

H. B. 2750

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

[Introduced January 21, 2011; referred to the
Committee on the Judiciary.]

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

Be it enacted by the Legislature of West Virginia:

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

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

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

-- Temporary custody.

(a) Upon the filing of a petition, the court may order that
the child alleged to be an abused or neglected child be delivered
for not more than ten days into the custody of the state department
or a responsible person found by the court to be a fit and proper
person for the temporary care of the child pending a preliminary
hearing, if it finds that: (1) There exists imminent danger to the
physical well-being of the child; and (2) there are no reasonably
available alternatives to removal of the child, including, but not
limited to, the provision of medical, psychiatric, psychological or

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

1 to initiate or become involved in services to facilitate
2 reunification of the family.

3 (b) Whether or not the court orders immediate transfer of
4 custody as provided in subsection (a) of this section, if the facts
5 alleged in the petition demonstrate to the court that there exists
6 imminent danger to the child, the court may schedule a preliminary
7 hearing giving the respondents at least five days' actual notice.
8 If the court finds at the preliminary hearing that there are no
9 alternatives less drastic than removal of the child and that a
10 hearing on the petition cannot be scheduled in the interim period,
11 the court may order that the child be delivered into the temporary
12 custody of the department or a responsible person or agency found
13 by the court to be a fit and proper person for the temporary care
14 of the child for a period not exceeding sixty days: *Provided*, That
15 the court order shall state: (1) That continuation in the home is
16 contrary to the best interests of the child and set forth the
17 reasons therefor; (2) whether or not the department made reasonable
18 efforts to preserve the family and to prevent the child's removal
19 from his or her home; (3) whether or not the department made
20 reasonable efforts to preserve the family and to prevent the
21 placement or that the emergency situation made such efforts
22 unreasonable or impossible; and (4) what efforts should be made by
23 the department, if any, to facilitate the child's return home:
24 *Provided, however*, That if the court grants an improvement period
25 as provided in section twelve of this article, the sixty-day limit
26 upon temporary custody is waived.

27 (c) If a child or children shall, in the presence of a child

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

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

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

25 (1) The parent has subjected the child, another child of the
26 parent, or any other child residing in the same household or under
27 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, another
5 child of the parent, or any other child residing in the same
6 household or under the temporary or permanent custody of the
7 parent;

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

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

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

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

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

10 (1) Dismiss the petition;

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

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

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

21 (5) Upon a finding that the abusing parent or battered parent
22 or parents are presently unwilling or unable to provide adequately
23 for the child's needs, commit the child temporarily to the custody
24 of the state department, a licensed private child welfare agency or
25 a suitable person who may be appointed guardian by the court. The
26 court order shall state: (A) That continuation in the home is
27 contrary to the best interests of the child and why; (B) whether or

1 not the department has made reasonable efforts, with the child's
2 health and safety being the paramount concern, to preserve the
3 family, or some portion thereof, and to prevent or eliminate the
4 need for removing the child from the child's home and to make it
5 possible for the child to safely return home; (C) what efforts were
6 made or that the emergency situation made such efforts unreasonable
7 or impossible; and (D) the specific circumstances of the situation
8 which made such efforts unreasonable if services were not offered
9 by the 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: (i) Be continued in foster care for a
13 specified period; (ii) be considered for adoption; (iii) be
14 considered for legal guardianship; (iv) be considered for permanent
15 placement with a fit and willing relative; or (v) be placed in
16 another planned permanent living arrangement, but only in cases
17 where the department has documented to the circuit court a
18 compelling reason for determining that it would not be in the best
19 interests of the child to follow one of the options set forth in
20 subparagraphs (i), (ii), (iii) or (iv) of this paragraph. The
21 court may order services to meet the special needs of the child.
22 Whenever the court transfers custody of a youth to the department,
23 an appropriate order of financial support by the parents or
24 guardians shall be entered in accordance with section five, article
25 seven of this chapter; or

26 (6) Upon a finding that there is no reasonable likelihood that
27 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: (A) The child's need
10 for continuity of care and caretakers; (B) the amount of time
11 required for the child to be integrated into a stable and permanent
12 home environment; and (C) other factors as the court considers
13 necessary and proper. Notwithstanding any other provision of this
14 article, the court shall give consideration to the wishes of a
15 child fourteen years of age or older or otherwise of an age of
16 discretion as determined by the court regarding the permanent
17 termination of parental rights. No adoption of a child shall take
18 place until all proceedings for termination of parental rights
19 under this article and appeals thereof are final. In determining
20 whether or not parental rights should be terminated, the court
21 shall consider the efforts made by the department to provide
22 remedial and reunification services to the parent. The court order
23 shall state: (i) That continuation in the home is not in the best
24 interest of the child and why; (ii) why reunification is not in the
25 best interests of the child; (iii) whether or not the department
26 made reasonable efforts, with the child's health and safety being
27 the paramount concern, to preserve the family, or some portion

1 thereof, and to prevent the placement or to eliminate the need for
2 removing the child from the child's home and to make it possible
3 for the child to safely return home, or that the emergency
4 situation made such efforts unreasonable or impossible; and (iv)
5 whether or not the department made reasonable efforts to preserve
6 and reunify the family, or some portion thereof, including a
7 description of what efforts were made or that such efforts were
8 unreasonable due to specific circumstances.

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

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

18 (B) The parent has:

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

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

27 (iii) Attempted or conspired to commit such a murder or

1 voluntary manslaughter or been an accessory before or after the
2 fact to either such crime; ~~or~~

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

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

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

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

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

27 (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

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.

NOTE: The purpose of this bill is to make the commission of sexual assault or abuse an additional consideration a judge may use in issuing an order to temporarily or permanently end a parent-child relationship.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.