

H. B. 4048

(By Delegates Marshall, Longstreth, Lane,
Moore, Hamilton, Hunt, Staggers, Ellington and
Barill)

[Introduced January 13, 2012; referred to the
Committee on the Judiciary then Finance.]

A BILL to amend and reenact §49-1-3 of the Code of West Virginia,
1931, as amended; to amend and reenact §49-6-3 of said code;
and to amend and reenact §61-8D-3, all relating to conduct and
circumstances of child abuse; creating crime and criminal
penalties for drug and alcohol abuse during pregnancy
resulting in diagnosed harm to infant.

Be it enacted by the Legislature of West Virginia:

That §49-1-3 of the Code of West Virginia, 1931, as amended,
be amended and reenacted; that §49-6-3 of said code be amended and
reenacted; and that §61-8D-3 of said code be amended and reenacted,
all to read as follows:

CHAPTER 49. CHILD WELFARE.

ARTICLE 1. PURPOSES; DEFINITIONS.

§49-1-3. Definitions relating to abuse and neglect.

(a) "Abused child" means a child whose health or welfare is
harmful or threatened by:

(1) A parent, guardian or custodian who knowingly or
intentionally inflicts, attempts to inflict or knowingly allows

1 another person to inflict, physical injury or mental or emotional
2 injury, upon the child or another child in the home; or

3 (2) Sexual abuse or sexual exploitation; or

4 (3) The sale or attempted sale of a child by a parent, guardian
5 or custodian in violation of section sixteen, article four, chapter
6 forty-eight of this code; ~~or~~

7 (4) Domestic violence as defined in section two hundred two,
8 article twenty-seven, chapter forty-eight of this code; or

9 (5) A mother who, during her pregnancy, uses drugs or alcohol
10 and, as a result, gives birth to an infant who is dependent upon a
11 controlled substance not the result of medical treatment
12 administered to the mother or infant or who is diagnosed with fetal
13 alcohol syndrome or both.

14 In addition to its broader meaning, physical injury may include
15 an injury to the child as a result of excessive corporal punishment.

16 (b) "Abusing parent" means a parent, guardian or other
17 custodian, regardless of his or her age, whose conduct, as alleged
18 in the petition charging child abuse or neglect, has been adjudged
19 by the court to constitute child abuse or neglect.

20 (c) "Battered parent" means a parent, guardian or other
21 custodian who has been judicially determined not to have condoned
22 the abuse or neglect and has not been able to stop the abuse or
23 neglect of the child or children due to being the victim of domestic
24 violence as defined by section two hundred two, article twenty-
25 seven, chapter forty-eight of this code, which domestic violence was
26 perpetrated by the person or persons determined to have abused or

1 neglected the child or children.

2 (d) "Child abuse and neglect" or "child abuse or neglect" means
3 physical injury, mental or emotional injury, sexual abuse, sexual
4 exploitation, sale or attempted sale, alcohol or drug use during
5 pregnancy not administered for medical treatment of the mother or
6 infant resulting in diagnosed harm to an infant at birth or a blood,
7 urine or meconium test of the child at birth showing the presence
8 of any amount of a controlled substance or a metabolite of a
9 controlled substance or negligent treatment or maltreatment of a
10 child by a parent, guardian or custodian who is responsible for the
11 child's welfare, under circumstances which harm or threaten the
12 health and welfare of the child.

13 (e) "Child abuse and neglect services" means social services
14 which are directed toward:

15 (1) Protecting and promoting the welfare of children who are
16 abused or neglected;

17 (2) Identifying, preventing and remedying conditions which
18 cause child abuse and neglect;

19 (3) Preventing the unnecessary removal of children from their
20 families by identifying family problems and assisting families in
21 resolving problems which could lead to a removal of children and a
22 breakup of the family;

23 (4) In cases where children have been removed from their
24 families, providing services to the children and the families so as
25 to reunify such children with their families or some portion
26 thereof;

1 (5) Placing children in suitable adoptive homes when reunifying
2 the children with their families, or some portion thereof, is not
3 possible or appropriate; and

4 (6) Assuring the adequate care of children who have been placed
5 in the custody of the department or third parties.

6 (f) "Child advocacy center" means a community-based
7 organization that is a member in good standing with the West
8 Virginia Child Abuse Network, Inc., and is working to implement the
9 following program components:

10 (1) Child-appropriate/child-friendly facility: A child
11 advocacy center provides a comfortable, private, child-friendly
12 setting that is both physically and psychologically safe for
13 clients.

14 (2) Multidisciplinary team (MDT): A multidisciplinary team for
15 response to child abuse allegations includes representation from the
16 following: Law enforcement; child protective services; prosecution;
17 mental health; medical; victim advocacy; child advocacy center.

18 (3) Organizational capacity: A designated legal entity
19 responsible for program and fiscal operations has been established
20 and implements basic sound administrative practices.

21 (4) Cultural competency and diversity: The CAC promotes
22 policies, practices and procedures that are culturally competent.
23 Cultural competency is defined as the capacity to function in more
24 than one culture, requiring the ability to appreciate, understand
25 and interact with members of diverse populations within the local
26 community.

1 (5) Forensic interviews: Forensic interviews are conducted in
2 a manner which is of a neutral, fact finding nature and coordinated
3 to avoid duplicative interviewing.

4 (6) Medical evaluation: Specialized medical evaluation and
5 treatment are to be made available to CAC clients as part of the
6 team response either at the CAC or through coordination and referral
7 with other specialized medical providers.

8 (7) Therapeutic intervention: Specialized mental health
9 services are to be made available as part of the team response
10 either at the CAC or through coordination and referral with other
11 appropriate treatment providers.

12 (8) Victim support/advocacy: Victim support and advocacy are
13 to be made available as part of the team response, either at the CAC
14 or through coordination with other providers, throughout the
15 investigation and subsequent legal proceedings.

16 (9) Case review: Team discussion and information sharing
17 regarding the investigation, case status and services needed by the
18 child and family are to occur on a routine basis.

19 (10) Case tracking: CACs must develop and implement a system
20 for monitoring case progress and tracking case outcomes for team
21 components. ~~Provided, That~~ A child advocacy center may establish
22 a safe exchange location for children and families who have a
23 parenting agreement or an order providing for visitation or custody
24 of the children that require a safe exchange location.

25 (g) "Imminent danger to the physical well-being of the child"
26 means an emergency situation in which the welfare or the life of the

1 child is threatened. Such emergency situation exists when there is
2 reasonable cause to believe that any child in the home is or has
3 been sexually abused or sexually exploited or reasonable cause to
4 believe that the following conditions threaten the health or life
5 of any child in the home:

6 (1) Nonaccidental trauma inflicted by a parent, guardian,
7 custodian, sibling or a babysitter or other caretaker;

8 (2) A combination of physical and other signs indicating a
9 pattern of abuse which may be medically diagnosed as battered child
10 syndrome;

11 (3) Nutritional deprivation;

12 (4) Abandonment by the parent, guardian or custodian;

13 (5) Inadequate treatment of serious illness or disease;

14 (6) Substantial emotional injury inflicted by a parent,
15 guardian or custodian; ~~or~~

16 (7) Sale or attempted sale of the child by the parent, guardian
17 or custodian;

18 (8) A blood, urine or meconium test of the child at birth
19 showing the presence of a controlled substance or a metabolite of
20 a controlled substance unless the presence of the substance or the
21 metabolite is the result of medical treatment administered to the
22 mother or the infant; or

23 (9) A medical diagnosis of fetal alcohol syndrome at birth.

24 (h) "Legal guardianship" means the permanent relationship
25 between a child and caretaker, established by order of the circuit
26 court having jurisdiction over the child, pursuant to the provisions

1 of this chapter and chapter forty-eight of this code.

2 (i) "Multidisciplinary team" means a group of professionals and
3 paraprofessionals representing a variety of disciplines who interact
4 and coordinate their efforts to identify, diagnose and treat
5 specific cases of child abuse and neglect. Multidisciplinary teams
6 may include, but are not limited to, medical, educational, child
7 care and law-enforcement personnel, social workers, psychologists
8 and psychiatrists. Their goal is to pool their respective skills
9 in order to formulate accurate diagnoses and to provide
10 comprehensive coordinated treatment with continuity and follow-up
11 for both parents and children. "Community team" means a
12 multidisciplinary group which addresses the general problem of child
13 abuse and neglect in a given community and may consist of several
14 multidisciplinary teams with different functions.

15 (j) (1) "Neglected child" means a child:

16 (A) Whose physical or mental health is harmed or threatened by
17 a present refusal, failure or inability of the child's parent,
18 guardian or custodian to supply the child with necessary food,
19 clothing, shelter, supervision, medical care or education when such
20 refusal, failure or inability is not due primarily to a lack of
21 financial means on the part of the parent, guardian or custodian;
22 or

23 (B) Who is presently without necessary food, clothing, shelter,
24 medical care, education or supervision because of the disappearance
25 or absence of the child's parent or custodian.

26 (2) "Neglected child" does not mean a child whose education is

1 conducted within the provisions of section one, article eight,
2 chapter eighteen of this code.

3 (k) "Parenting skills" means a parent's competencies in
4 providing physical care, protection, supervision and psychological
5 support appropriate to a child's age and state of development.

6 (l) "Sexual abuse" means:

7 (A) As to a child who is less than sixteen years of age, any
8 of the following acts which a parent, guardian or custodian shall
9 engage in, attempt to engage in, or knowingly procure another person
10 to engage in, with such child, notwithstanding the fact that the
11 child may have willingly participated in such conduct or the fact
12 that the child may have suffered no apparent physical injury or
13 mental or emotional injury as a result of such conduct:

14 (i) Sexual intercourse;

15 (ii) Sexual intrusion; or

16 (iii) Sexual contact.

17 (B) As to a child who is sixteen years of age or older, any of
18 the following acts which a parent, guardian or custodian shall
19 engage in, attempt to engage in or knowingly procure another person
20 to engage in, with such child, notwithstanding the fact that the
21 child may have consented to such conduct or the fact that the child
22 may have suffered no apparent physical injury or mental or emotional
23 injury as a result of such conduct:

24 (i) Sexual intercourse;

25 (ii) Sexual intrusion; or

26 (iii) Sexual contact.

1 (C) Any conduct whereby a parent, guardian or custodian
2 displays his or her sex organs to a child, or procures another
3 person to display his or her sex organs to a child, for the purpose
4 of gratifying the sexual desire of the parent, guardian or
5 custodian, of the person making such display, or of the child, or
6 for the purpose of affronting or alarming the child.

7 (m) "Sexual contact" means sexual contact as that term is
8 defined in section one, article eight-b, chapter sixty-one of this
9 code.

10 (n) "Sexual exploitation" means an act whereby:

11 (1) A parent, custodian or guardian, whether for financial gain
12 or not, persuades, induces, entices or coerces a child to engage in
13 sexually explicit conduct as that term is defined in section one,
14 article eight-c, chapter sixty-one of this code;

15 (2) A parent, guardian or custodian persuades, induces, entices
16 or coerces a child to display his or her sex organs for the sexual
17 gratification of the parent, guardian, custodian or a third person,
18 or to display his or her sex organs under circumstances in which the
19 parent, guardian or custodian knows such display is likely to be
20 observed by others who would be affronted or alarmed.

21 (o) "Sexual intercourse" means sexual intercourse as that term
22 is defined in section one, article eight-b, chapter sixty-one of
23 this code.

24 (p) "Sexual intrusion" means sexual intrusion as that term is
25 defined in section one, article eight-b, chapter sixty-one of this
26 code.

1 (q) "Parental rights" means any and all rights and duties
2 regarding a parent to a minor child, including, but not limited to,
3 custodial rights and ~~visitation~~ visitation rights and rights to
4 participate in the decisions affecting a minor child.

5 (r) "Placement" means any temporary or permanent placement of
6 a child who is in the custody of the state in any foster home, group
7 home or other facility or residence.

8 (s) "Serious physical abuse" means bodily injury which creates
9 a substantial risk of death, which causes serious or prolonged
10 disfigurement, prolonged impairment of health or prolonged loss or
11 impairment of the function of any bodily organ.

12 (t) "Siblings" means children who have at least one biological
13 parent in common or who have been legally adopted by the same
14 parents or parent.

15 (u) "Time-limited reunification services" means individual,
16 group and family counseling, inpatient, residential or outpatient
17 substance abuse treatment services, mental health services,
18 assistance to address domestic violence, services designed to
19 provide temporary child care and therapeutic services for families,
20 including crisis nurseries and transportation to or from any such
21 services, provided during fifteen of the most recent twenty-two
22 months a child has been in foster care, as determined by the earlier
23 date of the first judicial finding that the child is subjected to
24 abuse or neglect, or the date which is sixty days after the child
25 is removed from home.

26 **ARTICLE 6. PROCEDURE IN CASES OF CHILD NEGLECT OR BLACKGUARD.**

1 **§49-6-3. Petition to court when child believed neglected or abused**

2 **-- Temporary custody.**

3 (a) Upon the filing of a petition, the court may order that the
4 child alleged to be an abused or neglected child be delivered for
5 not more than ten days into the custody of the state department or
6 a responsible person found by the court to be a fit and proper
7 person for the temporary care of the child pending a preliminary
8 hearing, if it finds that: (1) There exists imminent danger to the
9 physical well-being of the child; and (2) there are no reasonably
10 available alternatives to removal of the child, including, but not
11 limited to, the provision of medical, psychiatric, psychological or
12 homemaking services in the child's present custody: ~~Provided, That~~
13 Where the alleged abusing person, if known, is a member of a
14 household, the court shall not allow placement pursuant to this
15 section of the child or children in said home unless the alleged
16 abusing person is or has been precluded from visiting or residing
17 in said home by judicial order. In a case where there is more than
18 one child in the home, or in the temporary care, custody or control
19 of the alleged offending parent, the petition shall so state, and
20 notwithstanding the fact that the allegations of abuse or neglect
21 may pertain to less than all of such children, each child in the
22 home for whom relief is sought shall be made a party to the
23 proceeding. Even though the acts of abuse or neglect alleged in the
24 petition were not directed against a specific child who is named in
25 the petition, the court shall order the removal of such child,
26 pending final disposition, if it finds that there exists imminent

1 danger to the physical well-being of the child and a lack of
2 reasonable available alternatives to removal. The initial order
3 directing such custody shall contain an order appointing counsel and
4 scheduling the preliminary hearing, and upon its service, shall
5 require the immediate transfer of custody of such child or children
6 to the department or a responsible relative which may include any
7 parent, guardian, or other custodian. The court order shall state:
8 (1) That continuation in the home is contrary to the best interests
9 of the child and why; and (2) whether or not the department made
10 reasonable efforts to preserve the family and prevent the placement
11 or that the emergency situation made such efforts unreasonable or
12 impossible. The order may also direct any party or the department
13 to initiate or become involved in services to facilitate
14 reunification of the family.

15 (b) Whether or not the court orders immediate transfer of
16 custody as provided in subsection (a) of this section, if the facts
17 alleged in the petition demonstrate to the court that there exists
18 imminent danger to the child, the court may schedule a preliminary
19 hearing giving the respondents at least five days' actual notice.
20 If the court finds at the preliminary hearing that there are no
21 alternatives less drastic than removal of the child and that a
22 hearing on the petition cannot be scheduled in the interim period,
23 the court may order that the child be delivered into the temporary
24 custody of the department or a responsible person or agency found
25 by the court to be a fit and proper person for the temporary care
26 of the child for a period not exceeding sixty days. ~~Provided, That~~

1 The court order shall state: (1) That continuation in the home is
2 contrary to the best interests of the child and set forth the
3 reasons therefor; (2) whether or not the department made reasonable
4 efforts to preserve the family and to prevent the child's removal
5 from his or her home; (3) whether or not the department made
6 reasonable efforts to preserve the family and to prevent the
7 placement or that the emergency situation made such efforts
8 unreasonable or impossible; and (4) what efforts should be made by
9 the department, if any, to facilitate the child's return home:
10 ~~Provided, however, That~~ If the court grants an improvement period
11 as provided in section twelve of this article, the sixty-day limit
12 upon temporary custody is waived.

13 (c) If a child or children shall, in the presence of a child
14 protective service worker, be in an emergency situation which
15 constitutes an imminent danger to the physical well-being of the
16 child or children, as that phrase is defined in section three,
17 article one of this chapter, and if such worker has probable cause
18 to believe that the child or children will suffer additional child
19 abuse or neglect or will be removed from the county before a
20 petition can be filed and temporary custody can be ordered, the
21 worker may, prior to the filing of a petition, take the child or
22 children into his or her custody without a court order. ~~Provided,~~
23 ~~That~~ After taking custody of such child or children prior to the
24 filing of a petition, the worker shall forthwith appear before a
25 circuit judge or a juvenile referee of the county wherein custody
26 was taken, or if no such judge or referee be available, before a

1 circuit judge or a juvenile referee of an adjoining county, and
2 shall immediately apply for an order ratifying the emergency custody
3 of the child pending the filing of a petition. The circuit court
4 of every county in the state shall appoint at least one of the
5 magistrates of the county to act as a juvenile referee who shall
6 serve at the will and pleasure of the appointing court and who shall
7 perform the functions prescribed for such position by the provisions
8 of this subsection. The parents, guardians or custodians of the
9 child or children may be present at the time and place of
10 application for an order ratifying custody, and if at the time the
11 child or children are taken into custody by the worker, the worker
12 knows which judge or referee is to receive the application, the
13 worker shall so inform the parents, guardians or custodians. The
14 application for emergency custody may be on forms prescribed by the
15 Supreme Court of Appeals or prepared by the prosecuting attorney or
16 the applicant and shall set forth facts from which it may be
17 determined that the probable cause described above in this
18 subsection exists. Upon such sworn testimony or other evidence as
19 the judge or referee deems sufficient, the judge or referee may
20 order the emergency taking by the worker to be ratified. If
21 appropriate under the circumstances, the order may include
22 authorization for an examination as provided for in subsection (b),
23 section four of this article. If a referee issues such an order,
24 the referee shall by telephonic communication have such order orally
25 confirmed by a circuit judge of the circuit or an adjoining circuit
26 who shall on the next judicial day enter an order of confirmation.

1 If the emergency taking is ratified by the judge or referee,
2 emergency custody of the child or children shall be vested in the
3 department until the expiration of the next two judicial days, at
4 which time any such child taken into emergency custody shall be
5 returned to the custody of his or her parent or guardian or
6 custodian unless a petition has been filed and custody of the child
7 has been transferred under the provisions of section three of this
8 article.

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

13 (1) 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 (2) The parent has:

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

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

26 (C) Attempted or conspired to commit such a murder or voluntary

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

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

8 (E) Used alcohol or drugs not administered for medical
9 treatment during pregnancy and, as a result, the infant is born with
10 the diagnosis of fetal alcohol syndrome or with the presence of any
11 amount of a controlled substance or a metabolite of a controlled
12 substance in his or her blood, urine or meconium and such presence
13 is not the result of medical treatment administered to the mother.

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

16 **CHAPTER 61. CRIMES AND THEIR PUNISHMENT.**

17 **ARTICLE 8D. CHILD ABUSE.**

18 **§61-8D-3. Child abuse resulting in injury; child abuse or neglect**
19 **creating risk of injury; criminal penalties.**

20 (a) If any parent, guardian or custodian shall abuse a child
21 and by such abuse cause such child bodily injury as such term is
22 defined in section one, article eight-b of this chapter, then such
23 parent, guardian or custodian shall be guilty of a felony and, upon
24 conviction thereof, shall be fined not less than \$100 nor more than
25 \$1,000 and committed to the custody of the Division of Corrections
26 for not less than one nor more than five years, or in the discretion

1 of the court, be confined in jail for not more than one year.

2 (b) If any parent, guardian or custodian shall abuse a child
3 and by such abuse cause said child serious bodily injury as such
4 term is defined in section one, article eight-b of this chapter,
5 then such parent, guardian or custodian shall be guilty of a felony
6 and, upon conviction thereof, shall be fined not less than \$1,000
7 nor more than \$5,000 and committed to the custody of the Division
8 of Corrections not less than two nor more than ten years.

9 (c) Any person who abuses a child and by the abuse creates a
10 substantial risk of serious bodily injury or of death to the child
11 is guilty of a felony and, upon conviction thereof, shall be fined
12 not more than \$3,000 and confined to the custody of the Division of
13 Corrections for not less than one nor more than five years.

14 (d) Any mother who, during her pregnancy, abuses alcohol or
15 uses drugs not administered for medical treatment and, as a result,
16 gives birth to an infant diagnosed with fetal alcohol syndrome or
17 with the presence of any amount of a controlled substance or a
18 metabolite of a controlled substance in his or her blood, urine or
19 meconium and such presence is not the result of medical treatment
20 administered to the mother or the infant, is guilty of a felony and,
21 upon conviction thereof, shall be fined not less than \$100 nor more
22 than \$1,000 and committed to the custody of the Division of
23 Corrections for not less than one nor more than five years, or in
24 the discretion of the court, be confined in jail for not more than
25 one year.

NOTE: The purpose of this bill is to expressly state drug and alcohol use during pregnancy by a mother that results in diagnosed harm to a newborn is actionable in civil child abuse proceedings and criminal child abuse proceedings, with penalty.

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