

WEST VIRGINIA LEGISLATURE

2019 FIRST EXTRAORDINARY SESSION

ENROLLED

House Bill 115

OFFICE WEST VIRGINIA
SECRETARY OF STATE

2019 MAY 29 P 4: 21

FILED

BY DELEGATE HANSHAW (MR. SPEAKER) AND MILEY

(BY REQUEST OF THE EXECUTIVE)

[Passed May 20, 2019; in effect from passage.]

HB115

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1 AN ACT to amend and reenact §49-4-601 of the Code of West Virginia, 1931, as amended,
2 relating generally to court actions in abuse and neglect proceedings and appointment of
3 counsel in such proceedings; requiring a petition to include the names of all parents,
4 guardians, custodians and other persons standing *in loco parentis* with the child who is
5 the subject of the petition as well as an express statement as to whether each person
6 named is alleged to have abused or neglected the child; requiring courts to appoint
7 counsel for the child and any other named person who is without counsel prior to the initial
8 hearing; clarifying when a court may and may not appoint counsel; and establishing criteria
9 for appointment of counsel for unrepresented persons when necessary to ensure
10 fundamental fairness.

Be it enacted by the Legislature of West Virginia:

ARTICLE 4. COURT ACTIONS.

PART VI.

PROCEDURES IN CASES OF CHILD NEGLECT OR ABUSE.

§49-4-601. Petition to court when child believed neglected or abused; venue; notice; right to counsel; continuing legal education; findings; proceedings; procedure.

1 (a) *Petitioner and venue.* — If the department or a reputable person believes that a child is
2 neglected or abused, the department or the person may present a petition setting forth the facts
3 to the circuit court in the county in which the child resides, or if the petition is being brought by the
4 department, in the county in which the custodial respondent or other named party abuser resides,
5 or in which the abuse or neglect occurred, or to the judge of the court in vacation. Under no
6 circumstance may a party file a petition in more than one county based on the same set of facts.

7 (b) *Contents of Petition.* — The petition shall be verified by the oath of some credible
8 person having knowledge of the facts. The petition shall allege specific conduct including time
9 and place, how the conduct comes within the statutory definition of neglect or abuse with

10 references to the statute, any supportive services provided by the department to remedy the
11 alleged circumstances, and the relief sought. Each petition shall name as a party each parent,
12 guardian, custodian, other person standing *in loco parentis* of or to the child allegedly neglected
13 or abused and state with specificity whether each parent, guardian, custodian, or person standing
14 *in loco parentis* is alleged to have abused or neglected the child.

15 (c) *Court action upon filing of petition.* — Upon filing of the petition, the court shall set a
16 time and place for a hearing and shall appoint counsel for the child. When there is an order for
17 temporary custody pursuant to this article, the preliminary hearing shall be held within 10 days of
18 the order continuing or transferring custody, unless a continuance for a reasonable time is granted
19 to a date certain, for good cause shown.

20 (d) *Department action upon filing of the petition.* — At the time of the institution of any
21 proceeding under this article, the department shall provide supportive services in an effort to
22 remedy circumstances detrimental to a child.

23 (e) *Notice of hearing.* —

24 (1) The petition and notice of the hearing shall be served upon both parents and any other
25 guardian, custodian, or person standing *in loco parentis*, giving to those persons at least five days'
26 actual notice of a preliminary hearing and at least 10 days' notice of any other hearing.

27 (2) Notice shall be given to the department, any foster or pre-adoptive parent, and any
28 relative providing care for the child.

29 (3) In cases where personal service within West Virginia cannot be obtained after due
30 diligence upon any parent or other custodian, a copy of the petition and notice of the hearing shall
31 be mailed to the person by certified mail, addressee only, return receipt requested, to the last
32 known address of the person. If the person signs the certificate, service is complete and the
33 certificate shall be filed as proof of the service with the clerk of the circuit court.

34 (4) If service cannot be obtained by personal service or by certified mail, notice shall be
35 by publication as a Class II legal advertisement in compliance with §59-3-1 *et seq.* of this code.

36 (5) A notice of hearing shall specify the time and place of hearings, the right to counsel of
37 the child, parents, and other guardians, custodians, and other persons standing *in loco parentis*
38 with the child and the fact that the proceedings can result in the permanent termination of the
39 parental rights.

40 (6) Failure to object to defects in the petition and notice may not be construed as a waiver.

41 (f) *Right to counsel.* —

42 (1) In any proceeding under this article, the child shall have counsel to represent his or
43 her interests at all stages of the proceedings.

44 (2) The court's initial order shall appoint counsel for the child and for any parent, guardian,
45 custodian, or other person standing *in loco parentis* with the child if such person is without retained
46 counsel.

47 (3) The court shall, at the initial hearing in the matter, determine whether persons other
48 than the child for whom counsel has been appointed:

49 (A) Have retained counsel; and

50 (B) Are financially able to retain counsel.

51 (4) A parent, guardian, custodian, or other person standing *in loco parentis* with the child
52 who is alleged to have neglected or abused the child and who has not retained counsel and is
53 financially unable to retain counsel beyond the initial hearing, shall be afforded appointed counsel
54 at every stage of the proceedings.

55 (5) Under no circumstances may the same attorney represent both the child and another
56 party. The same attorney may not represent more than one parent or custodian: *Provided*, That
57 one attorney may represent both parents or custodians where both parents or custodians consent
58 to this representation after the attorney fully discloses to the client the possible conflict and where
59 the attorney advises the court that she or he is able to represent each client without impairing her
60 or his professional judgment. If more than one child from a family is involved in the proceeding,
61 one attorney may represent all the children.

62 (6) A parent who is a co-petitioner is entitled to his or her own attorney.

63 (7) The court may allow to each attorney appointed pursuant to this section a fee in the
64 same amount which appointed counsel can receive in felony cases.

65 (8) The court shall, *sua sponte* or upon motion, appoint counsel to any unrepresented
66 party if, at any stage of the proceedings, the court determines doing so is necessary to satisfy the
67 requirements of fundamental fairness.

68 (g) *Continuing education for counsel.* — Any attorney representing a party under this article
69 shall receive a minimum of eight hours of continuing legal education training per reporting period
70 on child abuse and neglect procedure and practice. In addition to this requirement, any attorney
71 appointed to represent a child must first complete training on representation of children that is
72 approved by the administrative office of the Supreme Court of Appeals. The Supreme Court of
73 Appeals shall develop procedures for approval and certification of training required under this
74 section. Where no attorney has completed the training required by this subsection, the court shall
75 appoint a competent attorney with demonstrated knowledge of child welfare law to represent the
76 parent or child. Any attorney appointed pursuant to this section shall perform all duties required
77 of an attorney licensed to practice law in the State of West Virginia.

78 (h) *Right to be heard.* — In any proceeding pursuant to this article, the party or parties
79 having custodial or other parental rights or responsibilities to the child shall be afforded a
80 meaningful opportunity to be heard, including the opportunity to testify and to present and cross-
81 examine witnesses. Foster parents, pre-adoptive parents, and relative caregivers shall also have
82 a meaningful opportunity to be heard.

83 (i) *Findings of the court.* — Where relevant, the court shall consider the efforts of the
84 department to remedy the alleged circumstances. At the conclusion of the adjudicatory hearing,
85 the court shall make a determination based upon the evidence and shall make findings of fact
86 and conclusions of law as to whether the child is abused or neglected and whether the respondent
87 is abusing, neglecting, or, if applicable, a battered parent, all of which shall be incorporated into

88 the order of the court. The findings must be based upon conditions existing at the time of the filing
89 of the petition and proven by clear and convincing evidence.

90 (j) *Priority of proceedings.* — Any petition filed and any proceeding held under this article
91 shall, to the extent practicable, be given priority over any other civil action before the court, except
92 proceedings under §48-27-309 of this code and actions in which trial is in progress. Any petition
93 filed under this article shall be docketed immediately upon filing. Any hearing to be held at the
94 end of an improvement period and any other hearing to be held during any proceedings under
95 this article shall be held as nearly as practicable on successive days and, with respect to the
96 hearing to be held at the end of an improvement period, shall be held as close in time as possible
97 after the end of the improvement period and shall be held within 30 days of the termination of the
98 improvement period.

99 (k) *Procedural safeguards.* — The petition may not be taken as confessed. A transcript or
100 recording shall be made of all proceedings unless waived by all parties to the proceeding. The
101 rules of evidence apply. Following the court's determination, it shall ask the parents or custodians
102 whether or not appeal is desired and the response transcribed. A negative response may not be
103 construed as a waiver. The evidence shall be transcribed and made available to the parties or
104 their counsel as soon as practicable, if the transcript is required for purposes of further
105 proceedings. If an indigent person intends to pursue further proceedings, the court reporter shall
106 furnish a transcript of the hearing without cost to the indigent person if an affidavit is filed stating
107 that he or she cannot pay for the transcript.

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

Nancy Lopez
.....
Chairman, House Committee

Mark R. Hayward
.....
Chairman, Senate Committee

Originating in the House.

In effect from passage.

Steve Harrison
.....
Clerk of the House of Delegates

Joe Lavin
.....
Clerk of the Senate

Ray Henshaw
.....
Speaker of the House of Delegates

Walter B. Combs
.....
President of the Senate

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SECRETARY OF STATE

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FILED

The within *is* approved this the *29th*
day of *May*, 2019.

James E. Cantor
.....
Governor

PRESENTED TO THE GOVERNOR

MAY 24 2019

Time 3:44 pm