, the Panel's email address, meeting materials, and research information. Each meeting is listed separately and contains the agenda, meeting minutes, and any materials offered during that meeting, including PowerPoint presentations, research and analysis, and other related documents.

Email

The Panel used its email address (vaguidelinespanel@dss.virginia.gov) to receive email comments from concerned citizens and the public. During this cycle, the Panel received three emails. Of those, two were about specific Division of Child Support Enforcement (DCSE) cases and were referred to DCSE for a response. The remaining question was on the topic of calculating child support when a custodial parent has additional children; the writer asked that the Panel consider this issue during its deliberations. Panel staff replied to all correspondence.

Policy Issues Considered

The Panel focused its work on the federal rule requirements that must be enacted in 2022 in order for Virginia's child support program to continue receiving federal funding. After reviewing the federal rule, current law, background, and research regarding these issues, the Panel made the following decisions:

¹ See [H7001](#), Ch. 1, § 17(a)-(c), 2021 Special Session II, and Va. Code §§ [3708.2](#) and [3708.10](#).

1. Ability to Pay

Based on the federal rule, [45 C.F.R. § 302.56](#)(c)(1) now requires that state child support guidelines provide that child support orders are based on a noncustodial parent's earnings, income, and other evidence of ability to pay.

Panel decision: The Panel determined the Virginia's current guidelines already address this requirement, so the Panel did not need to take any action on this issue. In addition, the Panel agreed that adding a statutory definition of ability to pay was unnecessary.

2. Basic Subsistence Level

Based on the federal rule, [45 C.F.R. § 302.56](#)(c)(1)(ii) now requires that state child support guidelines must consider the basic subsistence needs of noncustodial parents with limited ability to pay by incorporating a low-income adjustment. This Panel reviewed the previous Panel's decision not to incorporate a low-income adjustment into the guidelines schedule and to instead recommend adding language to Va. Code § [20-108.2](#)(B) to allow that, if an obligor's gross income is equal to or less than 150% of the federal poverty level, the court, upon hearing evidence that there is no ability to pay, may set the obligation below the presumptive statutory minimum obligation amount provided that doing so does not result in an obligation that seriously impairs the custodial parent's ability to provide adequate housing and other basic necessities for the child. This language was added to § [20-108.2](#)(B) in 2014.

Virginia asked the federal Office of Child Support Enforcement (OCSE) for guidance as to whether this statutory language satisfies the federal rule's low-income adjustment requirement (see OCSE response at Appendix A).

Panel decision: Because OCSE advised that Virginia's current statutory language is sufficient, the Panel did not need to take any action on this requirement.

3. Imputation of Income

Based on the federal rule, [45 C.F.R. § 302.56](#)(c)(1)(iii) now requires that, if imputation of income is authorized, the guidelines must consider a noncustodial parent's specific circumstances, to the extent known, including such factors as the noncustodial parent's assets, residence, employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the noncustodial parent, the prevailing earnings level in the local community, and other relevant background factors.

At the Panel's request, Panel staff provided information on several other states' imputation models. The Panel contemplated various methods, focusing particularly on Delaware's statutory scheme, which includes a number of additional factors not specifically required by the federal rule, including use of occupational wage surveys, minimum wage, and hours worked to determine an imputed income amount.

Panel decision: The Panel agreed to recommend that Virginia adopt just the federal rule requirements when considering imputation of income by adding language to Va. Code § [20-108.1\(B\)\(3\)](#) that includes the factors specifically set out in the rule. The Panel also recommended that the court be required to communicate the reasons for its decision to impute income, which is already a requirement of Va. Code § [20-108.1\(B\)](#). The Panel deferred consideration of any additional issues to the next Panel.

4. Incarceration as Voluntary Unemployment

[45 C.F.R. § 302.56\(c\)\(3\)](#) now requires that states not treat incarceration as voluntary unemployment when establishing or modifying a child support order. The Panel discussed this new requirement throughout the review cycle. Virginia appellate courts have repeatedly held and affirmed that incarceration constitutes voluntary unemployment when establishing or modifying a child support order.

[House Bill 2055](#), introduced in the 2021 General Assembly Session, proposed a change to Va. Code § [20-108.1\(B\)](#) that would have considered incarceration as a material change in circumstances upon which a modification of child support could be based, except where a parent was incarcerated for failure to pay support as ordered or for a crime against the custodial parent or child that was the subject of the support order. An amendment to the bill language removed the exception for failure to pay support and added an enactment clause that would have applied the provision only to petitions for child support commenced on or after July 1, 2021, and to requests for modifications of those orders. The Governor's amendment established that the bill would not go into effect unless re-enacted by the 2022 Session.

Upon DCSE's request for guidance, OCSE indicated that the enactment clause would not be sufficient for Virginia's compliance since the requirement must apply to all orders, not just those entered on or after a certain date (see Appendix B).

The Panel considered input from DCSE Director Barbara Lacina, who noted the minimal number of cases that would be affected by the bill and discussed the impact to the child support program if the Commonwealth does not pass legislation during the 2022 Session that complies with the federal regulation. These ramifications include loss of significant federal funding, data sharing, and tools.

The two judicial members of the Panel did not take part in discussion concerning the policy aspects of this issue.

Panel decision: The Panel did not support the removal of the exception for cases where incarceration was due to a failure to pay child support and asked that DCSE make a recommendation on behalf of the Panel to the Governor's Office that this amendment be removed. In addition, at its September 29, 2021 meeting, a majority of the in-person Panel voting (2y-5n-1a) did not support a bill with language matching House Bill 2055 without the enactment clause if such a bill is introduced during the 2022 Session.

5. Health Care as a Basis for Review

The federal rule amended [45 CFR § 303.8](#) to require that the need to provide health care coverage must be an adequate basis to initiate modification of a support order regardless of whether an adjustment to the actual support obligation amount is necessary. The rule deleted prior language that prohibited consideration of public coverage, such as Medicaid, as adequate to meet a child's health care.

At the Panel's request, Panel staff researched how several states addressed this issue. After reviewing the information, the Panel asked staff to draft proposals based on approaches used by Utah and Texas. Utah's statutory language states that a child support order can be modified by petition any time there is a material change in the availability, coverage, or reasonableness of the cost of health care coverage for a child. Texas's language does not require a material change in circumstances but only applies to Title IV-D cases where the existing child support order does not provide health care coverage. The Panel considered both of these options, as well as a hybrid option that included both Utah's and Texas's approaches.

The Panel expressed concern about opening up all parts of a child support order due just to a change in health care coverage. The Panel discussed whether the current statutory language in Va. Code [§ 20-108](#) is sufficient to allow courts to address this issue. Currently, Va. Code [§ 63.2-1921\(A\)](#) allows the Department of Social Services to initiate a review only of the obligation amount ordered by a court.

Panel decision: The Panel recommended that Va. Code [§ 63.2-1921\(A\)](#) be amended to add health care coverage as a basis for the Department of Social Services to initiate review of a support order.

Decisions Made by the Panel

The Panel voted to recommend that legislation be enacted to:

- (1) Amend Va. Code [§ 20-108.1\(B\)\(3\)](#) to add a subsection requiring that a parent's specific circumstances, to the extent presented to the court, be considered if imputing income, including the factors set out by the federal rule (proposed language attached as Appendix C).
- (2) Amend Va. Code [§ 63.2-1921\(A\)](#) to add health care coverage as a basis for the Department of Social Services to initiate review of a child support order (proposed language attached as Appendix D).

The Panel voted not to support legislation with language matching House Bill 2055 from the 2021 General Assembly regarding the federal rule requirement that incarceration not be treated as voluntary unemployment when establishing or modifying child support orders, without the enactment clause added during to the bill during the 2021 Session.

Legislative Recommendations

The Panel's recommendations for legislative action are based on its votes recited above. The Panel recommends that the General Assembly enact legislation that will:

- (1) Amend Va. Code § [20-108.1](#)(B)(3) to add a subsection requiring that a parent's specific circumstances, to the extent presented to the court, be considered if imputing income, including the factors set out by the federal rule.
- (2) Amend Va. Code § [63.2-1921](#)(A) to add health care coverage as a basis for the Department of Social Services to initiate review of a child support order.

Conclusion

The Panel's recommendation to amend the Virginia Code to require that, in order to impute income, courts must consider a parent's circumstances, including the various factors set out by the regulation and to the extent presented to the court, will help ensure that parents' child support obligations are based on their actual ability to pay that obligation. In addition, adding health care coverage as a basis for the Department of Social Services to initiate review of a child support order will provide flexibility to ensure that medical support is being provided to the greatest number of children.

APPENDIX C: PROPOSED STATUTORY LANGUAGE – IMPUTATION OF INCOME

Va. Code § 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. (a) Imputed income to a party who is voluntarily unemployed or voluntarily under-employed; provided that 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 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;

(b) Imputed income shall be determined by the specific circumstances of the parent, to the extent presented to the court, including such factors as the parent's assets, residence,

APPENDIX C: PROPOSED STATUTORY LANGUAGE – IMPUTATION OF INCOME

employment and earnings history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work, as well as the local job market, the availability of employers willing to hire the parent, prevailing earnings level in the local community, and other relevant background factors in the case;

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

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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 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.