

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Introduced

Senate Bill 408

BY SENATORS PALUMBO AND WOELFEL

[Introduced January 23, 2019; Referred
to the Committee on the Judiciary]

1 A BILL to amend and reenact §29-21-16 of the Code of West Virginia, 1931, as amended, relating
2 to public defender services; and determining indigency.

Be it enacted by the Legislature of West Virginia:

ARTICLE 21. PUBLIC DEFENDER SERVICES.

§29-21-16. Determination of maximum income levels; eligibility guidelines; use of form affidavit; inquiry by court; denial of services; repayment; limitation on remedies against affiant.

1 (a) The agency shall establish, and periodically review and update financial guidelines for
2 determining eligibility for legal representation made available under the provisions of this article.
3 The agency shall adopt a financial affidavit form for use by persons seeking legal representation
4 made available under the provisions of this article.

5 (b) All persons seeking legal representation made available under the provisions of this
6 article shall complete the agency's financial affidavit form, which shall be considered as an
7 application for the provision of publicly funded legal representation.

8 (c) Any juvenile shall have the right to be effectively represented by counsel at all stages
9 of proceedings brought under the provisions of §49-4-701 through §49-4-725 of this code. If the
10 child advises the court of his or her inability to pay for counsel, the court shall require the child's
11 parent or custodian to execute a financial affidavit. If the financial affidavit demonstrates that
12 neither of the child's parents, or, if applicable, the child's custodian, has sufficient assets to pay
13 for counsel, the court shall appoint counsel for the child. If the financial affidavit demonstrates that
14 either of the child's parents, or, if applicable, the child's custodian, does have sufficient assets to
15 pay for counsel, the court shall order the parent, or, if applicable, the custodian, to provide, by
16 paying for, legal representation for the child in the proceedings.

17 The court may disregard the assets of the child's parents or custodian and appoint
18 counsel for the child, as provided in this section, if the court concludes, as a matter of law, that
19 the child and the parent or custodian have a conflict of interest that would adversely affect the

20 child's right to effective representation of counsel, or concludes, as a matter of law, that requiring
21 the child's parent or custodian to provide legal representation for the child would otherwise
22 jeopardize the best interests of the child.

23 (d) In any county in which there exists a trial court administrator, the office of the
24 administrator shall make determinations of indigency. In circuits in which a public defender office
25 is in operation and a trial court administrator does not exist, all determinations of indigency shall
26 be made by a public defender office employee designated by the executive director. In circuits in
27 which no trial court administrator or public defender office is in operation, circuit judges shall make
28 all determinations of eligibility. In circuits in which a public defender office is in operation, all
29 determinations of indigency shall be made by a public defender office employee designated by
30 the executive director. The determinations shall be made after a careful review of the financial
31 affidavit submitted by the person seeking representation. The review of the affidavit shall be
32 conducted in accord with the financial eligibility guidelines established by the agency pursuant to
33 subsection (a) of this section. In addition to the financial eligibility guidelines, the person
34 determining eligibility shall consider other relevant factors, including, but not limited to, those set
35 forth in subdivisions (1) through (9) of subsection (e) of this section. If there is substantial reason
36 to doubt the accuracy of information in the financial affidavit, the person determining eligibility may
37 make any inquiries necessary to determine whether the affiant has truthfully and completely
38 disclosed the required financial information.

39 After reviewing all pertinent matters, the person determining eligibility may find the affiant
40 eligible to have the total cost of legal representation provided by the state, or may find that the
41 total cost of providing representation shall be apportioned between the state and the eligible
42 person. A person whose annual income exceeds the maximum annual income level allowed for
43 eligibility may receive all or part of the necessary legal representation, or a person whose income
44 falls below the maximum annual income level for eligibility may be denied all or part of the
45 necessary legal representation if the person determining eligibility finds the person's particular

46 circumstances require that eligibility be allowed or disallowed, as the case may be, on the basis
47 of one or more of the nine factors set forth in subsection (e) of this section. If legal representation
48 is made available to a person whose income exceeds the maximum annual income level for
49 eligibility, or if legal representation is denied to a person whose income falls below the maximum
50 annual income level for eligibility, the person determining eligibility shall make a written statement
51 of the reasons for the action and shall specifically relate those reasons to one or more of the
52 factors set forth in subsection (e) of this section.

53 (e) The following factors shall be considered in determining eligibility for legal
54 representation made available under the provisions of this article:

55 (1) Current income prospects, taking into account, seasonal variations in income;

56 (2) Liquid assets, assets which may provide collateral to obtain funds to employ private
57 counsel, and other assets which may be liquidated to provide funds to employ private counsel;

58 (3) Fixed debts and obligations, including federal, state and local taxes, and medical
59 expenses;

60 (4) Child care, transportation, and other expenses necessary for employment;

61 (5) Age or physical infirmity of resident family members;

62 (6) Whether the person seeking publicly funded legal representation has made reasonable
63 and diligent efforts to obtain private legal representation, and the results of those efforts;

64 (7) The cost of obtaining private legal representation with respect to the particular matter
65 in which assistance is sought;

66 (8) Whether the person seeking publicly funded legal representation has posted a cash
67 bond for bail or has obtained release on bond for bail through the services of a professional
68 bondsman for compensation and the amount and source of the money provided for the bond;

69 (9) The consequences for the individual if legal assistance is denied.

70 (f) Legal representation requested by the affiant may not be denied in whole or part unless
71 the affiant can obtain legal representation without undue financial hardship. A person determined

72 to be ineligible by public defender personnel may have the initial determination reviewed by a
73 local circuit judge who may amend, modify or rewrite the initial determination. At any stage of the
74 proceedings a circuit court may determine a prior finding of eligibility was incorrect or has become
75 incorrect as the result of the affiant's changed financial circumstances, and may revoke any prior
76 order providing legal representation. In that event, any attorney previously appointed shall be
77 entitled to compensation under the provisions of law applicable to the appointment for services
78 already rendered.

79 (g) In the circumstances and manner set forth below, circuit judges may order repayment
80 to the state, through the office of the clerk of the circuit court having jurisdiction over the
81 proceedings, of the costs of representation provided under this article:

82 (1) In every case in which services are provided to an indigent person and an adverse
83 judgment has been rendered against such person, the court may require that person, and in
84 juvenile cases, may require the juvenile's parents or custodian, to pay as costs the compensation
85 of appointed counsel, the expenses of the defense, and any other fees and costs authorized by
86 statute.

87 (2) The court shall not order a person to pay costs unless the person is able to pay without
88 undue hardship. In determining the amount and method of repayment of costs, the court shall
89 take account of the financial resources of the person, the person's ability to pay, and the nature
90 of the burden that payment of costs will impose. The fact that the court initially determines, at the
91 time of a case's conclusion, that it is not proper to order the repayment of costs does not preclude
92 the court from subsequently ordering repayment if the person's financial circumstances change.

93 (3) When a person is ordered to repay costs, the court may order payment to be made
94 immediately or within a specified period of time or in specified installments. If a person is
95 sentenced to a term of imprisonment, an order for repayment of costs is not enforceable during
96 the period of imprisonment unless the court expressly finds, at the time of sentencing, that the
97 person has sufficient assets to pay the amounts ordered to be paid or finds there is a reasonable

98 likelihood the person will acquire the necessary assets in the foreseeable future.

99 (4) A person who has been ordered to repay costs, and who is not in contumacious default
100 in the payment thereof, may at any time petition the sentencing court for modification of the
101 repayment order. If it appears to the satisfaction of the court that continued payment of the amount
102 ordered will impose undue hardship on the person or the person's dependents, the court may
103 modify the method or amount of payment.

104 (5) When a person ordered to pay costs is also placed on probation or imposition or
105 execution of sentence is suspended, the court may make the repayment of costs a condition of
106 probation or suspension of sentence.

107 (h) Circuit clerks shall keep a record of repaid counsel fees and defense expenses
108 collected pursuant to this section and shall, quarterly, pay the moneys to the State Auditor who
109 shall deposit the funds in the General Revenue Fund of the state.

110 (i) The making of an affidavit subject to inquiry under this section does not in any event
111 give rise to criminal remedies against the affiant nor occasion any civil action against the affiant
112 except for the recovery of costs as in any other case where costs may be recovered and the
113 recovery of the value of services, if any, provided pursuant to this article. A person who has made
114 an affidavit knowing the contents of the affidavit to be false may be prosecuted for false swearing
115 as provided by law.

NOTE: The bill clarifies who has the authority to make determinations of indigency for the purpose of eligibility for public defender services.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.