

1 **ENROLLED**

2 COMMITTEE SUBSTITUTE

3 for

4 **H. B. 2750**

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

7  
8 [Passed March 9, 2011; in effect ninety days from passage.]  
9

10 AN ACT 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 against certain  
13 persons a basis for denying someone temporary or permanent  
14 custody of a minor child or children.

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

27       (B) Whether or not the department made reasonable efforts to  
28 preserve the family and prevent the placement or that the emergency

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

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

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

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

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

26 (4) What efforts should be made by the department, if any, to  
27 facilitate the child's return home: *Provided, however, That* if the  
28 court grants an improvement period as provided in section twelve of

1 this article, the sixty-day limit upon temporary custody is waived.

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

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

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

26 (1) The parent has subjected the child, another child of the  
27 parent, or any other child residing in the same household or under  
28 the temporary or permanent custody of the parent to aggravated

1 circumstances which include, but are not limited to, abandonment,  
2 torture, chronic abuse and sexual abuse;

3 (2) The parent has:

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

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

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

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

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

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

26 **§49-6-5. Disposition of neglected or abused children.**

27 (a) Following a determination pursuant to section two of this  
28 article wherein the court finds a child to be abused or neglected,

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

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

8 (1) Dismiss the petition;

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

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

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

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

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

27 (B) Whether or not the department has made reasonable efforts,  
28 with the child's health and safety being the paramount concern, to

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

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

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

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

13 (ii) Be considered for adoption;

14 (iii) Be considered for legal guardianship;

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

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

27 (6) Upon a finding that there is no reasonable likelihood that  
28 the conditions of neglect or abuse can be substantially corrected

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

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

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

13 (C) Other factors as the court considers necessary and proper.

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

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

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

26 (ii) Why reunification is not in the best interests of the  
27 child;

28 (iii) Whether or not the department 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 the  
3 placement or to eliminate the need for removing the child from the  
4 child's home and to make it possible for the child to safely return  
5 home, or that the emergency situation made such efforts  
6 unreasonable or impossible; and

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

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

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

20 (B) The parent has:

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

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

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

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

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

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

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

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

28 (2) The abusing parent or parents have willfully refused or

1 are presently unwilling to cooperate in the development of a  
2 reasonable family case plan designed to lead to the child's return  
3 to their care, custody and control;

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

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

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

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

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

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