

SENATE BILL 968

By McNally

AN ACT to amend Tennessee Code Annotated, Title 8, Chapter 14; Title 16; Title 37; Title 40, Chapter 14 and Title 67, Chapter 4, Part 17, relative to legal representation of certain indigent defendants.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 40-14-202(b), is amended by deleting subsection (b) in its entirety and by substituting instead the following:

(b) Whenever an accused informs the court that the accused is financially unable to obtain the assistance of counsel, the burden shall lie on the accused to convince the court of the accused's eligibility to receive legal representation under this part. It is the duty of the court to conduct a full and complete hearing as to the financial ability of the accused to obtain the assistance of counsel, and to verify sources of income and property interests of the accused pursuant to subsection (d). All statements made by the accused seeking the appointment of counsel shall be by sworn testimony in open court or written affidavit sworn to before the judge pursuant to subsection (i).

SECTION 2. Tennessee Code Annotated, Section 40-14-202(d), is amended by deleting the subsection in its entirety and by substituting instead the following:

(d)

(1) The court shall verify the accused's income with any agency of this state or any political subdivision, including, but not limited to, the department of human services or a social service agency that services the criminal justice system of the judicial district. The court is authorized to obtain information from any agency upon its request. Any agency from which the court requests information pursuant to this subsection (d) shall supply such information, without

payment of any fees. The court shall order the agency to verify the income of the accused and report its findings directly to the court. The court shall consider the contents of the agency's report in making its determination and the report shall be made a part of the record in the cause.

(2) The court or clerk of the court shall conduct a review of the property records for the county in which the accused resides and in each county in which the accused owns any assets or property and the motor vehicle title and registration records of the state to identify any property interests of the accused.

(3) The court shall require the accused or those persons holding property in trust or otherwise for the accused to execute and deliver such written authorization as may be necessary to provide the court or the clerk with access to records of public or private sources, otherwise confidential, or any other information which may be relevant to the making of a determination as to the indigency of the accused under this section.

(4) The court or clerk of the court may contract with third parties to perform the verification of income and property ownership functions required by this subsection (d).

(5) After considering the factors set forth in subsection (c), conducting a hearing and performing the verification functions required by this subsection (d), the court shall make a finding as to the indigency of the accused.

SECTION 3. Tennessee Code Annotated, Section 40-14-202(c), is amended by deleting subdivisions (5), (6), and (7) and by substituting instead the following:

(5) The ownership or equity in any real or personal property; provided, that if the accused has equity in any intangible or tangible personal or real property or the expectancy of any interest of such property having a net equity value of two thousand five hundred dollars (\$2,500) or more, excluding the value of the person's homestead and the value of one (1) vehicle having a net value not exceeding five thousand dollars (\$5,000), or the accused has retained private

counsel immediately before or after filing the affidavit asserting indigency, then the defendant shall be presumed to be not indigent;

(6) The amount of the appearance or appeal bond, whether the party has been able to obtain release by making bond, and, if the party obtained release by making bond, the amount of money paid and the source of the money; provided, that if the accused has been released by posting a cash bond in the amount of five thousand dollars (\$5,000) or more, the defendant shall be presumed to be not indigent; and

(7) Any other circumstances presented to the court which are relevant to the issue of indigency.

SECTION 4. Tennessee Code Annotated, Section 40-14-202(e), is amended by deleting the subsection in its entirety and by substituting instead the following:

(e) If the court appoints counsel to represent an accused in a felony case under this section or in a misdemeanor case as required by law, but finds the accused is financially able to defray a portion or all of the cost of the accused's representation, the court shall enter an order pursuant to § 40-14-211 directing the party to pay into the registry of the clerk of the court any sum that the court determines the accused is able to pay. The sum shall be a lien against the accused in favor of the state on any and all property to which the defendant has or acquires an interest, and shall be enforced and subject to execution in the manner prescribed in § 40-14-211.

SECTION 5. Tennessee Code Annotated, Section 40-14-202(i)(1), is amended by deleting the language "the uniform affidavit of indigency" and by substituting instead the language "the affidavit of indigency designed by the administrative office of the courts for purposes of assisting the court in making its determination pursuant to subsection (c)".

SECTION 6. Tennessee Code Annotated, Title 40, Chapter 14, Part 2, is amended by adding the following as a new section:

**40-14-211.**

(a) The court having jurisdiction over any indigent defendant who has received the assistance of the public defender's office or an appointed private attorney, shall assess against the defendant the sum of any and all administrative fees, recoupment for defrayal of costs, attorney's fees and other costs associated with the provision of court-appointed counsel that the court finds the accused is financially able to pay.

(b) The court shall include in its final judgment a requirement that the defendant pay all such fees and costs assessed pursuant to this section. The court shall determine the value of the services of the public defender or appointed private attorney and costs, at which time the defendant, after receiving adequate notice from the court, shall have an opportunity to be heard and offer objection to the determination, and to be represented by counsel, with due opportunity to exercise and be accorded the procedures and rights provided in the laws and court rules pertaining to civil cases at law.

(c)

(1) The fees and costs assessed by the court under this section shall constitute a lien against the defendant in favor of the state on any and all property, both real and personal, of the defendant, and shall be effectuated in the manner prescribed by this section.

(2) To effectuate such a lien, the public defender or appointed private attorney shall, prior to the final disposition of the case or within ten (10) days thereafter, file a notice of lien setting forth the services rendered to the defendant and a claim for the amount of the fee with the clerk of the court.

(3) The defendant shall be personally served with a copy of such notice of lien.

(4) The court shall rule on whether all or any part of the claim shall be allowed.

(5) The portion of the claim approved by the court as the value of legal services which has been provided to the defendant shall be a judgment at law.

(6) The public defender shall not be required to pay filing or recording fees for or relating to such claim.

(7) The court may contract with private attorneys for the collection and enforcement of liens and other judgments owed to the state for services rendered by the public defender system.

(8) The lien created by this section shall be from the time filed in the court by the public defender or appointed private attorney a claim against any property of the defendant.

(9) No lien shall be foreclosed upon the homestead of the defendant, nor shall any defendant liable for payment of fees or costs be denied any of the protections afforded any other civil judgment debtor.

(d)

(1) The judgment ordering the defendant to pay fees and costs shall state the name and residence of the defendant and shall be recorded by the clerk of the court, without cost, in the office of the register of deeds in the county in which the defendant resides and in each county in which the defendant then owns or later acquires any assets or property.

(2) Such judgments shall be enforced on behalf of the state by the clerk of the court of the county in which assistance of counsel was rendered.

(3) The court may order that the fees and costs be paid immediately or within a specified period, that the fees and costs be paid at intervals or in installments to the clerk of the court or to the judge, if there is no clerk, or that payment of the fees and costs be a condition of probation, suspension of a sentence, or of withholding the imposition of a sentence.

(4) If a defendant is convicted and sentenced to a term of imprisonment, any part of the sentence that requires the payment of the fees and costs is enforceable during the period of imprisonment if the court expressly finds that the defendant has assets to pay all or part of the amounts ordered.

(5) When a defendant directed to pay is sentenced to probation or suspended sentence, the court, or the court clerk or parole and probation officer if so ordered by the court, shall establish a schedule of payments to satisfy the obligation.

(e) A defendant who has been ordered to pay fees and costs and who is not in willful default in the payment of fees and costs may at any time petition the court that ordered the defendant for deferral of the payment of fees and costs or of any unpaid portion of the fees and costs. If it appears to the satisfaction of the court that payment of the amount due will impose substantial hardship on the defendant or the immediate family of the defendant, the court may modify the judgment.

(f)

(1) The court shall immediately effectuate a levy of execution or wage garnishment on the salary or wages payable to or receivable by a defendant, which shall be continuous from the date a levy is made until the judgment out of which the levy arose is satisfied or becomes unenforceable by reason of lapse of

time, or until the expiration of the employer's payroll period that ends immediately prior to three (3) calendar months after the levy is made, whichever occurs first.

(2) With respect to a levy made under this subsection (f), the clerk of the court shall promptly release the levy when the judgment out of which it arose is satisfied or becomes unenforceable by reason of lapse of time, and shall promptly notify the defendant upon whom the levy was made that it has been released.

(3) If, pursuant to subdivision (f)(2), the period of effectiveness for a levy expires prior to the time the judgment out of which the levy arose is satisfied or becomes unenforceable by reason of lapse of time, the clerk of the court may subsequently proceed to levy on salary or wages in like manner as often as may be necessary until the judgment out of which the levy arose is fully satisfied or becomes unenforceable by reason of lapse of time.

(g)

(1) When a defendant who has been ordered to pay the fees and costs pursuant to this section, defaults on a payment or installment ordered by the court, the court on motion of the district attorney or upon its own motion may require the defendant to show cause why the default should not be treated as contempt of court and may issue a show cause citation or a warrant of arrest for the appearance of the defendant.

(2) Unless the defendant shows that the default was not attributable to a willful refusal to obey the order of the court or to a willful failure on the defendant's part to make a good faith effort to make the payment, the court shall find that the default constitutes criminal contempt.

(3) The term of confinement for contempt for nonpayment of the fees and costs shall be set forth in the judgment and shall not exceed one (1) day for each twenty-five dollars (\$25.00) of the payment, thirty (30) days if the order for payment of fees and costs was imposed upon conviction of a violation or misdemeanor, or one (1) year in any other case, whichever is the shorter period.

(4) If it appears to the satisfaction of the court that the default in the payment of costs is not contempt, the court may enter an order allowing the defendant additional time for payment, reducing the amount of the payment or installments due on the payment, or revoking the order for payment of the unpaid portion of the fees and costs in whole or in part.

(5) A person imprisoned for nonpayment of fees and costs shall be given credit toward payment for each day of imprisonment at the rate specified in the judgment.

SECTION 7. Tennessee Code Annotated, Section 40-14-103(b)(1), is amended by deleting the following language:

provided, however, that the defendant's willful failure to pay the fee may be considered by the court as an enhancement factor when imposing sentence if the defendant is found guilty of criminal conduct, and may also be considered by the court as evidence of the defendant's financial responsibility, or lack thereof, in a determination of the best interest of the child

and by substituting instead the following language:

provided, however, that the defendant's willful failure to pay the fee may be considered by the court as an enhancement factor when imposing sentence if the defendant is found guilty of criminal conduct, as evidence of the defendant's financial responsibility, or lack thereof, in a determination of the best interest of



the child, or as evidence of contempt for nonpayment of fees and costs pursuant to § 40-14-211

SECTION 8. Tennessee Code Annotated, Section 40-14-103(b)(3), is amended by deleting the language "If the administrative fee is not paid prior to disposition of the case, then the fee shall be collected in the same manner as costs are collected;" and by substituting instead the language "If the administrative fee is not paid prior to disposition of the case, then the fee shall be collected in the manner prescribed by § 40-14-211;".

SECTION 9. Tennessee Code Annotated, Section 40-14-206, is amended by designating the existing language as subsection (a) and by adding the following as new subsections (b) - (d):

(b) The supreme court shall also prescribe by rule the qualifications of appointed counsel in non-capital criminal cases, and the standards for appointing counsel from the roster of private attorneys maintained by each trial court exercising criminal jurisdiction. Such rules shall provide that each trial court take into consideration any circumstances affecting the quality of representation, including, but not limited to, whether the trial court, administrative office of the courts or supreme court have been advised of any complaints from attorneys or the public concerning the payment from public funds of nonroutine fees and expenses incurred by, or any false or fraudulent billing practices of, any attorney on the roster who has previously handled cases under this part.

(c) The court may establish a peer review system for the approval of nonroutine fees and expenses incurred in any cases under this part. Any such review shall be conducted by a panel of attorneys who practice in the area of criminal defense.

(d) The court may also adopt rules for contracting with expert witnesses to allow contracting with out-of-state expert witnesses only if in-state expert witnesses are not available or are more expensive than out-of-state expert witnesses.

SECTION 10. Tennessee Code Annotated, Section 40-14-208(d), is amended by deleting the subsection in its entirety and by substituting instead the following:

(d)

(1) A certified copy of the court order fixing any compensation or approving any expenses under this part, along with a true copy of the attorney's application, shall be forwarded to the administrative director of the courts, who shall audit and review the order and application, and upon finding payment to be in order, process the payment of compensation and expenses of all such orders received each quarter of a year out of money as appropriated in the annual appropriations act for that purpose.

(2) In the event that funding appropriated in the annual appropriations act is not sufficient to fully pay all orders and attorneys' applications received by the administrative director of the courts in a particular quarter, each attorney shall be entitled to the amount of compensation that bears the same ratio to the entire amount of compensation requested by all attorneys in such quarter, as determined by the administrative director of the court.

(3) In the event that the revenues generated from the increase in the annual privilege tax established pursuant to title 67, chapter 4, part 17, exceeds nine million dollars (\$9,000,000) or a higher amount as determined by the general assembly in the annual appropriations act, each attorney shall be entitled to the amount of compensation that equals fifty percent (50%) of the compensation requested by the attorney or a higher percentage as determined by the administrative director of the courts.

(4) Compensation and expenses shall not exceed the amounts fixed by the administrative director of the courts.

SECTION 11. Tennessee Code Annotated, Section 67-4-1703, is amended by adding the following as new subsection (f) and by redesignating existing subsection (f) accordingly:

(f) Notwithstanding subsection (a) or (b), the annual privilege tax established by this part payable by any person described in § 67-4-1702(a)(5) in any tax year shall be six hundred dollars (\$600). All revenue generated from the two hundred dollar (\$200) increase in the tax from four hundred dollars (\$400) to six hundred dollars (\$600) imposed by this act in this subsection (f) shall be credited to the indigent defense fund for providing legal services pursuant to title 40, chapter 14, for persons accused of criminal offenses.

SECTION 12. This act shall take effect July 1, 2013, the public welfare requiring it.