

1 COMMITTEE SUBSTITUTE

2 for

3 **H. B. 2750**

4 (By Delegates Frazier, Mahan, Fleischauer,
5 Caputo, Moore, Hunt and Skaff)

6
7 (Originating in the Committee on the Judiciary)

8 [February 1, 2011]

9
10 A BILL to amend and reenact §49-6-3 and §49-6-5 of the Code of West
11 Virginia, 1931, as amended, all relating to making the
12 commission of sexual assault or sexual abuse an additional
13 consideration a judge may use in issuing an order to
14 temporarily or permanently end a parent-child relationship.

15 *Be it enacted by the Legislature of West Virginia:*

16 That §49-6-3 and §49-6-5 of the Code of West Virginia, 1931,
17 as amended, be amended and reenacted, all to read as follows:

18 **ARTICLE 6. PROCEDURE IN CASES OF CHILD NEGLECT OR ABUSE.**

19 **§49-6-3. Petition to court when child believed neglected or abused**

20 **-- Temporary custody.**

21 (a) Upon the filing of a petition, the court may order that
22 the child alleged to be an abused or neglected child be delivered
23 for not more than ten days into the custody of the state department
24 or a responsible person found by the court to be a fit and proper
25 person for the temporary care of the child pending a preliminary
26 hearing, if it finds that:

27 (1) There exists imminent danger to the physical well-being of
28 the child; and

29 (2) there are no reasonably available alternatives to removal

1 of the child, including, but not limited to, the provision of
2 medical, psychiatric, psychological or homemaking services in the
3 child's present custody: *Provided*, That where the alleged abusing
4 person, if known, is a member of a household, the court shall not
5 allow placement pursuant to this section of the child or children
6 in said home unless the alleged abusing person is or has been
7 precluded from visiting or residing in said home by judicial order.
8 In a case where there is more than one child in the home, or in the
9 temporary care, custody or control of the alleged offending parent,
10 the petition shall so state, and notwithstanding the fact that the
11 allegations of abuse or neglect may pertain to less than all of
12 such children, each child in the home for whom relief is sought
13 shall be made a party to the proceeding. Even though the acts of
14 abuse or neglect alleged in the petition were not directed against
15 a specific child who is named in the petition, the court shall
16 order the removal of such child, pending final disposition, if it
17 finds that there exists imminent danger to the physical well-being
18 of the child and a lack of reasonable available alternatives to
19 removal. The initial order directing such custody shall contain an
20 order appointing counsel and scheduling the preliminary hearing,
21 and upon its service shall require the immediate transfer of
22 custody of such child or children to the department or a
23 responsible relative which may include any parent, guardian, or
24 other custodian. The court order shall state:

25 ~~(1)~~(A) that continuation in the home is contrary to the best
26 interests of the child and why; and

27 ~~(2)~~(B) whether or not the department made reasonable efforts
28 to preserve the family and prevent the placement or that the

1 emergency situation made such efforts unreasonable or impossible.
2 The order may also direct any party or the department to initiate
3 or become involved in services to facilitate reunification of the
4 family.

5 (b) Whether or not the court orders immediate transfer of
6 custody as provided in subsection (a) of this section, if the facts
7 alleged in the petition demonstrate to the court that there exists
8 imminent danger to the child, the court may schedule a preliminary
9 hearing giving the respondents at least five days' actual notice.
10 If the court finds at the preliminary hearing that there are no
11 alternatives less drastic than removal of the child and that a
12 hearing on the petition cannot be scheduled in the interim period,
13 the court may order that the child be delivered into the temporary
14 custody of the department or a responsible person or agency found
15 by the court to be a fit and proper person for the temporary care
16 of the child for a period not exceeding sixty days: *Provided*, That
17 the court order shall state:

18 (1) That continuation in the home is contrary to the best
19 interests of the child and set forth the reasons therefor;

20 (2) whether or not the department made reasonable efforts to
21 preserve the family and to prevent the child's removal from his or
22 her home;

23 (3) whether or not the department made reasonable efforts to
24 preserve the family and to prevent the placement or that the
25 emergency situation made such efforts unreasonable or impossible;
26 and

27 (4) what efforts should be made by the department, if any, to
28 facilitate the child's return home: *Provided, however*, That if the

1 court grants an improvement period as provided in section twelve of
2 this article, the sixty-day limit upon temporary custody is waived.

3 (c) If a child or children shall, in the presence of a child
4 protective service worker, be in an emergency situation which
5 constitutes an imminent danger to the physical well-being of the
6 child or children, as that phrase is defined in section three,
7 article one of this chapter, and if such worker has probable cause
8 to believe that the child or children will suffer additional child
9 abuse or neglect or will be removed from the county before a
10 petition can be filed and temporary custody can be ordered, the
11 worker may, prior to the filing of a petition, take the child or
12 children into his or her custody without a court order: *Provided,*
13 That after taking custody of such child or children prior to the
14 filing of a petition, the worker shall forthwith appear before a
15 circuit judge or a juvenile referee of the county wherein custody
16 was taken, or if no such judge or referee be available, before a
17 circuit judge or a juvenile referee of an adjoining county, and
18 shall immediately apply for an order ratifying the emergency
19 custody of the child pending the filing of a petition. The circuit
20 court of every county in the state shall appoint at least one of
21 the magistrates of the county to act as a juvenile referee, who
22 shall serve at the will and pleasure of the appointing court, and
23 who shall perform the functions prescribed for such position by the
24 provisions of this subsection. The parents, guardians or
25 custodians of the child or children may be present at the time and
26 place of application for an order ratifying custody, and if at the
27 time the child or children are taken into custody by the worker,
28 the worker knows which judge or referee is to receive the

1 application, the worker shall so inform the parents, guardians or
2 custodians. The application for emergency custody may be on forms
3 prescribed by the Supreme Court of Appeals or prepared by the
4 prosecuting attorney or the applicant, and shall set forth facts
5 from which it may be determined that the probable cause described
6 above in this subsection exists. Upon such sworn testimony or
7 other evidence as the judge or referee deems sufficient, the judge
8 or referee may order the emergency taking by the worker to be
9 ratified. If appropriate under the circumstances, the order may
10 include authorization for an examination as provided for in
11 subsection (b), section four of this article. If a referee issues
12 such an order, the referee shall by telephonic communication have
13 such order orally confirmed by a circuit judge of the circuit or an
14 adjoining circuit who shall on the next judicial day enter an order
15 of confirmation. If the emergency taking is ratified by the judge
16 or referee, emergency custody of the child or children shall be
17 vested in the department until the expiration of the next two
18 judicial days, at which time any such child taken into emergency
19 custody shall be returned to the custody of his or her parent or
20 guardian or custodian unless a petition has been filed and custody
21 of the child has been transferred under the provisions of section
22 three of this article.

23 (d) For purposes of the court's consideration of temporary
24 custody pursuant to the provisions of subsection (a) or (b) of this
25 section, the department is not required to make reasonable efforts
26 to preserve the family if the court determines:

27 (1) The parent has subjected the child, another child of the
28 parent, or any other child residing in the same household or under

1 the temporary or permanent custody of the parent to aggravated
2 circumstances which include, but are not limited to, abandonment,
3 torture, chronic abuse and sexual abuse;

4 (2) The parent has:

5 (A) Committed murder of the child's other parent, or
6 custodian, another child of the parent, or any other child residing
7 in the same household or under the temporary or permanent custody
8 of the parent;

9 (B) Committed voluntary manslaughter of the child's other
10 parent, another child of the parent, or any other child residing in
11 the same household or under the temporary or permanent custody of
12 the parent;

13 (C) Attempted or conspired to commit such a murder or
14 voluntary manslaughter or been an accessory before or after the
15 fact to either such crime; ~~or~~

16 (D) Committed unlawful or malicious wounding that results in
17 serious bodily injury to the child, the child's other parent, to
18 another child of the parent, or any other child residing in the
19 same household or under the temporary or permanent custody of the
20 parent; or

21 (E) Committed sexual assault or sexual abuse of the child, the
22 child's other parent, guardian, or custodian, another child of the
23 parent, or any other child residing in the same household or under
24 the temporary or permanent custody of the parent.

25 (3) The parental rights of the parent to another child have
26 been terminated involuntarily.

27 **§49-6-5. Disposition of neglected or abused children.**

28 (a) Following a determination pursuant to section two of this

1 article wherein the court finds a child to be abused or neglected,
2 the department shall file with the court a copy of the child's case
3 plan, including the permanency plan for the child. The term case
4 plan means a written document that includes, where applicable, the
5 requirements of the family case plan as provided for in section
6 three, article six-d of this chapter and that also includes at
7 least the following: A description of the type of home or
8 institution in which the child is to be placed, including a
9 discussion of the appropriateness of the placement and how the
10 agency which is responsible for the child plans to assure that the
11 child receives proper care and that services are provided to the
12 parents, child and foster parents in order to improve the
13 conditions in the parent(s) home; facilitate return of the child to
14 his or her own home or the permanent placement of the child; and
15 address the needs of the child while in foster care, including a
16 discussion of the appropriateness of the services that have been
17 provided to the child. The term "permanency plan" refers to that
18 part of the case plan which is designed to achieve a permanent home
19 for the child in the least restrictive setting available. The plan
20 must document efforts to ensure that the child is returned home
21 within approximate time lines for reunification as set out in the
22 plan. Reasonable efforts to place a child for adoption or with a
23 legal guardian may be made at the same time reasonable efforts are
24 made to prevent removal or to make it possible for a child to
25 safely return home. If reunification is not the permanency plan
26 for the child, the plan must state why reunification is not
27 appropriate and detail the alternative placement for the child to
28 include approximate time lines for when such placement is expected

1 to become a permanent placement. This case plan shall serve as the
2 family case plan for parents of abused or neglected children.
3 Copies of the child's case plan shall be sent to the child's
4 attorney and parent, guardian or custodian or their counsel at
5 least five days prior to the dispositional hearing. The court
6 shall forthwith proceed to disposition giving both the petitioner
7 and respondents an opportunity to be heard. The court shall give
8 precedence to dispositions in the following sequence:

9 (1) Dismiss the petition;

10 (2) Refer the child, the abusing parent, the battered parent
11 or other family members to a community agency for needed assistance
12 and dismiss the petition;

13 (3) Return the child to his or her own home under supervision
14 of the department;

15 (4) Order terms of supervision calculated to assist the child
16 and any abusing parent or battered parent or parents or custodian
17 which prescribe the manner of supervision and care of the child and
18 which are within the ability of any parent or parents or custodian
19 to perform;

20 (5) Upon a finding that the abusing parent or battered parent
21 or parents are presently unwilling or unable to provide adequately
22 for the child's needs, commit the child temporarily to the custody
23 of the state department, a licensed private child welfare agency or
24 a suitable person who may be appointed guardian by the court. The
25 court order shall state:

26 (A) That continuation in the home is contrary to the best
27 interests of the child and why;

28 (B) whether or not the department has made reasonable efforts,

1 with the child's health and safety being the paramount concern, to
2 preserve the family, or some portion thereof, and to prevent or
3 eliminate the need for removing the child from the child's home and
4 to make it possible for the child to safely return home;

5 (C) what efforts were made or that the emergency situation
6 made such efforts unreasonable or impossible; and

7 (D) the specific circumstances of the situation which made
8 such efforts unreasonable if services were not offered by the
9 department. The court order shall also determine under what
10 circumstances the child's commitment to the department shall
11 continue. Considerations pertinent to the determination include
12 whether the child should:

13 (i) Be continued in foster care for a specified period;

14 (ii) be considered for adoption;

15 (iii) be considered for legal guardianship;

16 (iv) be considered for permanent placement with a fit and
17 willing relative; or

18 (v) be placed in another planned permanent living arrangement,
19 but only in cases where the department has documented to the
20 circuit court a compelling reason for determining that it would not
21 be in the best interests of the child to follow one of the options
22 set forth in subparagraphs (i), (ii), (iii) or (iv) of this
23 paragraph. The court may order services to meet the special needs
24 of the child. Whenever the court transfers custody of a youth to
25 the department, an appropriate order of financial support by the
26 parents or guardians shall be entered in accordance with section
27 five, article seven of this chapter; or

28 (6) Upon a finding that there is no reasonable likelihood that

1 the conditions of neglect or abuse can be substantially corrected
2 in the near future and, when necessary for the welfare of the
3 child, terminate the parental, custodial and guardianship rights
4 and responsibilities of the abusing parent and commit the child to
5 the permanent sole custody of the nonabusing parent, if there be
6 one, or, if not, to either the permanent guardianship of the
7 department or a licensed child welfare agency. The court may award
8 sole custody of the child to a nonabusing battered parent. If the
9 court shall so find, then in fixing its dispositional order the
10 court shall consider the following factors:

11 (A) The child's need for continuity of care and caretakers;

12 (B) the amount of time required for the child to be integrated
13 into a stable and permanent home environment; and

14 (C) other factors as the court considers necessary and proper.

15 Notwithstanding any other provision of this article, the court
16 shall give consideration to the wishes of a child fourteen years of
17 age or older or otherwise of an age of discretion as determined by
18 the court regarding the permanent termination of parental rights.

19 No adoption of a child shall take place until all proceedings for
20 termination of parental rights under this article and appeals
21 thereof are final. In determining whether or not parental rights
22 should be terminated, the court shall consider the efforts made by
23 the department to provide remedial and reunification services to
24 the parent. The court order shall state:

25 (i) That continuation in the home is not in the best interest
26 of the child and why;

27 (ii) why reunification is not in the best interests of the
28 child;

1 (iii) whether or not the department made reasonable efforts,
2 with the child's health and safety being the paramount concern, to
3 preserve the family, or some portion thereof, and to prevent the
4 placement or to eliminate the need for removing the child from the
5 child's home and to make it possible for the child to safely return
6 home, or that the emergency situation made such efforts
7 unreasonable or impossible; and

8 (iv) whether or not the department made reasonable efforts to
9 preserve and reunify the family, or some portion thereof, including
10 a description of what efforts were made or that such efforts were
11 unreasonable due to specific circumstances.

12 (7) For purposes of the court's consideration of the
13 disposition custody of a child pursuant to the provisions of this
14 subsection, the department is not required to make reasonable
15 efforts to preserve the family if the court determines:

16 (A) The parent has subjected the child, another child of the
17 parent, or any other child residing in the same household or under
18 the temporary or permanent custody of the parent to aggravated
19 circumstances which include, but are not limited to, abandonment,
20 torture, chronic abuse and sexual abuse;

21 (B) The parent has:

22 (i) Committed murder of the child's other parent, another
23 child of the parent or any other child residing in the same
24 household or under the temporary or permanent custody of the
25 parent;

26 (ii) Committed voluntary manslaughter of the child's other
27 parent, another child of the parent, or any other child residing in
28 the same household or under the temporary or permanent custody of

1 the parent;

2 (iii) Attempted or conspired to commit such a murder or
3 voluntary manslaughter or been an accessory before or after the
4 fact to either such crime; ~~or~~

5 (iv) Committed a felonious assault that results in serious
6 bodily injury to the child, the child's other parent, or custodian,
7 to another child of the parent, or any other child residing in the
8 same household or under the temporary or permanent custody of the
9 parent; or

10 (v) Committed sexual assault or sexual abuse of the child, the
11 child's other parent, guardian, or custodian, another child of the
12 parent, or any other child residing in the same household or under
13 the temporary or permanent custody of the parent.

14 (C) The parental rights of the parent to another child have
15 been terminated involuntarily.

16 (b) As used in this section, "no reasonable likelihood that
17 conditions of neglect or abuse can be substantially corrected"
18 shall mean that, based upon the evidence before the court, the
19 abusing adult or adults have demonstrated an inadequate capacity to
20 solve the problems of abuse or neglect on their own or with help.
21 Such conditions shall be considered to exist in the following
22 circumstances, which shall not be exclusive:

23 (1) The abusing parent or parents have habitually abused or
24 are addicted to alcohol, controlled substances or drugs, to the
25 extent that proper parenting skills have been seriously impaired
26 and such person or persons have not responded to or followed
27 through the recommended and appropriate treatment which could have
28 improved the capacity for adequate parental functioning;

1 (2) The abusing parent or parents have willfully refused or
2 are presently unwilling to cooperate in the development of a
3 reasonable family case plan designed to lead to the child's return
4 to their care, custody and control;

5 (3) The abusing parent or parents have not responded to or
6 followed through with a reasonable family case plan or other
7 rehabilitative efforts of social, medical, mental health or other
8 rehabilitative agencies designed to reduce or prevent the abuse or
9 neglect of the child, as evidenced by the continuation or
10 insubstantial diminution of conditions which threatened the health,
11 welfare or life of the child;

12 (4) The abusing parent or parents have abandoned the child;

13 (5) The abusing parent or parents have repeatedly or seriously
14 injured the child physically or emotionally, or have sexually
15 abused or sexually exploited the child, and the degree of family
16 stress and the potential for further abuse and neglect are so great
17 as to preclude the use of resources to mitigate or resolve family
18 problems or assist the abusing parent or parents in fulfilling
19 their responsibilities to the child;

20 (6) The abusing parent or parents have incurred emotional
21 illness, mental illness or mental deficiency of such duration or
22 nature as to render such parent or parents incapable of exercising
23 proper parenting skills or sufficiently improving the adequacy of
24 such skills; or

25 (7) The battered parent's parenting skills have been seriously
26 impaired and said person has willfully refused or is presently
27 unwilling or unable to cooperate in the development of a reasonable
28 treatment plan or has not adequately responded to or followed

1 through with the recommended and appropriate treatment plan.

2 (c) The court may, as an alternative disposition, allow the
3 parents or custodians an improvement period not to exceed six
4 months. During this period the court shall require the parent to
5 rectify the conditions upon which the determination was based. The
6 court may order the child to be placed with the parents, or any
7 person found to be a fit and proper person, for the temporary care
8 of the child during the period. At the end of the period, the
9 court shall hold a hearing to determine whether the conditions have
10 been adequately improved and at the conclusion of the hearing shall
11 make a further dispositional order in accordance with this section.