

WEST VIRGINIA LEGISLATURE

FIRST REGULAR SESSION, 2011



ENROLLED

COMMITTEE SUBSTITUTE

FOR

House Bill No. 2750

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



Passed March 9, 2011

In Effect Ninety Days From Passage

E N R O L L E D

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H. B. 2750

(BY DELEGATES FRAZIER, MAHAN, FLEISCHAUER,
CAPUTO, MOORE, HUNT AND SKAFF)

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AN ACT 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 sexual abuse against certain persons a basis for denying someone temporary or permanent custody of a minor child or children.

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.

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

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

9 (2) There are no reasonably available alternatives to
10 removal of the child, including, but not limited to, the
11 provision of medical, psychiatric, psychological or
12 homemaking services in the child's present custody:
13 *Provided*, That where the alleged abusing person, if known,
14 is a member of a household, the court shall not allow
15 placement pursuant to this section of the child or children in
16 said home unless the alleged abusing person is or has been
17 precluded from visiting or residing in said home by judicial
18 order. In a case where there is more than one child in the
19 home, or in the temporary care, custody or control of the
20 alleged offending parent, the petition shall so state, and
21 notwithstanding the fact that the allegations of abuse or
22 neglect may pertain to less than all of such children, each
23 child in the home for whom relief is sought shall be made a
24 party to the proceeding. Even though the acts of abuse or
25 neglect alleged in the petition were not directed against a
26 specific child who is named in the petition, the court shall
27 order the removal of such child, pending final disposition, if
28 it finds that there exists imminent danger to the physical well-
29 being of the child and a lack of reasonable available
30 alternatives to removal. The initial order directing such
31 custody shall contain an order appointing counsel and
32 scheduling the preliminary hearing, and upon its service shall
33 require the immediate transfer of custody of such child or
34 children to the department or a responsible relative which

35 may include any parent, guardian, or other custodian. The
36 court order shall state:

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

39 (B) Whether or not the department made reasonable
40 efforts to preserve the family and prevent the placement or
41 that the emergency situation made such efforts unreasonable
42 or impossible. The order may also direct any party or the
43 department to initiate or become involved in services to
44 facilitate reunification of the family.

45 (b) Whether or not the court orders immediate transfer of
46 custody as provided in subsection (a) of this section, if the
47 facts alleged in the petition demonstrate to the court that there
48 exists imminent danger to the child, the court may schedule
49 a preliminary hearing giving the respondents at least five
50 days' actual notice. If the court finds at the preliminary
51 hearing that there are no alternatives less drastic than removal
52 of the child and that a hearing on the petition cannot be
53 scheduled in the interim period, the court may order that the
54 child be delivered into the temporary custody of the
55 department or a responsible person or agency found by the
56 court to be a fit and proper person for the temporary care of
57 the child for a period not exceeding sixty days: *Provided*,
58 That the court order shall state:

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

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

64 (3) Whether or not the department made reasonable
65 efforts to preserve the family and to prevent the placement or

66 that the emergency situation made such efforts unreasonable
67 or impossible; and

68 (4) What efforts should be made by the department, if
69 any, to facilitate the child's return home: *Provided, however,*
70 That if the court grants an improvement period as provided
71 in section twelve of this article, the sixty-day limit upon
72 temporary custody is waived.

73 (c) If a child or children shall, in the presence of a child
74 protective service worker, be in an emergency situation
75 which constitutes an imminent danger to the physical well-
76 being of the child or children, as that phrase is defined in
77 section three, article one of this chapter, and if such worker
78 has probable cause to believe that the child or children will
79 suffer additional child abuse or neglect or will be removed
80 from the county before a petition can be filed and temporary
81 custody can be ordered, the worker may, prior to the filing of
82 a petition, take the child or children into his or her custody
83 without a court order: *Provided,* That after taking custody of
84 such child or children prior to the filing of a petition, the
85 worker shall forthwith appear before a circuit judge or a
86 juvenile referee of the county wherein custody was taken, or
87 if no such judge or referee be available, before a circuit judge
88 or a juvenile referee of an adjoining county, and shall
89 immediately apply for an order ratifying the emergency
90 custody of the child pending the filing of a petition. The
91 circuit court of every county in the state shall appoint at least
92 one of the magistrates of the county to act as a juvenile
93 referee, who shall serve at the will and pleasure of the
94 appointing court, and who shall perform the functions
95 prescribed for such position by the provisions of this
96 subsection. The parents, guardians or custodians of the child
97 or children may be present at the time and place of
98 application for an order ratifying custody, and if at the time
99 the child or children are taken into custody by the worker, the
100 worker knows which judge or referee is to receive the

101 application, the worker shall so inform the parents, guardians
102 or custodians. The application for emergency custody may
103 be on forms prescribed by the Supreme Court of Appeals or
104 prepared by the prosecuting attorney or the applicant, and
105 shall set forth facts from which it may be determined that the
106 probable cause described above in this subsection exists.
107 Upon such sworn testimony or other evidence as the judge or
108 referee deems sufficient, the judge or referee may order the
109 emergency taking by the worker to be ratified. If appropriate
110 under the circumstances, the order may include authorization
111 for an examination as provided for in subsection (b), section
112 four of this article. If a referee issues such an order, the
113 referee shall by telephonic communication have such order
114 orally confirmed by a circuit judge of the circuit or an
115 adjoining circuit who shall on the next judicial day enter an
116 order of confirmation. If the emergency taking is ratified by
117 the judge or referee, emergency custody of the child or
118 children shall be vested in the department until the expiration
119 of the next two judicial days, at which time any such child
120 taken into emergency custody shall be returned to the custody
121 of his or her parent or guardian or custodian unless a petition
122 has been filed and custody of the child has been transferred
123 under the provisions of section three of this article.

124 (d) For purposes of the court's consideration of
125 temporary custody pursuant to the provisions of subsection
126 (a) or (b) of this section, the department is not required to
127 make reasonable efforts to preserve the family if the court
128 determines:

129 (1) The parent has subjected the child, another child of
130 the parent, or any other child residing in the same household
131 or under the temporary or permanent custody of the parent to
132 aggravated circumstances which include, but are not limited
133 to, abandonment, torture, chronic abuse and sexual abuse;

134 (2) The parent has:

135 (A) Committed murder of the child's other parent,
136 guardian or custodian, another child of the parent, or any
137 other child residing in the same household or under the
138 temporary or permanent custody of the parent;

139 (B) Committed voluntary manslaughter of the child's
140 other parent, guardian or custodian, another child of the
141 parent, or any other child residing in the same household or
142 under the temporary or permanent custody of the parent;

143 (C) Attempted or conspired to commit such a murder or
144 voluntary manslaughter or been an accessory before or after
145 the fact to either such crime;

146 (D) Committed unlawful or malicious wounding that
147 results in serious bodily injury to the child, the child's other
148 parent, guardian or custodian, to another child of the parent,
149 or any other child residing in the same household or under
150 the temporary or permanent custody of the parent; or

151 (E) Committed sexual assault or sexual abuse of the
152 child, the child's other parent, guardian, or custodian, another
153 child of the parent, or any other child residing in the same
154 household or under the temporary or permanent custody of
155 the parent.

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

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

1 (a) Following a determination pursuant to section two of
2 this article wherein the court finds a child to be abused or
3 neglected, the department shall file with the court a copy of
4 the child's case plan, including the permanency plan for the
5 child. The term case plan means a written document that
6 includes, where applicable, the requirements of the family

7 case plan as provided for in section three, article six-d of this
8 chapter and that also includes at least the following: A
9 description of the type of home or institution in which the
10 child is to be placed, including a discussion of the
11 appropriateness of the placement and how the agency which
12 is responsible for the child plans to assure that the child
13 receives proper care and that services are provided to the
14 parents, child and foster parents in order to improve the
15 conditions in the parent(s) home; facilitate return of the child
16 to his or her own home or the permanent placement of the
17 child; and address the needs of the child while in foster care,
18 including a discussion of the appropriateness of the services
19 that have been provided to the child. The term “permanency
20 plan” refers to that part of the case plan which is designed to
21 achieve a permanent home for the child in the least restrictive
22 setting available. The plan must document efforts to ensure
23 that the child is returned home within approximate time lines
24 for reunification as set out in the plan. Reasonable efforts to
25 place a child for adoption or with a legal guardian may be
26 made at the same time reasonable efforts are made to prevent
27 removal or to make it possible for a child to safely return
28 home. If reunification is not the permanency plan for the
29 child, the plan must state why reunification is not appropriate
30 and detail the alternative placement for the child to include
31 approximate time lines for when such placement is expected
32 to become a permanent placement. This case plan shall serve
33 as the family case plan for parents of abused or neglected
34 children. Copies of the child’s case plan shall be sent to the
35 child’s attorney and parent, guardian or custodian or their
36 counsel at least five days prior to the dispositional hearing.
37 The court shall forthwith proceed to disposition giving both
38 the petitioner and respondents an opportunity to be heard.
39 The court shall give precedence to dispositions in the
40 following sequence:

41 (1) Dismiss the petition;

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

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

47 (4) Order terms of supervision calculated to assist the
48 child and any abusing parent or battered parent or parents or
49 custodian which prescribe the manner of supervision and care
50 of the child and which are within the ability of any parent or
51 parents or custodian to perform;

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

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

60 (B) Whether or not the department has made reasonable
61 efforts, with the child's health and safety being the
62 paramount concern, to preserve the family, or some portion
63 thereof, and to prevent or eliminate the need for removing the
64 child from the child's home and to make it possible for the
65 child to safely return home;

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

68 (D) The specific circumstances of the situation which
69 made such efforts unreasonable if services were not offered
70 by the department. The court order shall also determine under
71 what circumstances the child's commitment to the

72 department shall continue. Considerations pertinent to the
73 determination include whether the child should:

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

75 (ii) Be considered for adoption;

76 (iii) Be considered for legal guardianship;

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

79 (v) Be placed in another planned permanent living
80 arrangement, but only in cases where the department has
81 documented to the circuit court a compelling reason for
82 determining that it would not be in the best interests of the
83 child to follow one of the options set forth in subparagraphs
84 (i), (ii), (iii) or (iv) of this paragraph. The court may order
85 services to meet the special needs of the child. Whenever the
86 court transfers custody of a youth to the department, an
87 appropriate order of financial support by the parents or
88 guardians shall be entered in accordance with section five,
89 article seven of this chapter; or

90 (6) Upon a finding that there is no reasonable likelihood
91 that the conditions of neglect or abuse can be substantially
92 corrected in the near future and, when necessary for the
93 welfare of the child, terminate the parental, custodial and
94 guardianship rights and responsibilities of the abusing parent
95 and commit the child to the permanent sole custody of the
96 nonabusing parent, if there be one, or, if not, to either the
97 permanent guardianship of the department or a licensed child
98 welfare agency. The court may award sole custody of the
99 child to a nonabusing battered parent. If the court shall so
100 find, then in fixing its dispositional order the court shall
101 consider the following factors:

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

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

107 (C) Other factors as the court considers necessary and
108 proper. Notwithstanding any other provision of this article,
109 the court shall give consideration to the wishes of a child
110 fourteen years of age or older or otherwise of an age of
111 discretion as determined by the court regarding the
112 permanent termination of parental rights. No adoption of a
113 child shall take place until all proceedings for termination of
114 parental rights under this article and appeals thereof are final.
115 In determining whether or not parental rights should be
116 terminated, the court shall consider the efforts made by the
117 department to provide remedial and reunification services to
118 the parent. The court order shall state:

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

121 (ii) Why reunification is not in the best interests of the
122 child;

123 (iii) Whether or not the department made reasonable
124 efforts, with the child's health and safety being the
125 paramount concern, to preserve the family, or some portion
126 thereof, and to prevent the placement or to eliminate the need
127 for removing the child from the child's home and to make it
128 possible for the child to safely return home, or that the
129 emergency situation made such efforts unreasonable or
130 impossible; and

131 (iv) Whether or not the department made reasonable
132 efforts to preserve and reunify the family, or some portion
133 thereof, including a description of what efforts were made or

134 that such efforts were unreasonable due to specific
135 circumstances.

136 (7) For purposes of the court's consideration of the
137 disposition custody of a child pursuant to the provisions of
138 this subsection, the department is not required to make
139 reasonable efforts to preserve the family if the court
140 determines:

141 (A) The parent has subjected the child, another child of
142 the parent, or any other child residing in the same household
143 or under the temporary or permanent custody of the parent to
144 aggravated circumstances which include, but are not limited to,
145 to, abandonment, torture, chronic abuse and sexual abuse;

146 (B) The parent has:

147 (i) Committed murder of the child's other parent,
148 guardian or custodian, another child of the parent or any
149 other child residing in the same household or under the
150 temporary or permanent custody of the parent;

151 (ii) Committed voluntary manslaughter of the child's
152 other parent, guardian or custodian, another child of the
153 parent, or any other child residing in the same household or
154 under the temporary or permanent custody of the parent;

155 (iii) Attempted or conspired to commit such a murder or
156 voluntary manslaughter or been an accessory before or after
157 the fact to either such crime;

158 (iv) Committed a felonious assault that results in serious
159 bodily injury to the child, the child's other parent, guardian
160 or custodian, to another child of the parent, or any other child
161 residing in the same household or under the temporary or
162 permanent custody of the parent; or

163 (v) Committed sexual assault or sexual abuse of the child,
164 the child's other parent, guardian, or custodian, another child
165 of the parent, or any other child residing in the same
166 household or under the temporary or permanent custody of
167 the parent.

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

170 (b) As used in this section, "no reasonable likelihood that
171 conditions of neglect or abuse can be substantially corrected"
172 shall mean that, based upon the evidence before the court, the
173 abusing adult or adults have demonstrated an inadequate
174 capacity to solve the problems of abuse or neglect on their
175 own or with help. Such conditions shall be considered to
176 exist in the following circumstances, which shall not be
177 exclusive:

178 (1) The abusing parent or parents have habitually abused
179 or are addicted to alcohol, controlled substances or drugs, to
180 the extent that proper parenting skills have been seriously
181 impaired and such person or persons have not responded to
182 or followed through the recommended and appropriate
183 treatment which could have improved the capacity for
184 adequate parental functioning;

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

189 (3) The abusing parent or parents have not responded to
190 or followed through with a reasonable family case plan or
191 other rehabilitative efforts of social, medical, mental health
192 or other rehabilitative agencies designed to reduce or prevent
193 the abuse or neglect of the child, as evidenced by the
194 continuation or insubstantial diminution of conditions which
195 threatened the health, welfare or life of the child;

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

198 (5) The abusing parent or parents have repeatedly or
199 seriously injured the child physically or emotionally, or have
200 sexually abused or sexually exploited the child, and the
201 degree of family stress and the potential for further abuse and
202 neglect are so great as to preclude the use of resources to
203 mitigate or resolve family problems or assist the abusing
204 parent or parents in fulfilling their responsibilities to the
205 child;

206 (6) The abusing parent or parents have incurred
207 emotional illness, mental illness or mental deficiency of such
208 duration or nature as to render such parent or parents
209 incapable of exercising proper parenting skills or sufficiently
210 improving the adequacy of such skills; or

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

217 (c) The court may, as an alternative disposition, allow the
218 parents or custodians an improvement period not to exceed
219 six months. During this period the court shall require the
220 parent to rectify the conditions upon which the determination
221 was based. The court may order the child to be placed with
222 the parents, or any person found to be a fit and proper person,
223 for the temporary care of the child during the period. At the
224 end of the period, the court shall hold a hearing to determine
225 whether the conditions have been adequately improved and
226 at the conclusion of the hearing shall make a further
227 dispositional order in accordance with this section.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman, House Committee

Chairman, Senate Committee

Originating in the House.

To take effect ninety days from passage.

Clerk of the House of Delegates

Clerk of the Senate

Speaker of the House of Delegates

President of the Senate

The within _____ this the _____
day of _____, 2011.

Governor