

# **WEST VIRGINIA LEGISLATURE**

## **2019 REGULAR SESSION**

**Introduced**

### **House Bill 3073**

BY DELEGATES SKAFF, STEELE, ROBINSON, CAPITO AND

BYRD

[Introduced February 12, 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 authorizing a court administrator to make determinations of financial eligibility for public  
 3 defender services.

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

36 After reviewing all pertinent matters, the person determining eligibility may find the affiant  
37 eligible to have the total cost of legal representation provided by the state, or may find that the  
38 total cost of providing representation shall be apportioned between the state and the eligible  
39 person. A person whose annual income exceeds the maximum annual income level allowed for  
40 eligibility may receive all or part of the necessary legal representation, or a person whose income  
41 falls below the maximum annual income level for eligibility may be denied all or part of the  
42 necessary legal representation if the person determining eligibility finds the person's particular  
43 circumstances require that eligibility be allowed or disallowed, as the case may be, on the basis  
44 of one or more of the nine factors set forth in subsection (e) of this section. If legal representation

45 is made available to a person whose income exceeds the maximum annual income level for  
46 eligibility, or if legal representation is denied to a person whose income falls below the maximum  
47 annual income level for eligibility, the person determining eligibility shall make a written statement  
48 of the reasons for the action and shall specifically relate those reasons to one or more of the  
49 factors set forth in subsection (e) of this section.

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

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

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

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

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

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

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

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

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

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

67 (f) Legal representation requested by the affiant may not be denied in whole or part unless  
68 the affiant can obtain legal representation without undue financial hardship. A person determined  
69 to be ineligible by public defender personnel may have the initial determination reviewed by a  
70 local circuit judge who may amend, modify or rewrite the initial determination. At any stage of the

71 proceedings a circuit court may determine a prior finding of eligibility was incorrect or has become  
72 incorrect as the result of the affiant's changed financial circumstances, and may revoke any prior  
73 order providing legal representation. In that event, any attorney previously appointed shall be  
74 entitled to compensation under the provisions of law applicable to the appointment for services  
75 already rendered.

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

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

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

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

96 (4) A person who has been ordered to repay costs, and who is not in contumacious default

97 in the payment thereof, may at any time petition the sentencing court for modification of the  
98 repayment order. If it appears to the satisfaction of the court that continued payment of the amount  
99 ordered will impose undue hardship on the person or the person's dependents, the court may  
100 modify the method or amount of payment.

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

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

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

NOTE: The purpose of this bill is to authorize the court administrator for a circuit court to determine whether a person charged with a criminal offense is eligible for services of a public defender.

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