

**REPORT OF THE  
VIRGINIA STATE CRIME COMMISSION  
FAMILY VIOLENCE SUB-COMMITTEE**

**SB1118  
Felony for Nonsupport; Penalty**

**A BILL REFERRAL STUDY TO  
THE VIRGINIA STATE CRIME COMMISSION AND  
THE GENERAL ASSEMBLY OF VIRGINIA**



**COMMONWEALTH OF VIRGINIA  
RICHMOND  
2004**

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G. Stewart Petoe, Director of Legal Services  
Christina M. Barnes, Legislative Policy Analyst  
Stephen W. Bowman, Staff Attorney/Senior Policy Analyst  
Thomas E. Cleator, Staff Attorney  
Jaime H. Hoyle, Staff Attorney  
Kristen M. Jones, Legislative Policy Analyst  
John B. Reaves, Legislative Policy Analyst  
Sylvia A. Reid, Office Manager

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Points of view or opinions contained within this document are those of the author and do not necessarily represent the official position or policies of DCJS or the U.S. Department of Justice.

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## **I. Authority**

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The *Code of Virginia*, § 30-156, authorizes the Virginia State Crime Commission to study, report and make recommendations on all areas of public safety and protection. Additionally, the Commission is to study matters “including apprehension, trial and punishment of criminal offenders.” Section 30-158(3) provides the Commission the power to “conduct studies and gather information and data in order to accomplish its purposes as set forth in § 30-156. . .and formulate its recommendations to the Governor and the General Assembly.”

Using the statutory authority granted to the Crime Commission, the staff of the Virginia State Crime Commission, Family Violence Sub-Committee conducted a study relating to penalty enhancement for failure to pay child support.

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## **II. Executive Summary**

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During the 2003 Session of the Virginia General Assembly, Senator L. Louise Lucas introduced Senate Bill 1118 (SB 1118),<sup>1</sup> relating to the penalty for failure to pay child support. This bill was left in the Senate Courts of Justice Committee, referred by letter to the Virginia State Crime Commission, and subsequently to the Family Violence Sub-Committee (FVS), for further study. As a result of the study effort, staff presented the following policy options for consideration:

- Policy Option 1: Change SB 1118 as drafted to ensure that a Class 6 felony conviction can only be achieved for the second or subsequent violation of *Virginia Code* § 20-61, and not for two or more contempt violations pursuant to *Virginia Code* § 16.1-278.16.
- Policy Option 2: Recommend the General Assembly not support the enactment of SB 1118 as drafted.

### **Recommendation:**

The Family Violence Sub-Committee recommended the General Assembly not support the enactment of SB 1118 as drafted. The Virginia State Crime Commission voted to accept the recommendation of the Family Violence Sub-Committee.

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## **III. Methodology**

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Staff of the Virginia State Crime Commission, Family Violence Sub-Committee utilized four research methodologies to examine SB 1118. First, staff conducted a literature review of documents, nationally and in Virginia, regarding criminal nonsupport of a child. Second, staff examined the *United States Code* and federal child support enforcement provisions. Third, staff reviewed current enforcement provisions available

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<sup>1</sup> Senate Bill 1118 (2003). See attachment 1.

in Virginia and analyzed the number of convictions under the current version of *Virginia Code* § 20-61. Fourth, staff analyzed other states' statutes to compare the penalty and any enhancement provisions included for failure to pay child support.

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## **IV. Background**

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Child support positively impacts the income of single-parent families, and approximately half of all children today spend time in a single-parent home, evenly divided between those whose parents separated or divorced, and those whose parents were never married.<sup>2</sup> According to 1997 census data, the poverty rate for custodial parents due child support who did not receive any payments was 36%, but only 15% of custodial parents who received all the child support due to them had incomes below the poverty level.<sup>3</sup>

States face strong fiscal incentives to commit to child support programs. For example, strong state child support programs allow families to become self-sufficient and less reliant on state programs such as Temporary Assistance to Needy Families (TANF), food stamps, and Medicare.<sup>4</sup> Specifically, child support helps reduce the child poverty rate and associated future economic and social costs for children, and helps create and maintain family self-sufficiency. States report that consistent, reliable, and reasonable child support awards equal the difference between state support and self-sufficiency.<sup>5</sup> Above a certain threshold, it is more important that payments are reasonable and regular than that they be large.<sup>6</sup> Additionally, states with strong child support programs realize future cost-avoidance savings through lower juvenile and criminal court costs, special education resources, and mental health expenditures.<sup>7</sup>

The collection of child support has increased steadily nationwide, due in part, to stricter requirements for state programs.<sup>8</sup> At a minimum, state child support programs are required to provide the following services: 1). Locating noncustodial parents, 2). Establishing paternity, 3). Establishing child support orders, 4). Enforcing child support orders, 5). Distributing child support, and, 6). Reviewing child support orders periodically and modifying them when appropriate.<sup>9</sup> The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) required states to expand the administrative authority of their state agencies to carry out many of the child support establishment and enforcement tasks previously reserved to the courts.<sup>10</sup> States are permitted under federal law to charge a fee of up to \$25 for child support enforcement

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<sup>2</sup> National Conference of State Legislatures, "Child Support 101: An Introductory Course for Legislators. Lesson One: Why Do We Need Child Support" (2000).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> National Conference of State Legislatures, "Child Support 101: An Introductory Course for Legislators. Lesson Two, Six Steps for Child Support Enforcement." (2002).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

services, and many states do.<sup>11</sup> However, cash assistance and food stamp recipients are not required to pay for any child support services.<sup>12</sup> Under federal law, all TANF clients are required to cooperate with state authorities in child support establishment and enforcement efforts as a condition of receiving benefits or assistance, which includes cash, food and housing.<sup>13</sup> Failure to cooperate results in loss of TANF eligibility. Additionally, TANF clients are required to assign their rights to their child support payments to the state in return for eligibility to receive TANF assistance.<sup>14</sup> Delinquent obligors whose children are TANF recipients may be required to agree to a payment plan or to participate in work activities.

State child support programs mainly assist low-income parents to establish and enforce child support orders, since members of this population are least likely to hire a private attorney to pursue their cases. Under federal law, all child support orders handled by the state system are subject to automatic income withholding when a delinquency of at least one month occurs.<sup>15</sup>

Arrearages occur for many reasons. For example, when courts order retroactive child support, the obligor starts his child support payments with an arrearage already in place. As a result, retroactive child support presents difficulties for low income obligors because they are saddled with an insurmountable debt at the outset.<sup>16</sup> However, the most severe enforcement penalties focus on those obligors who are reluctant to pay and those who are active evaders of their obligation.<sup>17</sup> Examples of severe enforcement penalties include charging interest on delinquent payments and setting orders automatically when noncustodial parents fail to appear in court.<sup>18</sup> Some states, however, limit collection of child support arrearages. Likewise, some states facilitate opportunities for obligors' child support debts to be compromised or forgiven. Under the Bradley Amendment, state courts may not retroactively modify child support orders, nor unilaterally forgive or waive child support arrearages.<sup>19</sup> However, states are permitted to compromise and forgive arrearages under certain circumstances.<sup>20</sup>

Additionally, states can incorporate various child support enforcement procedures into their child support programs.<sup>21</sup> For instance, states can implement license restrictions, property liens, income tax refund intercepts, reporting delinquent obligors to

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<sup>11</sup> The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 10 Stat. 2105.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 10 Stat. 2105.

<sup>15</sup> National Conference of State Legislatures, "Child Support 101: An Introductory Course for Legislators. Lesson Two, Six Steps for Child Support Enforcement." (2002).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> 42 USC § 666.

<sup>20</sup> National Conference of State Legislatures, "Child Support 101: An Introductory Course for Legislators. Lesson Two, Six Steps for Child Support Enforcement." (2002).

<sup>21</sup> *Id.*

credit bureaus, voiding property transfers completed to evade child support obligations, and mandating work requirements for delinquent obligors whose children are TANF recipients. States also implement car boots, most wanted posters, and public relations campaigns that look to encourage compliance.<sup>22</sup>

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## V. Federal Law

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The Child Support Enforcement (CSE) Program is a Federal/State/local partnership to collect child support.<sup>23</sup> Title IV-D of the Social Security Act of 1975 established the Program, which functions in all States and territories. However, as mentioned earlier, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) updated this program and provides for more comprehensive child support enforcement.<sup>24</sup> As part of a 1996 welfare reform package, the law requires each state to operate a child support enforcement program meeting federal requirements in order to be eligible for TANF block grants.<sup>25</sup> Provisions include:<sup>26</sup>

- The establishment of a national new hire reporting system. Specifically, the law establishes a Federal Case Registry and National Directory of New Hires to track delinquent parents across state lines. It also requires that employers report all new hires to state agencies for transmittal of new hire information to the National Directory of New Hires, an electronic and centralized system that matches all employees with parents who owe child support and listed in the federal case registry.<sup>27</sup> The law also expands and streamlines procedures for direct withholding of child support from wages.
- The establishment of a Financial Institution Data Match Program. PRWORA requires all states to enter into agreements with financial institutions to match the records of parents who are delinquent in their child support obligations. When a match is identified, the information is sent to the state within 48 hours for placement of a lien on, and seizure or, the accounts identified to collect past due child support.<sup>28</sup>
- The establishment of a Passport Denial Program. States may request the State Department to deny United States passports to non-custodial parents, who at the time of application, owe a child support debt of at least \$5,000.<sup>29</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> United States Department of Health & Human Services, Administration for Children & Families, Office of Child Support Enforcement. “Handbook on Child Support Enforcement,” (1997).

<sup>24</sup> The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 10 Stat. 2105.

<sup>25</sup> *Id.*

<sup>26</sup> Office of Child Support Enforcement, available at <http://acf.dhhs.gov/programs/cse/new/prwora.htm>.

<sup>27</sup> Welfare Information Network. “Resources for Welfare Decisions: Innovations in Child Support Enforcement,” available at <http://www.welfareinfo.org>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

- Uniform interstate child support laws. The Uniform Interstate Family Support Act (UIFSA) provides for uniform rules, procedures, and forms for interstate cases.
- Computerized state-wide collections. The new law requires states to establish central registries of child support orders and centralized collection and disbursement units. It also requires expedited state procedures for child support enforcement.
- Tough new penalties. Under the new law, states can implement tough child support enforcement techniques. The new law will expand wage garnishment, allow states to seize assets, allows states to require community service in some cases, and enable states to revoke drivers and professional licenses for parents who owe delinquent child support.

In addition to administrative procedures to enforce child support, failure to pay legal child support obligations is a criminal offense under Federal law. Specifically, the Child Support Recovery Act of 1992,<sup>30</sup> amended by the Deadbeat Parents Punishment Act of 1998, makes it an offense for any person:

“(1) to willfully fail to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 1 year, or is greater than \$5,000;

(2) travel in interstate or foreign commerce with the intent to evade a support obligation, if such obligation has remained unpaid for a period longer than 1 year, or is greater than \$5,000; or,

(3) willfully fail to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 2 years, or is greater than \$10,000.”<sup>31</sup>

As a general principle, the United States only prosecutes cases under this statute when it is clear that all reasonable, available remedies have been exhausted. At that point, a conviction requires the United States to prove that the defendant had the ability to pay, willfully failed to pay, the existence of a known and past due child support obligation which has remained unpaid for longer than one year or is an amount greater than \$5,000, and the child support is for a child who resides in a different state than the defendant. The Deadbeat Parents Punishment Act fails to provide a clear definition of “willful”. However, legislative history suggests that willfulness has the same meaning it has for purposes of federal criminal tax law, which is the knowing and intentional violation of a known legal duty.<sup>32</sup> Furthermore, case law proves that the definition of

<sup>30</sup> The Child Support Recovery Act of 1992, Pub. L. No. 102-521.

<sup>31</sup> 18 USCA § 228(a).

<sup>32</sup> H. Rep. No. 102-771, 102<sup>nd</sup> Cong., 2d Sess. At 6; Cheek v. United States, 111 S.Ct. 604, 610 (1991).



willful under this statute means having the money and refusing to use it to pay child support, or not having the money because one has failed to avail oneself of the available means of obtaining it.<sup>33</sup> It is irrelevant that a defendant failed to accept employment because he was motivated by a desire to withhold support.<sup>34</sup>

Additionally, legislative history reveals that willfulness cannot be presumed from non-payment by the defendant alone. The prosecution has the burden to prove beyond a reasonable doubt that any failure to pay child support is willful at the time the child support was due to the custodial parent and the defendant had sufficient money to pay the child support obligation or that any lack of funds was caused by a voluntary and intentional act of the defendant without justification in view of all the financial circumstances of the case.<sup>35</sup> Furthermore, the prosecution is not required to prove that the defendant was able to pay the entire amount of a past due child support obligation to prove that his failure to pay was in fact willful, but only that the defendant had the ability to pay some amount towards the obligation.<sup>36</sup> Because the statute defines “support obligation” to include any amount that has been determined under a court order to be due and owing, the defendant’s legal obligation to pay a total amount in arrears “necessarily encompassed an obligation to pay any lesser-included amount that he was capable of paying.”<sup>37</sup>

Once the prosecution proves the elements of the statute and a conviction is secured, United States Code, Title 18, Section 228, Subsection (c) provides for a first offense under Subsection (a)(1) a fine, imprisonment for not more than 6 months, or both; and for an offense under paragraph (2) or (3) of Subsection (a), or a second or subsequent offense under Subsection (a)(1), a fine, imprisonment for not more than 2 years, or both.<sup>38</sup> In addition to fines and jail sentences, a federal conviction may result in the defendant being ordered to pay restitution to the custodial parent in the amount equal to the child support arrearage existing at the time that the defendant is sentenced.<sup>39</sup>

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## **VI. Virginia Law: Current Child Support Enforcement Provisions**

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Virginia’s child support program is widely respected as one of the most effective programs nationwide. The federal government, which gives incentives to states each year based on effective collection efforts, awarded Virginia \$16.9 million for its diligence in 2001.<sup>40</sup> During that year, The Virginia Division of Child Support Enforcement (DCSE) located almost 115,400 non-custodial parents and collected a record \$474 million in child support.<sup>41</sup> Still, Virginia has a significant number of delinquent parents. Nearly 225,000 non-custodial parents owe approximately \$1.93 billion, and Virginia is actively pursuing

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<sup>33</sup> U.S. v. Ballek, 170 F.3d 871 (1999).

<sup>34</sup> *Id.*

<sup>35</sup> H. Rep. No. 102-771, 102<sup>nd</sup> Cong., 2d Sess. At 6; Cheek v. United States, 111 S.Ct. 604, 610 (1991).

<sup>36</sup> U.S. v. Mattice, 22 F.Supp.2d 49 (1998).

<sup>37</sup> *Id.*

<sup>38</sup> 18 USCA § 228(c).

<sup>39</sup> 18 USC § 228(c).

<sup>40</sup> Costanzo, Dan. “Child Support Enforcement,” (December 12, 2002).

<sup>41</sup> *Id.*

100,000 of these parents.<sup>42</sup>

As required under federal law and regulation, Virginia utilizes administrative tools for the enforcement of child support orders. Specifically, these administrative enforcement provisions include involuntary collections through a Federal and State tax intercept; professional license suspension,<sup>43</sup> driver's license suspension,<sup>44</sup> refusal to issue a new passport; credit reporting;<sup>45</sup> filing liens;<sup>46</sup> withholding and seizure of personal property;<sup>47</sup> sale and seizure; lottery and vendor intercepts; state worker travel voucher intercepts; income withholding;<sup>48</sup> seizure of financial accounts;<sup>49</sup> withholding of unemployment benefits,<sup>50</sup> worker's compensation,<sup>51</sup> and social security benefits; intercept of personal injury proceeds; and, distraint, sale and seizure of property subject to liens;<sup>52</sup> as well as the authority for foreclosure.<sup>53</sup> Additionally, Virginia publishes a most wanted delinquent parent list and was the first state to implement car booting.<sup>54</sup>

In addition to administrative enforcement, Virginia charges delinquent child support obligors with contempt. Specifically, *Virginia Code* § 20-115 provides for the imposition of sanctions for contempt of court when an individual has willfully failed or refused to comply with an order or decree for support. This section provides for commitment to a local jail "as provided for in § 20-61," but limits the period of confinement to 12 months. Similarly, *Virginia Code* § 16.2-278.16 vests juvenile and domestic relations district courts with the authority to impose sanctions for failure to pay support. Under this section, if the court finds that the respondent has failed to comply with a child support order, the court may issue a civil show cause summons or a capias and may impose up to a 12 month jail sentence.

Failure to pay child support is currently a criminal offense under Virginia law as well. Specifically, *Virginia Code* § 20-61 states that:

"...any parent who deserts or willfully neglects or refuses or fails to provide for the support and maintenance of his or her child under the age of eighteen years of age, or child of whatever age who is crippled or otherwise incapacitated from earning a living, the ... child or children being then and there in necessitous circumstances, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not exceeding \$500, or confinement in jail not

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<sup>42</sup> *Id.*

<sup>43</sup> Va. Code Ann. § 63.2-1937 (2003).

<sup>44</sup> Va. Code Ann. § 46.2-320 (2003).

<sup>45</sup> Va. Code Ann. § 63.2-1940 (2003).

<sup>46</sup> Va. Code Ann. § 63.2-1927 (2003).

<sup>47</sup> Va. Code Ann. § 63.2-1929 (2003).

<sup>48</sup> Va. Code Ann. § 63.2-1924 (2003).

<sup>49</sup> Va. Code Ann. § 63.2-1931 (2003).

<sup>50</sup> Va. Code Ann. § 60.2-608 (2003).

<sup>51</sup> Va. Code Ann. § 65.2-531 (2003).

<sup>52</sup> Va. Code Ann. § 63.2-1933 (2003).

<sup>53</sup> Va. Code Ann. § 63.2-1934 (2003).

<sup>54</sup> Va. Code Ann. § 63.2-1040.1 (2003).

exceeding twelve months, or both, or on work release employment as provided in § 53.1-131 for a period of not less than ninety days nor more than twelve months; or in lieu of the fine or confinement being imposed upon conviction by the court or by verdict of a jury he or she may be required by the court to suffer a forfeiture of an amount not exceeding the sum of \$1,000 and the fine or forfeiture may be directed by the court to be paid in whole or in part ... to the guardian, curator, custodian or trustee of the minor child or children, or to some discreet person or responsible organization designated by the court to receive it. This section shall not apply to any parent of any child of whatever age, if the child qualifies for and is receiving aid under a federal or state program for aid to the permanently and totally disabled...”

As with the federal Deadbeat Parents Punishment Act, Virginia’s criminal nonsupport statute requires the prosecution to prove the element of willfulness. Likewise, the intent of the statute is to punish willfulness, so to warrant conviction, the delinquency must be without cause.<sup>55</sup> However, whereas *Virginia Code* § 20-61 couples the willful element with the element of “without cause” in reference to spousal support, the “without cause” is not coupled with the element of willfulness in reference to child support. The current punishment proscribed in this section has remained unchanged since the statute’s enactment in 1944.<sup>56</sup> However, SB 1118 looks to raise the current penalty outlined in *Virginia Code* § 20-61 for nonpayment of child support from a misdemeanor to a Class 6 felony under one of two circumstances:

(1). If the court finds that the person has been previously convicted of 2 or more violations of the provisions of *Virginia Code* § 20-61, or

(2). If the court finds that the person has been previously held in contempt 2 or more times pursuant to *Virginia Code* § 16.1-278.16.

Punishment for a Class 6 felony results in a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$2,500, either or both.<sup>57</sup>

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## **VII. Other States’ Child Support Enforcement Laws**

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Thirty-three states provide felony penalties for failure to pay child support.<sup>58</sup> Of these 33 states, 12 states mandate felony penalties without any enhancement provisions,<sup>59</sup> and 21 states provide felony enhancement provisions. (See Table A below).

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<sup>55</sup> *Painter v. Commonwealth*, 124 S.E. 431 (1924).

<sup>56</sup> House Bill 300, 1944 General Assembly Session, Reg. Sess. (Va. 1944).

<sup>57</sup> Va. Code Ann. § 18.2-10 (2003).

<sup>58</sup> National Conference of State Legislatures. “Criminal Nonsupport Statutes,” (Nov. 2002). See attachment 2.

<sup>59</sup> *Id.*

**Table A: States with Felony Enhancement Provisions for Nonsupport**

	<b>Amount of \$ in Arrears</b>	<b>Duration in Arrears</b>	<b>Multiple Offenses</b>	<b>Leaving State</b>
<b>AR</b>	\$2,500	4 months	2 <sup>nd</sup> Offense	Yes
<b>DE</b>	\$10,000	No payment in 8 months		
<b>FL</b>			4 <sup>th</sup> and Subsequent	
<b>GA</b>			3 <sup>rd</sup>	Yes
<b>IL</b>			2 <sup>nd</sup>	
<b>IN</b>	\$15,000			
<b>KY</b>	\$1,000	6 months		
<b>MN</b>		Over 180 days		
<b>MO</b>	\$5,000	No payment 6/12 months		
<b>NV</b>			2 <sup>nd</sup> or excessive	
<b>NH</b>	\$10,000	1 year	2 <sup>nd</sup>	
<b>NY</b>			2 <sup>nd</sup>	
<b>OH</b>		26/104 weeks	2 <sup>nd</sup>	
<b>OK</b>			2 <sup>nd</sup>	
<b>RI</b>	\$30,000	3 years		
<b>TN</b>			2 <sup>nd</sup>	Yes
<b>UT</b>	\$10,000	18/24 months	2 <sup>nd</sup>	Yes
<b>WV</b>	\$8,000	1 year		
<b>WI</b>		Over 120 days		

As Table A indicates only 1 state, Indiana, raises the penalty for nonsupport to a felony based solely on a specific dollar amount in arrears, and three states enhance the penalty solely for a specific duration in arrears. However, 8 states provide felony enhancement provisions for arrearages in specific amounts of money and/or time, whereas only 5 states enhance penalties based on repeat offenses only. Yet, 4 states allow for felony enhancement for leaving the state to avoid the payment of child support.

Additionally, of the 33 states providing felony penalties for failure to pay child support, 6 states require as an element of the criminal offense the willful/knowing refusal or failure to pay the support.<sup>60</sup> In 17 states, this element is paired with the element of “without lawful excuse” or the “inability to pay”.<sup>61</sup> Eight states specifically make the

<sup>60</sup> Ga. Code Ann. § 19-10-1 (2003); Minn. Stat. Ann. § 609.375 (2003); Miss. Code Ann. § 97-5-3 (2003); Neb. Rev. Stat. § 28-706 (2003); Nev. Rev. Stat. Ann. § 201.020; N.D. Cent. Code § 14-07-15 (2003).

<sup>61</sup> Fla. Stat. Ann. § 827.06 (2003); Idaho Code § 18-401 (2003); 750 Ill. Comp. Stat. Ann. 16/15 (2003); Iowa Code Ann. § 726.5 (2003); Kan. Stat. Ann. § 21-3605 (2003); Ky. Rev. Stat. Ann. § 530.05 (2003); Mass. Gen. Laws Ann. Ch. 273 § 1 (2003); Mo. Ann. Stat. § 568.040 (2003); N.H. Rev. Stat. Ann. § 639:4 (2003); N.M. Stat. Ann. § 30-6-2 (2003); N.Y. Penal Law § 260.06 (2003); Okla. Stat. Ann. Tit. 21 § 852 (2003); Or. Rev. Stat. § 163.555 (2003); R.I. Gen. Laws § 11-2-1.1 (2003); S. D. Codified Laws § 25-7-16 (2003); Tenn. Code Ann. § 39-15-101 (2003) W. Va. Code Ann. § 61-5-29 (2003).

inability to pay an affirmative defense<sup>62</sup> and 2 states do not make willfulness an element of the offense.<sup>63</sup>

## VIII. Conclusion and Recommendation

### **FVS Recommendation:**

It is the recommendation of the Virginia State Crime Commission, Family Violence Sub-Committee that the General Assembly not support the enactment of SB 1118 as drafted due to the DOC correctional fiscal impact resulting from the felony charge for an estimated 2,853 inmates that would be charged under this bill.

Staff of the Virginia State Crime Commission Family Violence Sub-Committee presented two policy options for consideration. First, staff recommended changing SB 1118 as drafted to ensure that a Class 6 felony conviction can only be achieved for the second or subsequent violation of *Virginia Code* § 20-61, and not for two or more contempt violations pursuant to *Virginia Code* § 16.1-278.16. This change will ensure that the penalty enhancement from a misdemeanor to a Class 6 felony occurs only when there are violations of a statute requiring proof of the element of willingness for a conviction. A felony penalty should not be provided for someone who has failed to pay child support because he/she has an inability to pay, as can happen with contempt violations under *Virginia Code* § 16.1-278.16. The standard for enhancement instead should be for someone with the ability to pay who willingly refuses or willingly fails to pay.

This willingness standard ensures that a felony will not be taken lightly because enhancing the penalty for criminal nonsupport of a child carries consequences for the delinquent obligor and for the State. A felony conviction results in the revocation of the right to vote for the defendant and makes applying for a job more difficult. Additionally, the longer the obligor remains in jail without a source of income, the longer the child remains without child support. On the other hand, facing a felony conviction often causes the defendant to plead down to a misdemeanor charge on the promise of making future payments.<sup>64</sup> Also, felony charges allow prosecutors to extradite obligors who have fled to other states,<sup>65</sup> and having only a misdemeanor charge on the books makes the work of locating and extraditing fleeing obligors more difficult.<sup>66</sup>

As a second policy option for consideration, staff recommended the General Assembly not recommend the enactment of SB 1118 as drafted because it carries a

<sup>62</sup> Ariz. Rev. Stat. Ann. § 25-511 (2003); Colo. Rev. Stat. Ann. § 14-6-101 (2003); Del. Coe Ann. Tit. 11, § 5-1113 (2003); Ind. Code Ann. § 35-46-1-5 (2003); Ohio Rev. Code Ann. § 2919.21 (2003); Tex. Penal Code Ann. § 25.05 (2003); Utah Code Ann. § 76-7-201; Wis. Stat. Ann. § 948.22 (2003).

<sup>63</sup> Ark. Code Ann. § 5-26-401 (2003) and Mich. Comp. Laws Ann. § 750.165 (2003).

<sup>64</sup> Costanzo, Dan. "Child Support Enforcement," (December 12, 2002).

<sup>65</sup> *Id.*

<sup>66</sup> Costanzo, Dan. "Child Support Enforcement," (December 12, 2002).

significant fiscal impact. Specifically, from FY00 to FY01, the number of civil contempt commitments under *Virginia Code* §20-61 for failure to pay child support grew 68% from 11,268 to 18,968, with the average length of stay being 30.66 days in FY01. As Table B indicates the number of inmates with two or more convictions for failure to pay child support grew annually from FY00 to FY03.

**Table B: Child Support Recidivist Counts**

FY00		FY01		FY02		FY03	
# of Inmates	# of Confinements per Inmate	# of Inmates	# of Confinements per inmate	# of Inmates	# of Confinements per inmate	# of Inmates	# of Confinements per inmate
7132	1	7200	1	7212	1	7341	1
1795	2	1824	2	1827	2	1868	2
580	3	599	3	601	3	608	3
189	4	188	4	192	4	204	4
107	5	106	5	108	5	97	5
31	6	40	6	37	6	37	6
26	7	19	7	29	7	24	7
4	8	5	8	4	8	6	8
4	9	7	9	5	9	4	9
1	10	1	10	1	10	2	10
1	13	1	12	1	12	2	12
1	14	1	13	1	13	1	14

Specifically, there were 2,739 inmates in FY00 with multiple convictions; 2,791 in FY01; 2,806 in FY02, and 2,853 in FY03.

After considering the two policy options, the FVS recommended the General Assembly not support the enactment of SB1118 as drafted.