

**CHAPTER 2 - GUIDELINES FOR DETERMINING ELIGIBILITY FOR COURT-APPOINTED COUNSEL****I. STATUTORY PROVISIONS ON THE RIGHT TO COUNSEL**

Statutory procedures on the right to representation by a lawyer and appointment of counsel for indigents are found in [Va. Code §§ 16.1-266, 16.1-267, 16.1-268](#) and [Va. Code §§ 19.2-157, 19.2-158, 19.2-159, 19.2-160, 19.2-161, 19.2-162](#) and [19.2-163](#). A person appearing in court has the right to legal representation and may obtain his/her own counsel. The accused may also waive his/her right to legal representation. The right to be represented by a court-appointed attorney is restricted by law to individuals who are indigent and charged with an offense punishable by incarceration, or adults who may be subjected to loss of parental rights by court order. An indigent is defined as a person who requests legal counsel but is unable to provide for full payment of a lawyer's fee without causing undue financial hardship to himself or his family.

The court is not required to appoint counsel in instances where the accused is charged with a non-jailable misdemeanor or, if charged with a jailable misdemeanor, where the judge has declared in writing prior to trial that any sentence upon conviction will not include imprisonment.

The appointment of counsel in cases involving children is handled differently according to the type of case. In abuse, neglect, termination of parental rights cases, and entrustment agreement proceedings, a lawyer who serves as a guardian ad litem must be appointed pursuant to [Va. Code § 16.1-266](#). The parents of the child, adoptive parents, or other parties with a legitimate interest who have filed a petition with the court are liable to pay the costs of such representation under [Va. Code § 16.1-267](#) and under the Appropriations Act, Acts of Assembly, if they are determined to be financially able to do so.

In cases involving children alleged to be in need of services, in need of supervision or delinquent, an attorney is appointed if the court determines that the child is indigent and his or her parent/guardian does not retain counsel on the child's behalf. In practice, children are found to be indigent almost without exception when considering their financial resources apart from those of their parents or guardian. If the parents of the child, adoptive parents, or other parties with a legitimate interest are found to be financially able to retain counsel and refuse to do so, then they may be ordered by the court to pay the costs for such representation. In custody cases where each parent or person is represented by counsel, the court does not appoint an attorney for the child except in instances in which the judge finds that the interests of the child are not being adequately represented.

**II. GENERAL POLICIES**

In order to aid case processing and provide counsel to eligible defendants at an early stage in the proceedings, the following procedures should be considered:

- The judge of each appointing court should designate an office and/or individuals to be responsible for interviewing and assisting the defendant in filling out the financial statement forms.
- Judges of the district courts should make the eligibility determination and appointment of counsel in all cases arising in those courts. Judges of the circuit court should rely on the decision of the judge of the district court regarding those cases and only open the issue of eligibility if new information comes to the court's attention or upon request of any party.
- Form DC-333, [FINANCIAL STATEMENT-ELIGIBILITY DETERMINATION FOR INDIGENT DEFENSE SERVICES](#) is included in this manual and has been reviewed and approved by the Committee on District Courts for use in all district courts. It is also recommended for use in circuit courts.
- All persons requesting counsel should be reminded of the penalties for giving false information in the eligibility process. [Va. Code § 19.2-161](#).
- Defendants should be reminded that, if convicted, costs for their legal representation will be assessed against them at the conclusion of the trial and added to their fines, costs, and expenses owed.
- The person requesting court-appointed counsel should provide to the court an estimation of their total assets, to be recorded onto the financial statement form. The court may but is not required to verify the estimations given.

**III. PROCEDURES FOR DETERMINING ELIGIBILITY OF AN ADULT FOR  
COURT-APPOINTED COUNSEL**

The determination of the right to court-appointed counsel is made prior to the trial if no determination was made in a pre-trial procedure. The procedures for determining the right of the person to a court-appointed lawyer are outlined below:

- Every person accused of having committed a crime or who may be subjected to loss of parental rights must be advised of his/her right to legal representation:
  - The individual may elect to hire their own attorney;
  - The individual may waive their right to legal representation;

- The judge will appoint a lawyer to represent the accused at public expense if the person indicates he is indigent and that it is his desire to obtain a court-appointed attorney by filing a request for counsel form together with a financial statement, and the person indicates that he is indigent and meets the eligibility requirements established by law.
- The court is not required to appoint counsel in instances where the accused is charged with a misdemeanor if the judge has stipulated in writing prior to trial that, if convicted, no jail sentence will be imposed.
- The person should be advised that if the court appoints a lawyer, the accused is liable for the full costs allowed by the court for such counsel if convicted.
- The person should be asked to indicate his/her choice regarding representation by a lawyer:
  - If the accused indicates he/she will hire an attorney, instruct him/her to have the attorney notify the clerk's office that the lawyer will be representing the accused.
  - If the accused wishes to waive their right to counsel, have him/her sign form DC-335, TRIAL WITHOUT A LAWYER (in district courts) and follow the appropriate waiver process in circuit courts.

**NOTE:** If the accused executes a waiver prior to an appearance before a judge, the judge must ask the accused at the trial if he/she still wishes to waive his right to legal representation. This act is required to comply with [Va. Code § 19.2-160](#).

- The judge may decide not to appoint an attorney prior to trial on a misdemeanor charge if the judge decides that no jail sentence will be imposed upon the accused if convicted. That decision should be stipulated in writing by the judge (in district courts, the judge uses the appropriate section of form DC-335, TRIAL WITHOUT A LAWYER).
- If the accused asks for a court-appointed lawyer, it must be determined whether he/she is eligible given the charge(s) pending against them. In order to be eligible for representation by a court-appointed lawyer, the accused must be:
  - charged with a felony or a misdemeanor for which a jail sentence may be imposed and be without counsel.
  - one who has not waived his/her right to legal representation, and be one who claims indigency.

- The accused must prepare and sign form DC-334, REQUEST FOR APPOINTMENT OF A LAWYER requesting representation by a lawyer as well as form DC-333, [FINANCIAL STATEMENT - ELIGIBILITY DETERMINATION FOR INDIGENT DEFENSE SERVICES](#). These forms may be used as well in circuit courts.
- Once completed, the forms must be transmitted to the court according to the instructions of the judge.

#### **IV. USE OF THE FINANCIAL ELIGIBILITY GUIDELINES**

The financial eligibility guidelines established by the General Assembly for use by all courts are as follows:

##### **A. Presumption of Indigency**

A defendant is presumed eligible for appointed counsel if the defendant is a current recipient of a state or federally administered public assistance program for the indigent. Examples are AFDC, Food Stamps, Medicaid, and Supplemental Security Income (SSI). This presumption shall be rebuttable where the court finds that a more thorough examination of financial resources of the defendant is necessary.

##### **B. Financial Resources**

If the defendant requests court-appointed counsel and is not presumptively eligible under paragraph 1, the court shall examine the financial resources of the defendant with consideration given to net income, assets, and exceptional expenses.

##### **C. Net Income**

The defendant's net income shall include total salary and/or wages minus deductions required by law. Also to be considered are funds and amenities from any other sources including but not limited to:

- social security payments
- union funds
- veteran's benefits
- workmen's compensation
- unemployment benefits
- other regular support from an absent family member
- public or private employer pensions
- income from dividends, interest, rents, estates, trusts, or gifts.

##### **D. Assets**

The court shall examine all assets convertible into cash within a reasonable period of time without causing substantial hardship or jeopardizing the applicant's ability to

maintain home/employment. Assets include all cash on hand as well as in checking and savings accounts, stocks, bonds, certificates of deposit, and tax refunds. All personal property owned by the defendant that is readily convertible into cash shall be considered, except property exempt from attachment. All real estate owned by the defendant shall be considered in terms of the amount that can be raised by a loan on the property.

**E. Exceptional Expenses**

In making its determination, the court shall consider, in addition to income and assets, any unusual expenses of the defendant and/or his/her family, which would in all probability prohibit him/her from being able to secure private counsel. Such items shall include but not be limited to costs for medical care, family support obligations, and child care payments.

**F. Indigency Formula**

If the available funds (sum obtained from paragraph 2 A and B minus the expenses included in paragraph 2 C) are at or below the amounts in the following table and the defendant does not waive his right to counsel or retain counsel on his own behalf, the defendant is deemed eligible for defense services at public expense.

**Household Size:** includes total number of persons residing in the home that the defendant has financial responsibility for, including the defendant.

<b>Household Size:</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>
2018 Average Funds (annually)	\$15,175	20,575	25,975	31,375

Source: Federal Poverty Guidelines plus 25% (Source: Federal Register/ Vol.83, No. 12/ January 18, 2018/ pp. 2642-2644)

**(Add \$5,400 for each additional member in households of more than four)**

For purposes of eligibility determination, the income, assets, and expenses of the spouse, if any, who is a member of the defendant's household, shall be considered unless the spouse was the victim of the offense(s) allegedly committed by the accused.

**NOTE:** The Office of the Executive Secretary of the Supreme Court of Virginia will distribute updates to these income levels to all courts on an annual basis.

**G. Exceptional Circumstances**

If the available funds of the accused exceed recommended guidelines and the defendant fails to employ counsel and does not waive his right to counsel, the Court

may, in exceptional circumstances and where the ends of justice so require, appoint an attorney to represent the defendant. In making such appointments, the Court shall state in writing its reasons for so doing. The written statement by the Court shall be included in the permanent record of the case. In district court cases, the written statement should be made in the order portion of form DC-334, REQUEST FOR APPOINTMENT OF A LAWYER.

**V. PROCEDURES FOR DETERMINING ELIGIBILITY OF A JUVENILE FOR  
COURT APPOINTED COUNSEL**

If a juvenile is eligible for court-appointed counsel under the provisions of [Va. Code § 16.1-266](#), the same financial eligibility guidelines are applied in determining whether counsel should be appointed. The financial and legal responsibility of parents or persons standing in loco parentis is provided in [Va. Code §§ 16.1-266](#) and [16.1-267](#). Parents or guardians must complete a financial statement if a court-appointed lawyer for the juvenile is requested. Parents are liable for the costs of such counsel up to \$120 when a lawyer is appointed in the J&DR court and the parents are deemed financially able to pay. However, [Va. Code § 16.1-267](#) limits the liability of a parent to a maximum of \$100 if the action involving a juvenile is in a circuit court. In addition, counsel appointed by the court under [Va. Code § 16.1-343](#) for involuntary commitment, or an appeal, shall be compensated in the amount not to exceed \$100.



**VII. ELIGIBILITY DETERMINATION**

Pursuant to [Va. Code § 19.2-159](#), the criteria is established for determination of indigency and eligibility for appointment of court-appointed counsel or public defender services in all Virginia courts.

**VIII. PRESUMPTION OF INDIGENCY**

A defendant is presumed eligible for appointed counsel if the defendant is a current recipient of a state or federally administered public assistance program for the indigent. Examples are AFDC, Food Stamps, Medicaid, and Supplemental Security Income (SSI). This presumption shall be rebuttable where the court finds that a more thorough examination of financial resources of the defendant is necessary.

**IX. FINANCIAL RESOURCES**

If the defendant requests court-appointed counsel and is not presumptively eligible, the court shall examine the financial resources of the defendant with consideration given to Net Income, Assets, and Exceptional Expenses.

**A. Net Income**

The defendant's net income shall include total salary and/or wages minus deductions required by law. Also to be considered are funds and amenities from any other sources including but not limited to social security payments, union funds, veteran's benefits, workmen's compensation, unemployment benefits, other regular support from an absent family member, public or private employee pensions, or income from dividends, interests, rents, estates or trusts, or gifts.

**B. Assets**

The court shall examine all assets convertible into cash within a reasonable period of time without causing substantial hardship or jeopardizing defendant's ability to maintain home/employment. Assets include all cash on hand as well as in checking and savings accounts, stocks, bonds, certificates of deposit, and tax refunds. All personal property owned by the defendant that is readily convertible into cash shall be considered, except property exempt from attachment. All real estate owned by the defendant shall be considered in terms of the amounts that could be raised by a loan on the property.

**C. Exceptional Expenses**

In making its determination, the court shall consider, in addition to income and assets, any unusual expenses of the defendant and/or his/her family that would, in all probability, prohibit him/her from being able to secure private counsel. (Such items



shall include but not be limited to costs for medical care, family support obligations, and child care payments.)

**X. INDIGENCY FORMULA**

If the available funds (sum of total income and assets less the exceptional expenses) are at or below the amounts in the following table and the defendant does not waive his right to counsel or retain counsel on his own behalf the defendant is deemed eligible for defense services at public expense.

**Household Size:** includes total number of persons residing in the home that the defendant has financial responsibility for including the defendant.

Household Size	1	2	3	4	5	6	7	8
2018 Average Funds (annually)	15,175	20,575	25,975	31,375	36,775	42,175	47,575	52,975

Source: Federal Poverty Guidelines plus 25% (Source: Federal Register/ Vol.83, No. 12/ January 18, 2018/ pp. 2642-2644)

**(Add \$5,400 for each additional member in households of more than eight.)**

For purposes of eligibility determination, the income, assets, and expenses of the spouse, if any, who is a member of the defendant's household, shall be considered unless the spouse was the victim of the offense or offenses allegedly committed by the accused.

**XI. EXCEPTIONAL CIRCUMSTANCES**

If the available funds of the accused exceed recommended guidelines and the defendant fails to employ counsel and does not waive his right to counsel, the Court may, in exceptional circumstances and where the ends of justice so require, appoint an attorney to represent the defendant; provided however, that in making such appointments, the Court shall state in writing its reasons for so doing. The written statement by the Court shall be included in the permanent record of the case.

**(This page can be duplicated for use in the Courtroom)**