

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Introduced

House Bill 2503

BY DELEGATE STEELE, PACK, HARSHBARGER, MANDT,
JEFFRIES, J., GRAVES, WILSON, FOSTER AND KESSINGER

[Introduced January 17, 2019; Referred
to the Committee on the Judiciary.]

1 A BILL to amend and reenact §49-4-601 of the Code of West Virginia, 1931, as amended, relating
 2 to court actions; procedures in child neglect or abuse cases; requiring a petition to include
 3 an accusatory statement; when a court may and may not appoint counsel; and removing
 4 provision permitting copetitioners each to have counsel.

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 person
 8 having knowledge of the facts. The petition shall allege specific conduct including time and place,
 9 how the conduct comes within the statutory definition of neglect or abuse with references thereto,
 10 any supportive services provided by the department to remedy the alleged circumstances and the
 11 relief sought. The petition shall include an accusatory statement concerning each parent,
 12 guardian, or person standing in loco parentis for the minor children as to whether such persons
 13 are accused to be “offending” or contributing to the abuse or neglect of the subject minor children,
 14 or “nonoffending”.

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 ten 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 custodian, giving to the parents or custodian at least five days' actual notice of a preliminary
26 hearing and at least ten days' notice of any other hearing.

27 (2) Notice shall be given to the department, any foster or preadoptive 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 shall be complete and
33 the 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 article three, chapter fifty-nine
36 of this code.

37 (5) A notice of hearing shall specify the time and place of the hearing, the right to counsel
38 of the child and parents or other custodians at every stage of the proceedings and the fact that
39 the proceedings can result in the permanent termination of the 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, his or her parents and his or her legally
43 established custodian or other persons standing in *loco parentis* to him or her has the right to be
44 represented by counsel at every stage of the proceedings and shall be informed by the court of
45 their right to be so represented and that if they cannot pay for the services of counsel, and they
46 have been accused to be “offending”, that counsel will be appointed. The court may not appoint
47 counsel for any parent, guardian, custodian, or person standing in loco parentis to the minor
48 children if that person has not been alleged to be “offending” in the Petition. Such individuals may
49 hire counsel of their choice, or, if they so desire, represent themselves pro se. If the Petitioner,
50 pursuant to this article, seeks to amend the petition to bring new allegations against a person
51 previously alleged to be “nonoffending,” and the amendment alleges that person to be “offending,”
52 then the court, upon receiving the amended petition, shall enter an order appointing counsel for
53 said person in accordance with this article.

54 (2) Counsel shall be appointed in the initial order. For parents, legal guardians, and other
55 persons standing in *loco parentis*, the representation may only continue after the first appearance
56 if the parent or other persons standing in *loco parentis* cannot pay for the services of counsel.

57 (3) Counsel for other parties shall only be appointed upon request for appointment of
58 counsel. If the requesting parties have not retained counsel and cannot pay for the services of
59 counsel, the court shall, by order entered of record, appoint an attorney or attorneys to represent
60 the other party or parties and so inform the parties.

61 (4) Under no circumstances may the same attorney represent both the child and the other
62 party or parties, nor may the same attorney represent both parents or custodians. However, one
63 attorney may represent both parents or custodians where both parents or guardians consent to
64 this representation after the attorney fully discloses to the client the possible conflict and where

65 the attorney assures the court that she or he is able to represent each client without impairing her
66 or his professional judgment; however, if more than one child from a family is involved in the
67 proceeding, one attorney may represent all the children.

68 ~~(5) A parent who is a copetitioner is entitled to his or her own attorney. The court may~~
69 ~~allow to each attorney so appointed a fee in the same amount which appointed counsel can~~
70 ~~receive in felony cases~~

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

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

86 (i) *Findings of the court.* -- Where relevant, the court shall consider the efforts of the
87 department to remedy the alleged circumstances. At the conclusion of the adjudicatory hearing,
88 the court shall make a determination based upon the evidence and shall make findings of fact

89 and conclusions of law as to whether the child is abused or neglected and whether the respondent
90 is abusing, neglecting, or, if applicable, a battered parent, all of which shall be incorporated into
91 the order of the court. The findings must be based upon conditions existing at the time of the filing
92 of the petition and proven by clear and convincing evidence.

93 (j) *Priority of proceedings.* -- Any petition filed and any proceeding held under this article
94 shall, to the extent practicable, be given priority over any other civil action before the court, except
95 proceedings under section three hundred nine, article twenty-seven, chapter forty-eight of this
96 code and actions in which trial is in progress. Any petition filed under this article shall be docketed
97 immediately upon filing. Any hearing to be held at the end of an improvement period and any
98 other hearing to be held during any proceedings under this article shall be held as nearly as
99 practicable on successive days and, with respect to the hearing to be held at the end of an
100 improvement period, shall be held as close in time as possible after the end of the improvement
101 period and shall be held within 30 days of the termination of the improvement period.

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

NOTE: The purpose of this bill is to amend certain procedures in child neglect or abuse cases. The bill requires a petition to include an accusatory statement; provides when a

court may and may not appoint counsel; and it removes the provision permitting copetitioners each to have counsel.

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