

COMMITTEE SUBSTITUTE

FOR

**H. B. 2750**

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

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(Originating in the Committee on the Judiciary)  
[February 1, 2011]

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 sexual 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.**

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  
29 well-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 ~~(1)~~(A) that continuation in the home is contrary to the  
38 best interests of the child and why; and

39 ~~(2)~~(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  
48 there exists imminent danger to the child, the court may  
49 schedule a preliminary hearing giving the respondents at least  
50 five days' actual notice. If the court finds at the preliminary  
51 hearing that there are no alternatives less drastic than  
52 removal of the child and that a hearing on the petition cannot  
53 be scheduled in the interim period, the court may order that  
54 the 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  
121 custody of his or her parent or guardian or custodian unless  
122 a petition has been filed and custody of the child has been  
123 transferred under the provisions of section three of this  
124 article.

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

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

135 (2) The parent has:

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

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

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

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



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

157 (3) The parental rights of the parent to another child have  
158 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  
50 care of the child and which are within the ability of any  
51 parent or 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  
71 under 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 this  
138 subsection, the department is not required to make reasonable  
139 efforts to preserve the family if the court determines:

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

145 (B) The parent has:

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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