

# **WEST VIRGINIA LEGISLATURE**

## **2020 REGULAR SESSION**

### **Committee Substitute**

**for**

### **House Bill 4648**

BY DELEGATES FOSTER, SUMMERS, WILSON,

J. JEFFRIES, MCGEEHAN, WILLIAMS, MANDT

AND PHILLIPS

[Introduced February 03, 2020; Referred to the Committee  
on Senior, Children, and Family Issues then the Judiciary.]



1 A BILL to amend the Code of West Virginia, 1931, as amended by adding thereto four new  
2 sections, designated §48-1-239a, §48-1-239b, §48-1-239c, and §48-1-239d; to amend  
3 and reenact §48-9-102, §48-9-201, §48-9-203, §48-9-204, §48-9-206, §48-9-207, §48-9-  
4 209, §48-9-401, §48-9-403, and §48-9-601 of said code; to amend said code by adding  
5 thereto a new section, designated §48-9-204a, all relating to “The Parenting Fairness Act  
6 of 2020”; defining “shared legal custody”, “shared physical custody”, “sole legal custody”,  
7 and “sole physical custody”; establishing the presumption that co-equal shared legal and  
8 physical custody of children, and the maintaining of sibling, including half-sibling,  
9 relationships through co-equal shared legal and physical custody of children, in cases of  
10 divorce is presumed to be in the best interests of the children and families; requiring that  
11 temporary parenting plans, parenting plans and modifications to parenting plans consider  
12 the presumption of shared legal and physical custody is in the best interests of a child; to  
13 require courts to consider such presumption when making determination as to which  
14 parent has significant decision making responsibility; and establish both parents’ rights to  
15 school and medical records of child.

*Be it enacted by the Legislature of West Virginia:*

**ARTICLE 1. GENERAL PROVISIONS; DEFINITIONS.**

**§48-1-239a. Shared legal custody defined.**

1 “Shared legal custody” means a continued mutual responsibility and involvement by both  
2 parents in major decisions regarding the child’s welfare including matters of education, medical  
3 care, and emotional, moral and religious development.

**§48-1-239b. Shared physical custody defined.**

1 “Shared physical custody” means a child has periods of residing with, and being under the  
2 supervision of, each parent: *Provided*, That physical custody shall be shared by the parents in  
3 such a way as to assure a child frequent and continued contact with both parents. Such frequent  
4 and continued contact with both parents shall be presumptively shared equally unless after a full

5 adversarial judicial hearing particular adjudicatory facts are found by a preponderance of the  
6 evidence of incompetence, neglect or abuse as set forth in §48-9-204(a) of this code.

**§48-1-239c. Sole legal custody defined.**

1 “Sole legal custody” means one parent has the right and responsibility to make major  
2 decisions regarding the child’s welfare including matters of education, medical care and  
3 emotional, moral and religious development.

**§48-1-239d. Sole physical custody defined.**

1 “Sole physical custody” means a child resides with and is under the supervision of one  
2 parent, subject to reasonable visitation by the other parent, unless the court determines that such  
3 visitation would not be in the best interest of the child.

**ARTICLE 9. ALLOCATION OF CUSTODIAL RESPONSIBILITY AND DECISION-  
MAKING RESPONSIBILITY OF CHILDREN.**

**§48-9-102. Objectives; best interests of the child.**

1 (a) The primary objective of this article is to serve the child’s best interests, by facilitating:

2 (1) Stability of the child;

3 (2) Rebuttable presumption that co-equal shared legal and physical custody with both of  
4 the child’s parents is in the best interest of the child;

5 ~~(2)~~ (3) Parental planning and agreement about the child’s custodial arrangements and  
6 upbringing;

7 ~~(3)~~ (4) Continuity of existing parent-child attachments;

8 ~~(4)~~ (5) Meaningful contact between a child and each parent;

9 ~~(5)~~ (6) Caretaking relationships by adults who love the child, know how to provide for the  
10 child’s needs, and who place a high priority on doing so;

11 ~~(6)~~ (7) Security from exposure to physical or emotional harm; and

12           ~~(7)~~ (8) Expeditious, predictable decision-making and avoidance of prolonged uncertainty  
13 respecting arrangements for the child's care and control.

14           (9) A rebuttable presumption that keeping siblings, including half-siblings, together on at  
15 least an equal basis with the periods of physical custody and shared parenting that the child or  
16 children share with the parent of any siblings or half-siblings: *Provided*, That expansion of any  
17 shared parenting time to accommodate sibling/half-sibling time will not exceed an equal split of  
18 the parenting time between both parents unless agreed by the parties or the court expressly finds  
19 that the presumption of and equal split of parenting time has been rebutted by hearings meeting  
20 the requirements set forth in §48-9-204(a).

21           (b) A secondary objective of article is to achieve fairness between the parents: *Provided*,  
22 That it shall be recognized as the public policy of the State of West Virginia, as supported by the  
23 findings of leading published and peer-reviewed social science studies, that a rebuttable  
24 presumption exists and shall be applied that co-equal shared physical custody with both parents  
25 is in the best interest of the child absent limiting factors as described in §48-9-209(a), or after a  
26 full adversarial judicial hearing particular adjudicatory facts are found by a preponderance of the  
27 evidence of incompetence, neglect, or abuse as set forth in §48-9-204(a) of this code.

## PART 2. PARENTING PLANS.

### **§48-9-201. Parenting agreements.**

28           (a) If the parents agree to one or more provisions of a parenting plan, the court shall so  
29 order, unless it makes specific findings that:

30           (1) The agreement is not knowing or voluntary; or

31           (2) The plan would be harmful to the child.

32           (b) The court, at its discretion and on any basis it deems sufficient, may conduct an  
33 evidentiary hearing to determine whether there is a factual basis for a finding under subdivision  
34 (1) or (2), subsection (a) of this section: *Provided*, That such evidentiary hearing must meet all  
35 the requirements of §48-9-204(a) of this code. When there is credible information that child abuse

36 as defined by §49-1-3 of this code or domestic violence as defined by §48-27-202 of this code  
37 has occurred, an evidentiary hearing meeting the requirements of §48-9-204(a) of this code is  
38 mandatory and if the court determines that abuse has occurred, appropriate protective measures  
39 shall be ordered: Provided, That the findings of the court shall be set forth as required by §48-9-  
40 204(a) of this code.

41 (c) If an agreement, in whole or in part, is not accepted by the court under the standards  
42 set forth in subsection (a) of this section, the court shall allow the parents the opportunity to  
43 negotiate another agreement.

**§48-9-203. Proposed temporary parenting plan; temporary order; amendment; vacation of  
order.**

1 (a) A parent seeking a temporary order relating to parenting shall file and serve a proposed  
2 temporary parenting plan by motion. The other parent, if contesting the proposed temporary  
3 parenting plan, shall file and serve a responsive proposed parenting plan. Either parent may move  
4 to have a proposed temporary parenting plan entered as part of a temporary order. The parents  
5 may enter an agreed temporary parenting plan at any time as part of a temporary order. The  
6 proposed temporary parenting plan may be supported by relevant evidence and shall be verified  
7 and shall state at a minimum the following:

8 (1) The name, address and length of residence with the person or persons with whom the  
9 child has lived for the preceding 12 months;

10 ~~(2) The performance by each parent during the last twelve months of the parenting~~  
11 ~~functions relating to the daily needs of the child~~

12 ~~(3)~~ (2) The parents' work and child-care schedules for the preceding 12 months;

13 ~~(4)~~ (3) The parents' current work and child-care schedules; and

14 ~~(5)~~ (4) Any of the ~~circumstances~~ considerations set forth in §48-9-206(a)(9) and/or  
15 circumstances set forth in §48-9-209 of this code that indicate an intent or effort by either parent  
16 to alienate the child or children from the other parent and/or are likely to pose a serious risk to the

17 child and that warrant limitation on the award to a parent of temporary residence or time with the  
18 child pending entry of a permanent parenting plan.

19 (b) At the hearing, the court shall enter a temporary parenting order incorporating a  
20 temporary parenting plan which shall be consistent with §§48-9-102(a)(2), 48-9-102(a)(9) and 48-  
21 9-102(b), and shall include:

22 (1) A schedule for the child's time with each parent when appropriate: Provided, That it  
23 shall be recognized as the public policy of the State of West Virginia, as supported by the findings  
24 of leading published and peer-reviewed social science studies, that a rebuttable presumption  
25 exists and shall be applied that co-equal shared physical custody with both parents is in the best  
26 interest of the child absent particular adjudicatory facts that limiting factors as described in §48-  
27 9-209(a), or of incompetence, neglect or abuse as set forth in §48-9-204(a) of this code, are found  
28 by a preponderance of the evidence following a full adversarial judicial hearing;

29 (2) Designation of a temporary residence for the child, which, consistent with §48-9-  
30 102(a)(2), §48-9-102(a)(9), and §48-9-102(b) of this code shall be presumed to be equally shared  
31 with both parents;

32 (3) Allocation of decision-making authority, if any. Absent allocation of decision-making  
33 authority consistent with §48-9-207 of this code, neither party shall make any decision for the child  
34 other than those relating to day-to-day or emergency care of the child, which shall be made by  
35 the party who is present with the child;

36 (4) Provisions for temporary support for the child; and

37 (5) Restraining orders, if applicable.

38 (c) A parent may make a motion for an order to show cause and the court may enter a  
39 temporary order, including a temporary parenting plan, upon a showing of necessity.

40 (d) A parent may move for amendment of a temporary parenting plan, and the court may  
41 order amendment to the temporary parenting plan, if the amendment conforms to the limitations  
42 of §48-9-209 of this code and is in the best interest of the child: Provided, That full such findings

43 must be made only after an adversarial judicial hearing after which the court expressly finds  
44 particular adjudicatory facts by a preponderance of the evidence the existence of the limiting  
45 factors or of incompetence, neglect or abuse as set forth in §48-9-204(a) of this code.

**§48-9-204. Criteria for temporary parenting plan.**

1 (a) After considering the proposed temporary parenting plan filed pursuant to §48-9-203  
2 of this code and other relevant evidence presented, the court shall make a temporary parenting  
3 plan that is in the best interest of the child. Shared physical and shared legal custody shall be the  
4 presumptive parenting arrangement in cases where the parents do not agree to shared custody  
5 absent a finding by preponderance of the evidence of the existence of the limiting factors set forth  
6 in §48-9-209(a) or of incompetence, neglect or abuse following a full evidentiary hearing which  
7 shall be on the record and at which both parties may be represented by counsel and shall have  
8 the right to present witnesses, cross-examine witnesses, and to present and challenge evidence.  
9 If the court does not grant shared custody under this subsection, the court shall expressly cite all  
10 the evidence of record upon which the court relies for its determination that shared custody is  
11 unreasonable and not in the best interest of the child to the extent that the legal and/or physical  
12 custodial relationship between the child and a parent should be severed. For the purposes of all  
13 evidentiary hearings held under this section, and/or of any other sections requiring a hearing  
14 consistent with this section, a court may consider a parent or guardian's: (i) adjudicated substance  
15 abuse addiction; (ii) current incarceration; or (iii) conviction of a crime of murder, rape, malicious  
16 assault, abduction, kidnapping, aggravated battery, child neglect, child abuse, child sexual abuse,  
17 child exploitation, child trafficking, or the sale of a child under any state or federal criminal law, to  
18 be grounds for a finding of incompetence, neglect or abuse sufficient to depart from the  
19 presumption of shared parenting. In making this determination the court shall give particular  
20 consideration to:

21 (1) ~~Which parent has taken greater responsibility during the last twelve months for~~  
22 ~~performing caretaking functions relating to the daily needs of the child; and~~



23 ~~(2) Which parenting arrangements will cause the least disruption to the child's emotional~~  
24 ~~stability while the action is pending~~

25 (b) ~~The court shall also consider the factors used to determine residential provisions in the~~  
26 ~~permanent parenting plan. In determining the temporary parenting plan the court shall give~~  
27 ~~particular consideration to:~~

28 (1) If the parents present a temporary custody agreement and mutually agreed plan for  
29 parenting time, and the court confirms that the agreement adequately provides for the welfare of  
30 the child, the agreement shall become the temporary custody order of the court.

31 (2) In making an order for temporary custody absent a mutually agreed plan by the  
32 parents, there shall be a presumption, rebuttable as set forth in §48-9-204(a) of this code, that  
33 the parents shall have temporary joint custody and shall share equally in parenting time.

34 (3) If a deviation from equal parenting time is warranted, the court shall construct a  
35 parenting time schedule which maximizes the time each parent has with the child, including  
36 overnight parenting time with each parent, and is consistent with ensuring the child's welfare as  
37 set forth in this article.

38 (4) Each temporary custody order shall include specific findings of fact and conclusions of  
39 law, except when the court confirms the consensual agreement of the parties.

40 (5) Subject to §48-9-401(a) and §48-9-203 of this code, modification of a temporary  
41 custody order may be sought when there is a material and substantial change in the  
42 circumstances of the parents or child.

43 (c) Upon credible evidence of one or more of the circumstances set forth in §48-9-209(a)  
44 of this code, following a full evidentiary hearing and finding as set forth in §48-9-204(a) of this  
45 code, the court shall issue a temporary order limiting or denying access to the child as required  
46 by that section, in order to protect the child or the other party, pending the final adjudication of the  
47 underlying facts.

48 (d) Expedited procedures shall be instituted to facilitate the prompt issuance of a parenting  
49 plan: Provided, That such expedited procedures must meet the requirements for the full  
50 evidentiary hearing and findings as set forth in §48-9-204(a) of this code before either parent's  
51 presumptive co-equal shared physical custody may be modified or denied.

**§48-9-204a. Model parenting schedules.**

1 The Supreme Court of Appeals shall adopt advisory model parenting schedules for use in  
2 determining schedules which most effectively promote the best interests of the child or children:  
3 Provided, That such model parenting schedules reflect the current state of published research in  
4 child development psychology in peer reviewed publications establishing that shared parenting,  
5 including overnight time with each parent is in the best interest of the child or children. Such  
6 schedules shall reflect the differing needs of the child based upon age: Provided, That such  
7 schedules recognize the current state of research in child development psychology establishing  
8 that shared parenting, including overnight time with each parent is in the best interest of the child  
9 or children, even in children under the age of one year old. Model parenting schedules shall  
10 recognize the rebuttable presumption that co-equal shared physical custody with both parents,  
11 and that keeping siblings, including half-siblings, together on at least an equal basis with the  
12 periods of physical custody and shared parenting that the child or children share with the parent  
13 of any siblings or half-siblings is in the best interest of the child. In the event that the presumption  
14 of co-equal shared parenting is rebutted as set forth in §48-9-204(a) of this code, schedules shall  
15 be adjusted for each child as it grows older and its needs and ability to adjust to its circumstances  
16 change including expanded parenting time for the parent who initially spends less time with the  
17 child, unless the limiting factors set forth in §48-9-209 of this code or of incompetence, neglect or  
18 abuse found in accordance with §48-9-204(a) of this code to remain present.

**§48-9-206. Allocation of custodial responsibility.**

1 (a) Unless otherwise resolved by agreement of the parents under §48-9-201 of this code  
2 or unless harmful to the child, the court shall allocate custodial responsibility ~~so that, except to~~

3 ~~the extent required under §48-9-209 of this code, the custodial time the child spends with each~~  
4 ~~parent may be expected to achieve any of the following objectives~~ based upon a rebuttable  
5 presumption that co-equal shared legal and physical custody is in the best interest of the child or  
6 children, except in instances where a judicial officer has found by a preponderance of the  
7 evidence the limiting factors set forth in §48-9-209 of this code or incompetence, neglect, or abuse  
8 as set forth in §48-9-204(a) of this code. If the court denies the request for shared physical  
9 custody, the determination shall be accompanied by specific findings of fact and conclusions of  
10 law that the awarding of shared physical custody is not in the best interests of the child. The court  
11 must document all the evidence of record upon which the court relies for its determination by a  
12 preponderance of the evidence that shared physical custody would endanger the child's physical,  
13 mental or emotional health:

14 (1) To permit the child to have a meaningful relationship with each parent who has  
15 performed a reasonable share of parenting functions;

16 (2) To accommodate, if the court determines it is in the best interests of the child, the firm  
17 and reasonable preferences of a child who is 14 years of age or older, and with regard to a child  
18 under 14 years of age, but sufficiently matured that he or she can intelligently express a voluntary  
19 preference for one parent, to give that preference the weight warranted by the circumstances;

20 (3) To keep siblings together when the court finds that doing so is necessary to their  
21 welfare: Provided, That there shall be a rebuttable presumption that keeping siblings, including  
22 half-siblings, together on at least an equal basis with the periods of physical custody and shared  
23 parenting that the child or children share with the parent of any siblings or half-siblings is in the  
24 best interest of the child, absent a finding of incompetence, neglect or abuse as set forth in §48-  
25 9-204(a) of this code or that the limiting factors set forth in §48-9-209 of this code are or remain  
26 present:

27 (4) To protect the child's welfare when, under an otherwise appropriate allocation, the child  
28 would be harmed because of a gross disparity in the quality of the emotional attachments between

29 each parent and the child, or in each parent's demonstrated ability or availability to meet a child's  
30 needs: Provided, That any unequal allocation of parenting time previously awarded which did not  
31 take into consideration the current state of research in child development psychology recognizing  
32 that shared parenting and shared legal and physical custody, including overnight time with each  
33 parent is in the best interest of the child or children, even in children under the age of one year  
34 old, shall not serve as the basis for any finding by the court of a gross disparity in the quality of  
35 the emotional attachments between each parent and the child or in each parent's demonstrated  
36 ability or availability to meet a child's needs;

37 (5) To take into account any prior agreement of the parents that, under the circumstances  
38 as a whole, including the reasonable expectations of the parents in the interest of the child, would  
39 be appropriate to consider;

40 (6) To avoid an allocation of custodial responsibility that would be extremely impractical  
41 or that would interfere substantially with the child's need for stability in light of economic, physical  
42 or other circumstances, including the distance between the parents' residences, the cost and  
43 difficulty of transporting the child, the parents' and child's daily schedules, and the ability of the  
44 parents to cooperate in the arrangement;

45 (7) To apply the principles set forth in §48-9-403(d) of this code if one parent relocates or  
46 proposes to relocate at a distance that will impair the ability of a parent to exercise the amount of  
47 custodial responsibility that would otherwise be ordered under this section: Provided, That in  
48 cases of proposed relocation the court's analysis shall reflect the current state of research in child  
49 development psychology recognizing that shared parenting, including overnight time with each  
50 parent is in the best interest of the child or children, even in children under the age of one year  
51 old; and that keeping siblings, including half-siblings, together on at least an equal basis with the  
52 periods of physical custody and shared parenting that the child or children share with the parent  
53 of any siblings or half-siblings is in the best interest of the child, absent a finding or of

54 incompetence, neglect or abuse as set forth in §48-9-204(a) of this code or unless the limiting  
55 factors set forth in §48-9-209 of this code are or remain present; and

56 (8) To consider the stage of a child's development: Provided, That such consideration  
57 shall recognize the current state of research in child development psychology establishing that  
58 shared parenting and shared legal and physical custody, including overnight time with each parent  
59 is in the best interest of the child or children, even in children under the age of one year old; and

60 (9) To consider which parent will encourage and accept a positive relationship between  
61 the child and the other parent, including which parent is more likely to keep the other parent  
62 involved in the child's life and activities.

63 (b) The court may consider the allocation of custodial responsibility arising from temporary  
64 agreements made by the parties after separation if the court finds, by a preponderance of the  
65 evidence, that such agreements were consensual. The court shall afford those temporary  
66 consensual agreements the weight the court believes the agreements are entitled to receive,  
67 based upon the evidence. The court may not consider the temporary allocation of custodial  
68 responsibility imposed by a court order on the parties.

69 (c) If the court is unable to allocate custodial responsibility under §48-9-206(a) of this code  
70 because the allocation under §48-9-206(a) of this code would be harmful to the child, or because  
71 there is no history of past performance of parenting functions, as in the case of a newborn, ~~or~~  
72 ~~because the history does not establish a pattern of caretaking sufficiently dispositive of the issues~~  
73 ~~of the case~~ the court shall allocate custodial responsibility based on the child's best interest, taking  
74 into account the current state of research in child development psychology establishing that  
75 shared parenting and shared physical custody, including overnight time with each parent is in the  
76 best interest of the child or children, even in children under the age of one year old, the  
77 presumptions of §48-9-102(a)(2), §48-9-102(a)(9), and §48-9-102(b) of this code, and the factors  
78 in considerations that are set forth in this section and in §48-9-209 and §48-9-403(d) of this code  
79 ~~and preserving to the extent possible this section's priority on the share of past caretaking~~

80 ~~functions each parent performed: Provided, That the court's analysis shall reflect the current state~~  
81 ~~of research in child development psychology recognizing that shared parenting, including~~  
82 ~~overnight time with each parent is in the best interest of the child or children, even in children~~  
83 ~~under the age of one year old; and that keeping siblings, including half-siblings, together on at~~  
84 ~~least an equal basis with the periods of physical custody and shared parenting that the child or~~  
85 ~~children share with the parent of any siblings or half-siblings is in the best interest of the child,~~  
86 ~~unless the limiting factors set forth in §48-9-209 of this code or incompetence, neglect or abuse~~  
87 ~~as set forth in §48-9-204(a) of this code are or remain present. and preserving to the extent~~  
88 ~~possible this section's priority on the share of past caretaking functions each parent performed~~

89 (d) In determining how to schedule the custodial time allocated to each parent, the court  
90 shall take account of the economic, physical and other practical circumstances such as those  
91 listed in §48-9-206(a)(6) of this code. The court shall also consider the willingness and ability of  
92 each parent to facilitate and encourage a close and continuing relationship between the other  
93 parent and the child as required under §48-9-206(a)(9) of this code. If the court determines by a  
94 preponderance of the evidence that a parent is not encouraging a close and continuing  
95 relationship between the other parent and the child, such a finding shall create a rebuttable  
96 presumption that the offending parent is alienating the other parent from the child and persistently  
97 interfering with the other parent's access to the child in violation of §48-9-209(a)(4) of this code.

**§48-9-207. Allocation of Significant Decision-Making Responsibility.**

1 (a) Unless otherwise resolved by agreement of the parents under §48-9-201 of this code,  
2 the court shall allocate responsibility for making significant life decisions on behalf of the child,  
3 including the child's education and health care, to one parent or to two parents jointly, in  
4 accordance with the child's best interest, in light of:

5 (1) The court's presumption that the maximum involvement and cooperation of both  
6 parents regarding the physical, mental, moral, and emotional well-being of their child is in the best

7 interest of the child. This shall be accomplished, to the maximum extent feasible, through the  
8 ordering of co-equal shared physical and legal custody and parenting time;

9       ~~(4)~~ (2) The allocation of custodial responsibility under §48-9-206 of this code: *Provided,*  
10 That any unequal allocation of parenting time previously awarded which did not take into  
11 consideration the current state of research in child development psychology recognizing that  
12 shared parenting, including overnight time with each parent is in the best interest of the child or  
13 children, even in children under the age of one year old, shall not serve as the basis for any finding  
14 by the court that the parent historically receiving less parenting time is not entitled to co-equal  
15 custodial responsibility;

16       ~~(2)~~ (3) The level of each parent's participation in past decision-making on behalf of the  
17 child: *Provided,* That any unequal allocation of parenting time previously awarded which did not  
18 take into consideration the current state of research in child development psychology recognizing  
19 that shared parenting, including overnight time with each parent is in the best interest of the child  
20 or children, even in children under the age of one year old, shall not serve as the basis for any  
21 finding by the court that the parent historically receiving less parenting time is not entitled to co-  
22 equal decision-making responsibility;

23       ~~(3)~~ (4) The wishes of the parents;

24       ~~(4)~~ (5) The level of ability and cooperation the parents have demonstrated in decision-  
25 making on behalf of the child;

26       ~~(5)~~ (6) Prior agreements of the parties; and

27       ~~(6)~~ (7) The existence of any limiting factors, as set forth in §48-9-209 of this code, or of  
28 incompetence, neglect, or abuse if found by the court as set forth in §48-9-204(a) of this code.

29       (b) If each of the child's legal parents has been exercising a reasonable share of parenting  
30 functions for the child, the court shall presume that an allocation of decision-making responsibility  
31 to both parents jointly is in the child's best interests. The presumption is overcome if there is a  
32 history of domestic abuse, or by a showing that joint allocation of decision-making responsibility

33 is not in the child's best interest: Provided, That the court must expressly document all the  
34 evidence of record upon which the court relies for its determination by a preponderance of the  
35 evidence that joint allocation of decision-making responsibility is not in the child's best interest.

36 (c) Unless otherwise provided or agreed by the parents, each parent who is exercising  
37 custodial responsibility shall be given sole responsibility for day-to-day decisions for the child,  
38 while the child is in that parent's care and control, including emergency decisions affecting the  
39 health and safety of the child.

## PART 2 – PARENTING PLANS

### **§48-9-209. Parenting plan; limiting factors.**

1 (a) If either of the parents so requests, or upon receipt of credible information thereof, the  
2 court shall determine whether a parent who would otherwise be allocated responsibility under a  
3 parenting plan:

4 (1) Has abused, neglected or abandoned a child, as defined by state law;

5 (2) Has sexually assaulted or sexually abused a child as those terms are defined in §61-  
6 8B-1 *et seq.* and §61-8D-1 *et seq.* of this code;

7 (3) Has been found, subject to the same procedural and evidentiary standards set forth in  
8 §48-9-204(a) of this code, to have committed domestic violence, as defined in §48-27-202 of this  
9 code.

10 (4) Has ~~interfered persistently with the other parent's access to the child~~ persistently  
11 violated, interfered with, impaired or impeded the rights of a parent or a child with respect to the  
12 exercise of shared or sole custodial authority, residence, visitation, or other contact with the child,  
13 except in the case of actions taken for the purpose of protecting the safety of the child or the  
14 interfering parent or another family member, pending the prompt and expeditious adjudication of  
15 the facts underlying that belief as set forth in §48-9-204(a) of this code; or



16 (5) Has made one or more fraudulent reports of domestic violence or child abuse:  
17 *Provided*, That a person's withdrawal of or failure to pursue a report of domestic violence or child  
18 support shall not alone be sufficient to consider that report fraudulent.

19 (b) If a parent is found by the court as set forth in §48-9-204(a) of this code to have  
20 engaged in any activity specified by §48-9-209(a) of this code, the court shall impose limits that  
21 are reasonably calculated to protect the child or child's parent from harm. The limitations that the  
22 court shall consider include, but are not limited to:

23 (1) An adjustment of the custodial responsibility of the parents, including but not limited to:

24 (A) Increased parenting time with the child to make up for any parenting time the other  
25 parent lost as a result of the proscribed activity;

26 (B) An additional allocation of parenting time in order to repair any adverse effect upon  
27 the relationship between the child and the other parent resulting from the proscribed activity; or

28 (C) The allocation of exclusive custodial responsibility to one of them;

29 (2) Supervision of the custodial time between a parent and the child;

30 (3) Exchange of the child between parents through an intermediary, or in a protected  
31 setting;

32 (4) Restraints on the parent from communication with or proximity to the other parent or  
33 the child;

34 (5) A requirement that the parent abstain from possession or consumption of alcohol or  
35 nonprescribed drugs while exercising custodial responsibility and in the 24-hour period  
36 immediately preceding such exercise;

37 (6) Denial of overnight custodial responsibility;

38 (7) Restrictions on the presence of specific persons while the parent is with the child;

39 (8) A requirement that the parent post a bond to secure return of the child following a  
40 period in which the parent is exercising custodial responsibility or to secure other performance  
41 required by the court;

42 (9) A requirement that the parent complete a program of intervention for perpetrators of  
43 domestic violence, for drug or alcohol abuse, or a program designed to correct another factor; or

44 (10) Any other constraints or conditions that the court deems necessary to provide for the  
45 safety of the child, a child's parent or any person whose safety immediately affects the child's  
46 welfare.

47 (c) If a parent is found subject to the procedural and evidentiary standards set forth in §48-  
48 9-204(a) of this code to have engaged in any activity specified in §48-9-209(a) of this code, the  
49 court may not allocate custodial responsibility or decision-making responsibility to that parent  
50 without making special written findings that the child and other parent can be adequately protected  
51 from harm by such limits as it may impose under §48-9-209(b) of this code. The parent found to  
52 have engaged in the behavior specified in §48-9-209(a) of this code has the burden of proving  
53 that an allocation of custodial responsibility or decision-making responsibility to that parent will  
54 not endanger the child or the other parent.

55 (d) If the court determines, based on the investigation described in part three of this article  
56 or other evidence presented to it, that an accusation of child abuse or neglect, or domestic  
57 violence made during a child custody proceeding is false and the parent making the accusation  
58 knew it to be false at the time the accusation was made, the court may order reimbursement to  
59 be paid by the person making the accusations of costs resulting from defending against the  
60 accusations. Such reimbursement may not exceed the actual reasonable costs incurred by the  
61 accused party as a result of defending against the accusation and reasonable attorney's fees  
62 incurred.

63 (e)(1) A parent who believes he or she is the subject of activities by the other parent  
64 described in §48-9-209(a)(5) of this code, may move the court pursuant to §49-5-101(b)(4) of this  
65 code for the Department of Health and Human Resources to disclose whether the other parent  
66 was the source of the allegation and, if so, whether the department found the report to be:

67 (A) Substantiated;

68 (B) Unsubstantiated;

69 (C) Inconclusive; or

70 (D) Still under investigation.

71 (2) If the court grants a motion pursuant to this subsection, disclosure by the Department

72 of Health and Human Resources shall be in camera. The court may disclose to the parties

73 information received from the department only if it has reason to believe a parent knowingly made

74 a false report.

#### PART 4. MODIFICATION OF PARENTING PLAN.

##### **§48-9-401. Modification upon showing of changed circumstances or harm.**

1 (a) Except as provided in §48-9-402 or §48-9-403 of this code, a court shall modify a  
2 parenting plan order if it finds, on the basis of facts that were not known or have arisen since the  
3 entry of the prior order and were not anticipated therein, that a substantial change has occurred  
4 in the circumstances of the child or of one or both parents and a modification is necessary to  
5 serve the best interests of the child.

6 (b) In exceptional circumstances, a court may modify a parenting plan if it finds that the  
7 plan is not working as contemplated and in some specific way is manifestly harmful to the child,  
8 even if a substantial change of circumstances has not occurred.

9 (c) Unless the parents have agreed otherwise, the following circumstances do not justify  
10 a significant modification of a parenting plan except where harm to the child is shown:

11 (1) Circumstances resulting in an involuntary loss of income, by loss of employment or  
12 otherwise, affecting the parent's economic status;

13 (2) A parent's remarriage or cohabitation; and

14 (3) Choice of reasonable caretaking arrangements for the child by a legal parent, including  
15 the child's placement in day care.

16 (d) For purposes of subsection (a) of this section, the occurrence or worsening of a limiting  
17 factor, as defined in §48-9-209(a) of this code, after a parenting plan has been ordered by the

18 court, constitutes a substantial change of circumstances and measures shall be ordered pursuant  
19 to §48-9-209 of this code to protect the child or the child's parent.

20 (e) For purposes of subsection (a) of this section, any parent subject to unequal allocation  
21 of parenting time previously awarded, which did not take into consideration the current state of  
22 research in child development psychology recognizing that shared parenting, including overnight  
23 time with each parent is in the best interest of the child or children, even in children under the age  
24 of one year old; and that keeping siblings, including half-siblings, together on at least an equal  
25 basis with the periods of physical custody and shared parenting that the child or children share  
26 with the parent of any siblings or half-siblings is in the best interest of the child, or did not  
27 specifically set forth the court's reasoning for departure from co-equal shared parenting in light of  
28 such child development psychology research findings (unless the limiting factors set forth in §48-  
29 9-209 of this code or incompetence, abuse or neglect set forth in §48-9-204(a) of this code are or  
30 remain present), as set forth in The Parenting Fairness Act of 2020, which amendments are  
31 deemed by the Legislature to be a qualifying substantial change in circumstances, may petition  
32 the court for a modification of his or her parenting plan: *Provided*, That any parent or guardian  
33 who: (i) has been found by a court to have a substance abuse addiction; (ii) is currently  
34 incarcerated; or (iii) has been convicted of a crime of murder, rape, malicious assault, abduction,  
35 kidnapping, aggravated battery, child neglect, child abuse, child sexual abuse, child exploitation,  
36 child trafficking, or the sale of a child under any state or federal criminal law, including as grounds  
37 for a finding of incompetence, neglect or abuse under §48-9-204(a) of this code, shall not be  
38 allowed to petition for modification of a parenting plan pursuant to this subsection. Upon such  
39 motion the court shall promptly conduct an evidentiary hearing, review and determine the proper  
40 scope of modification, if any, to such unequal parenting plan. In reviewing any petition for  
41 modification based on this section, the court shall take into consideration the current state of  
42 research in child development psychology recognizing that shared parenting, including overnight  
43 time with each parent, is in the best interest of the child or children, even in children under the

44 age of one year old; and that keeping siblings, including half-siblings, together on at least an equal  
45 basis with the periods of physical custody and shared parenting that the child or children share  
46 with the parent of any siblings or half-siblings is in the best interest of the child (unless the limiting  
47 factors set forth in §48-9-209 of this code or incompetence, abuse or neglect set forth in §48-9-  
48 204(a) of this code are or remain present). In reaching its decision, the court shall expressly cite  
49 all the evidence of record upon which the court relies for its determination that the unequal  
50 parenting shall or shall not be modified in accordance with The Parenting Fairness Act of 2020.

#### PART 4. MODIFICATION OF PARENTING PLAN.

##### **§48-9-403. Relocation of a parent.**

1 (a) The relocation of a parent constitutes a substantial change in the circumstances, under  
2 §48-9-401(a) of this code, of the child only when it significantly impairs either parent's ability to  
3 exercise responsibilities that the parent has been exercising.

4 (b) Unless otherwise ordered by the court, a parent who has responsibility under a  
5 parenting plan who changes, or intends to change, residences for more than 90 days must give  
6 a minimum of 60 days' advance notice, or the most notice practicable under the circumstances,  
7 to any other parent with responsibility under the same parenting plan. Notice shall include:

8 (1) The relocation date;

9 (2) The address of the intended new residence;

10 (3) The specific reasons for the proposed relocation;

11 (4) A proposal for how custodial responsibility shall be modified, in light of the intended  
12 move; and

13 (5) Information for the other parent as to how he or she may respond to the proposed  
14 relocation or modification of custodial responsibility.

15 Failure to comply with the notice requirements of this section without good cause may be  
16 a factor in the determination of whether the relocation is in good faith under §48-9-403(d) of this

17 code and is a basis for an award of reasonable expenses and reasonable attorney's fees to  
18 another parent that are attributable to such failure.

19 The Supreme Court of Appeals shall make available through the offices of the circuit clerks  
20 and the secretary-clerks of the family courts a form notice that complies with the provisions of this  
21 subsection. The Supreme Court of Appeals shall promulgate procedural rules that provide for an  
22 expedited hearing process to resolve issues arising from a relocation or proposed relocation.

23 (c) When changed circumstances are shown under §48-9-403(a) of this code, the court  
24 shall, if practical, revise the parenting plan so as to both accommodate the relocation and maintain  
25 the same proportion of custodial responsibility being exercised by each of the parents. In making  
26 such revision, the court may consider the additional costs that a relocation imposes upon the  
27 respective parties for transportation and communication, and may equitably allocate such costs  
28 between the parties.

29 (d) When the relocation constituting changed circumstances under §48-9-403(a) of this  
30 code renders it impractical to maintain the same proportion of custodial responsibility as that being  
31 exercised by each parent, the court shall modify the parenting plan in accordance with the child's  
32 best interests and in accordance with the following principles:

33 (1) A parent who has been exercising a significant majority of the custodial responsibility  
34 for the child should be allowed to relocate with the child so long as that parent shows that the  
35 relocation is in good faith for a legitimate purpose and to a location that is reasonable in light of  
36 the purpose: Provided, That any unequal allocation of parenting time and/or custodial  
37 responsibility previously awarded which did not take into consideration the current state of  
38 research in child development psychology recognizing that shared parenting, including overnight  
39 time with each parent is in the best interest of the child or children, even in children under the age  
40 of one year old, shall not serve as the basis for any finding by the court that the parent historically  
41 receiving less parenting time is not entitled to co-equal parenting time and/or legal and physical  
42 custodial responsibility after relocation. The percentage of custodial responsibility that constitutes

43 a significant majority of custodial responsibility is 70 percent or more. A relocation is for a  
44 legitimate purpose if it is to be close to significant family or other support networks, for significant  
45 health reasons, to protect the safety of the child or another member of the child's household from  
46 significant risk of harm, to pursue a significant employment or educational opportunity or to be  
47 with one's spouse who is established, or who is pursuing a significant employment or educational  
48 opportunity, in another location. The relocating parent has the burden of proving of the legitimacy  
49 of any other purpose. A move with a legitimate purpose is reasonable unless its purpose is shown  
50 to be substantially achievable without moving or by moving to a location that is substantially less  
51 disruptive of the other parent's relationship to the child: Provided, That if after a full, adversarial  
52 evidentiary hearing on the record, the court determines that the relocation is reasonable, the court  
53 shall expressly cite all the evidence of record upon which the court relies for its determination that  
54 the relocation is reasonable, and the court shall to the maximum extent possible require that the  
55 non-relocating parent be granted the maximum amount of parenting time possible, including, but  
56 not limited to, the child or children residing with the non-relocating parent during school summer  
57 vacation months and on other extended holidays and scheduled vacations. All modified parenting  
58 plans shall take into consideration the current state of research in child development psychology  
59 recognizing that shared parenting, including overnight time with each parent is in the best interest  
60 of the child or children, even in children under the age of one year old; and that keeping siblings,  
61 including half-siblings, together on at least an equal basis with the periods of physical custody  
62 and shared parenting that the child or children share with the parent of any siblings or half-siblings  
63 is in the best interest of the child, unless the limiting factors set forth in §48-9-209 of this code or  
64 incompetence, abuse, or neglect set forth in §48-9-204(a) of this code are or remain present.

65 (2) If a relocation of the parent is in good faith for legitimate purpose and to a location that  
66 is reasonable in light of the purpose and if neither has been exercising a significant majority of  
67 custodial responsibility for the child, the court shall reallocate custodial responsibility based on

68 the best interest of the child, taking into account all relevant factors including the effects of the  
69 relocation on the child, subject to the provisos set forth in §48-9-403(d)(1) of this code.

70 (3) If a parent does not establish that the purpose for that parent's relocation is in good  
71 faith for a legitimate purpose into a location that is reasonable in light of the purpose, the court  
72 may modify the parenting plan in accordance with the child's best interests and the effects of the  
73 relocation on the child. Among the modifications the court may consider is a reallocation of primary  
74 custodial responsibility, effective if and when the relocation occurs, but such a reallocation shall  
75 not be ordered if the relocating parent demonstrates that the child's best interests would be served  
76 by the relocation, subject to the provisos set forth in §48-9-403(d)(1) of this code.

77 (4) The court shall attempt to minimize impairment to a parent-child relationship caused  
78 by a parent's relocation through alternative arrangements for the exercise of custodial  
79 responsibility appropriate to the parents' resources and circumstances and the developmental  
80 level of the child and, subject to the provisos set forth in §48-9-403(d)(1) of this code.

81 (5) If the parents are exercising a basic shared parenting schedule and all of their children  
82 are under 10 years of age, the court shall consider this a factor against the approval of the  
83 relocation of the custodial parent unless the relocation has been agreed to by both parties; or  
84 unless in the opinion of the judge the relocation is in the best interest of the child or children:  
85 Provided, That the best interest of the child or children must consider the current state of the  
86 research in child development psychology recognizing that shared parenting, including overnight  
87 time with each parent is in the best interest of the child or children, and the court shall to the  
88 maximum extent possible require that the non-relocating parent be granted the maximum amount  
89 of parenting time possible, including, but not limited to, the child or children residing with the non-  
90 relocating parent during school summer vacation months and on other extended holidays and  
91 scheduled vacations.

92 (e) In determining the proportion of ~~caretaking~~ parenting functions each parent previously  
93 performed for the child under the parenting plan before relocation, the court may not consider a



94 division of functions arising from any arrangements made after a relocation but before a  
95 modification hearing on the issues related to relocation.

96 (f) In determining the effect of the relocation or proposed relocation on a child, any  
97 interviewing or questioning of the child shall be conducted in accordance with the provisions of  
98 rule 17 of the rules of practice and procedure for family law as promulgated by the Supreme Court  
99 of Appeals.

100 (g) Relocations found by the court to be reasonable prior to the passage of the Parenting  
101 Fairness Act of 2020 may depart from the presumption of co-equal shared parenting if the court  
102 determines that the circumstances due to the relocation make such co-equal shared parenting  
103 significantly impracticable: *Provided*, That in such circumstances, upon a motion of the non-  
104 relocating parent to modify an unequal parenting plan, the court shall to the maximum extent  
105 possible require that the non-relocating parent be granted the maximum amount of parenting time  
106 possible, including, but not limited to, the child or children residing with the non-relocating parent  
107 during school summer vacation months and on other extended holidays and scheduled vacations.

## PART 6. MISCELLANEOUS PROVISIONS.

### **§48-9-601. Access to a child's records Parental Rights.**

1 (a)(1) Each parent has the right to full and equal access to a child's educational records  
2 absent a court order to the contrary. Neither parent may veto the access requested by the other  
3 parent. Educational records are academic, attendance and disciplinary records of public and  
4 private schools in all grades kindergarten through 12 and any form of alternative school.  
5 Educational records are any and all school records concerning the child that would otherwise be  
6 properly released to the primary custodial parent, including, but not limited to, report cards and  
7 progress reports, attendance records, disciplinary reports, results of the child's performance on  
8 standardized tests and statewide tests and information on the performance of the school that the  
9 child attends on standardized statewide tests; curriculum materials of the class or classes in which  
10 the child is enrolled; names of the appropriate school personnel to contact if problems arise with

11 the child; information concerning the academic performance standards, proficiencies or skills the  
12 child is expected to accomplish; school rules, attendance policies, dress codes and procedures  
13 for visiting the school; and information about any psychological testing the school does involving  
14 the child.

15 (2) In addition to the right to receive school records, the nonresidential parent has the right  
16 to participate as a member of a parent advisory committee or any other organization comprised  
17 of parents of children at the school that the child attends.

18 (3) The nonresidential parent or noncustodial parent has the right to question anything in  
19 the child's record that the parent feels is inaccurate or misleading or is an invasion of privacy and  
20 to receive a response from the school.

21 (4) Each parent has a right to arrange appointments for parent-teacher conferences  
22 absent a court order to the contrary. Neither parent can be compelled against their will to exercise  
23 this right by attending conferences jointly with the other parent.

24 (b)(1) Each parent has the right to full and equal access to a child's medical records absent  
25 a court order to the contrary. Neither parent may veto the access requested by the other parent.  
26 If necessary, either parent is required to authorize medical providers to release to the other parent  
27 copies of any and all information concerning medical care provided to the child which would  
28 otherwise be properly released to either parent. For the purposes of this section, any and all  
29 copies (including prior drafts or versions subsequently removed or deleted from any hospital or  
30 birthing facility files, and all information contained therein) of birth registry forms completed for the  
31 hospital or birthing facility by the mother, or any other person, for the purposes of registering the  
32 birth of a child with the West Virginia Vital Registration Office, are deemed part of the child's  
33 medical records and are fully accessible, without limitation or reservation, to each legal and/or  
34 biological parent: *Provided* That either parent may request that the hospital redact their own  
35 personally identifiable information that would otherwise be subject to the protections of the federal  
36 Health Insurance Portability and Accountability Act ("HIPAA"), but under no circumstances may

37 either parent or the hospital or birthing facility rely on HIPAA to preclude the other parent from  
38 accessing and/or obtaining copies of any and all birth registry forms (including prior drafts or  
39 versions subsequently removed or deleted from any hospital or birthing facility files, and all  
40 information contained therein) completed for the parent's child and submitted to the hospital or  
41 birthing facility.

42 (2) If the child is in the actual physical custody of one parent, that parent is required to  
43 promptly inform the other parent of any illness of the child which requires medical attention.

44 (3) Each parent is required to consult with the other parent prior to any elective surgery  
45 being performed on the child, and in the event emergency medical procedures are undertaken for  
46 the child which require the parental consent of either parent, if time permits, the other parent shall  
47 be consulted, or if time does not permit such consultation, the other parent shall be promptly  
48 informed of the emergency medical procedures: *Provided*, That nothing contained herein alters  
49 or amends the law of this state as it otherwise pertains to physicians or health care facilities  
50 obtaining parental consent prior to providing medical care or performing medical procedures.

51 (c) (1) Each parent has full and equal access to a child's juvenile court records, process  
52 and pleadings, absent a court order to the contrary. Neither parent may veto any access  
53 requested by the other parent. Juvenile court records are limited to those records which are  
54 normally available to a parent of a child who is a subject of the juvenile justice system.

55 (2) Each parent has the right to be notified by the other party if the minor child is the victim  
56 of an alleged crime, including the name of the investigating law-enforcement officer or agency.  
57 There is no duty to notify if the party to be notified is the alleged perpetrator.

58 (d) Each parent has the right to reasonable access and telephone or other electronic  
59 contact with the minor children, which shall be defined in the parenting plan.

NOTE: The Parenting Fairness Act of 2020. The purpose of this bill is to establish that co-equal shared legal and physical custody of a child, and the maintaining of sibling, including half-sibling, relationships through co-equal shared legal and physical custody of children,

in cases of divorce is presumed to be in the best interests of the child; and also that certain parental rights are coordinate with and arise from shared legal and physical custody of a child and shall be so treated by the courts of this state.

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