

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Committee Substitute

for

House Bill 2363

BY DELEGATES FOSTER, SUMMERS, STORCH, PHILLIPS,

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[Introduced February 13, 2021; Referred to the

Committee on the Judiciary]

1 A BILL to amend the Code of West Virginia, 1931, as amended by adding thereto five new
2 sections, designated §48-1-217a, §48-1-239a, §48-1-241a, §48-1-241b, and §48-9-204a;
3 to amend and reenact §48-1-210, §48-1-218, §48-1-219, §48-1-220, §48-1-239, §48-1-
4 241, §48-1-303, §48-9-101, §48-9-102, §48-9-201, §48-9-203, §48-9-204, §48-9-206,
5 §48-9-207, §48-9-208, §48-9-209, §48-9-301, §48-9-401, §48-9-402, §48-9-403, §48-9-
6 601, §48-9-602 and §48-9-603 of said code, all relating to “Best Interests of the Child
7 Protection Act of 2021”; defining “shared legal custody”, “shared physical custody”;
8 establishing the presumption that co-equal shared legal and physical custody of children,
9 and the maintaining of sibling, including half-sibling, relationships through co-equal shared
10 legal and physical custody of children in cases of divorce to be in the best interests of the
11 children and families; requiring that temporary parenting plans, parenting plans,
12 modifications to parenting plans and parental relocations consider the presumption of co-
13 equal shared legal and physical custody is in the best interests of a child; to require courts
14 to consider such presumption of co-equal shared legal and physical custody being in the
15 best interests of a child when determining significant parental decision making
16 responsibility, legal and physical custody and parenting time allocation; to establish certain
17 procedural safeguards in the judicial review and allocation of parenting plans; and
18 establish both parents’ rights to school and medical records of their children, all relating
19 generally to the public policy recognition and preservation of the fundamental
20 constitutional rights of all parents to raise their own children and that it is presumptively in
21 the best interest of children to be raised by both of their parents equally.

Be it enacted by the Legislature of West Virginia:

ARTICLE 1. GENERAL PROVISIONS, DEFINITIONS.

§48-1-210. Caretaker and caretaking functions defined.

1 (a) “Caretaker” means a person who on a regular or routine basis performs one or more
2 caretaking functions for a child regardless of the quantity of time, or number of particular functions

3 such person performs relative to any other person. The term “caretaking functions” means
4 activities that involve interaction with a child and the care of a child. Caretaking functions also
5 include the supervision and direction of interaction and care provided by other persons.

6 (b) Caretaking functions include the following:

7 (1) Performing functions that meet the daily physical needs of the child. These functions
8 include, but are not limited to, the following:

9 (A) Feeding;

10 (B) Dressing;

11 (C) Bedtime and wake-up routines;

12 (D) Caring for the child when sick or hurt;

13 (E) Bathing and grooming;

14 (F) Recreation and play;

15 (G) Physical safety; and

16 (H) Transportation.

17 (2) Direction of the child’s various developmental needs, including the acquisition of motor
18 and language skills, toilet training, self-confidence and maturation;

19 (3) Discipline, instruction in manners, assignment and supervision of chores and other
20 tasks that attend to the child’s needs for behavioral control and self-restraint;

21 (4) Arrangements for the child’s education, including remedial or special services
22 appropriate to the child’s needs and interests, communication with teachers and counselors and
23 supervision of homework;

24 (5) The development and maintenance of appropriate interpersonal relationships with
25 peers, siblings and adults;

26 (6) Arrangements for health care, which includes making medical appointments,
27 communicating with health care providers and providing medical follow-up and home health care;

28 (7) Moral guidance; and

29 (8) Arrangement of alternative care by a family member, baby-sitter or other child care
30 provider or facility, including investigation of alternatives, communication with providers and
31 supervision.

§48-1-217a. Full adversarial judicial hearing defined.

1 “Full adversarial judicial hearing” means a full evidentiary hearing which shall be on the
2 record, before the judge, and at which both parties may be represented by counsel and shall have
3 the right to present witnesses, cross-examine witnesses, and to present, examine and challenge
4 evidence. No introduction of evidence or information of any kind may be presented to a judge ex
5 parte, nor without the ability and opportunity of both parties to examine, use and challenge all
6 evidence. The findings of the court following a full adversarial judicial hearing shall expressly cite
7 all the evidence of record upon which the court relies for its determination.

§48-1-218. Custodial parent defined.

1 “Custodial parent” or “custodial parent of a child” means a parent who has been granted
2 custody of a child by a court of competent jurisdiction. “Noncustodial parent” means a parent of a
3 child with respect to whom custody has been adjudicated with the result that such parent has not
4 been granted custody of the child: Provided, That it shall be the public policy of West Virginia to
5 order shared legal and physical custody in divorce cases unless after a full adversarial judicial
6 hearing particular adjudicatory facts are found by a preponderance of the evidence of
7 incompetence, neglect or abuse as set forth in §48-9-204(a) of this code.

§48-1-219. Custodial responsibility defined.

1 “Custodial responsibility” refers to physical custodianship and supervision of a child. It
2 usually includes, but does not necessarily require, the exercise of residential or overnight
3 responsibility: Provided, That it shall be the public policy of West Virginia to grant shared legal
4 and physical custody in divorce cases unless after a full adversarial judicial hearing particular
5 adjudicatory facts are found by a preponderance of the evidence of incompetence, neglect or
6 abuse as set forth in §48-9-204(a) of this code.

§48-1-220. Decision-making responsibility defined.

1 “Decision-making responsibility” refers to authority for making significant life decisions on
2 behalf of a child, including, but not limited to, the child’s education, spiritual guidance and health
3 care: Provided, That with regard to spiritual guidance, both parents in any shared parenting plan,
4 regardless of the relative ratio of parenting time allocated between the parents, neither parent
5 shall discourage or prohibit the minor child’s participation in the other parent’s faith life, nor
6 discourage or prohibit the minor child’s faith formation and/or reception of sacraments
7 participating in the other parent’s faith: *Provided, however,* That with regard to health care, both
8 parents in any shared parenting plan, regardless of the relative ratio of parenting time allocated
9 between the parents, shall have the authority to make emergency or other non-elective health
10 care decisions concerning their child necessary for the child’s health or welfare during such
11 parent’s parenting time.

**§48-1-239. Shared parenting defined; Rebuttable presumption that shared custody and
equally shared parenting time is in child’s best interests.**

1 (a) “Shared parenting” means ~~either basic shared parenting or extended shared parenting.~~
2 (b) “Basic shared parenting” means ~~an arrangement under which one parent keeps a child~~
3 ~~or children overnight for less than thirty five percent of the year and under which both parents~~
4 ~~contribute to the expenses of the child or children in addition to the payment of child support.~~
5 (c) ~~“Extended shared parenting” means an arrangement under which each parent keeps~~
6 ~~a child or children overnight for more than thirty five percent of the year and under which both~~
7 ~~parents contribute to the expenses of the child or children in addition to the payment of child~~
8 ~~support shared custody and shared physical custody as defined in §48-1-239a and §48-1-241 of~~
9 ~~this code to assure a child has frequent and continued contact with both parents. Shared parenting~~
10 ~~shall consist of a child having periods of residing overnight with, and being under the supervision~~
11 ~~of, each parent.~~

12 (b) In accordance with the best interests of the child, equal consideration shall be given to
13 each parent. There shall be a presumption, rebuttable by a preponderance of evidence, that
14 shared custody and co-equally shared parenting time is in the best interest of the child. If a
15 deviation from co-equal parenting time is warranted, the court shall construct a parenting time
16 schedule which maximizes the time each parent or de facto custodian has with the child and is
17 consistent with ensuring the child's welfare: *Provided*, That the court shall weigh all factors and
18 evidence in favor of a ratio of overnight parenting time no more disparate than 65 percent to 35
19 percent between each parent, with a primary goal of awarding overnight parenting time co-equally
20 as being in the best interests of the child, unless the conditions of §48-9-209 of this code are
21 found after a full adversarial judicial hearing to exist by the court.

22 (c) The court shall consider all relevant factors including:

23 (1) The wishes of the child's parent or parents, and any de facto custodian, as to his or
24 her custody;

25 (2) The wishes of the child as to his or her custodian, with due consideration given to the
26 influence a parent or custodian may have over the child's wishes, especially if parenting time has
27 previously been ordered in ratios more disparate than 65 percent to 35 percent;

28 (3) The interaction and interrelationship of the child with his or her parent or parents, his
29 or her siblings, and any other person who may significantly affect the child's best interests;

30 (4) The motivation of the adults participating in the custody proceeding, including, but
31 limited to, any past or current resistance or antagonism to shared parenting by either parent;

32 (5) The child's adjustment and continuing proximity to his or her home, school, and
33 community;

34 (6) The mental and physical health of all individuals involved;

35 (7) A final order by a court, following full adversarial judicial hearing which contains
36 particular adjudicatory facts finding by a preponderance of the evidence that domestic violence
37 and/or child abuse, as defined in §48-27-202 and §49-1-201 of this code, has been committed by

38 one of the parties against a child of the parties or against another party. The court shall determine
39 the extent to which the domestic violence and abuse has affected the child and the child's
40 relationship to each party, with due consideration given to efforts made by a party toward the
41 completion of any domestic violence treatment, counseling, or program;

42 (8) The extent to which the child has been cared for, nurtured, and supported by any non-
43 parental custodian;

44 (9) The intent of the parent or parents in placing the child with a non-parental custodian;

45 (10) The circumstances under which the child was placed or allowed to remain in the
46 custody of a non-parental custodian, including whether the parent now seeking custody was
47 previously prevented from doing so as a result of parental alienation by the other parent, or the
48 result of domestic violence as defined in §48-27-202 of this code and whether the child was placed
49 with a non-parental custodian to allow the parent now seeking custody to seek employment, work,
50 or attend school; and

51 (11) The likelihood a party will allow the child frequent, meaningful, and continuing contact
52 with the other parent or non-parental custodian, except that the court shall not consider this
53 likelihood if there is a specific finding in a final order after a full judicial adversarial hearing that
54 the other parent or non-parental custodian engaged in domestic violence and/or child abuse, as
55 defined in §48-27-202 and §49-1-201 of this code, against the party or a child and that a
56 continuing relationship with the other parent will endanger the health or safety of either that party
57 or the child.

58 (d) The abandonment of the family residence by a custodial party shall not be considered
59 where said party was physically harmed or was seriously threatened with physical harm by his or
60 her spouse, when such harm or threat of harm was causally related to the abandonment.

61 (e) If the court grants custody to a non-parental custodian, the non-parental custodian
62 shall have legal custody under the laws of West Virginia.

§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.

§48-1-241. ~~Split physical custody defined~~ Shared physical custody defined.

1 ~~“Split physical custody” means a situation where there is more than one child and where~~
2 ~~each parent has physical custody of at least one child.~~

3 “Shared physical custody” means a child has periods of residing with, and being under the
4 supervision of, each parent: *Provided*, That physical custody shall be shared by the parents in
5 such a way as to assure a child frequent and continued contact with both parents. Such frequent
6 and continued contact with both parents shall be presumptively shared equally unless after a full
7 adversarial judicial hearing particular adjudicatory facts are found by a preponderance of the
8 evidence which rebut the presumptions set forth in §48-1-239, §48-9-102(a)(2) and §48-9-
9 102(a)(9) of this code: *Provided, however*, That the court shall weigh all factors and evidence in
10 favor of a ratio of overnight parenting time no more disparate than 65 percent to 35 percent
11 between each parent, with a primary goal of awarding overnight parenting time co-equally as
12 being in the best interests of the child, unless the conditions of §48-1-217a of this code are found
13 after a full adversarial judicial hearing to exist by the court.

§48-1-241a. 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.

§48-1-241b. Split physical custody defined.

1 “Split physical custody” means a situation where there is more than one child and where
2 each parent has physical custody of at least one child: *Provided*, That split physical custody of
3 siblings, including half-siblings, of less than an amount equal to a ratio of time equivalent to the
4 maximum amount of parenting time any sibling or half-sibling has with a common biological
5 parent, but not to exceed 50 percent of annual parenting time, shall not be ordered by a court
6 unless after a full adversarial judicial hearing particular adjudicatory facts are found by a
7 preponderance of the evidence which rebut the presumptions set forth in §48-1-239, §48-9-
8 102(a)(2) and §48-9-102(a)(9) of this code.

PART 3. MISCELLANEOUS PROVISIONS RELATING TO DOMESTIC RELATIONS.

§48-1-303. Confidentiality of domestic relations court files.

1 (a) All orders in domestic relations actions entered in the civil order books by circuit clerks
2 are public records.

3 (b) Upon the filing of a domestic relations action, all pleadings, exhibits or other
4 documents, other than orders, that are contained in the court file are confidential and not open for
5 public inspection either during the pendency of the case or after the case is closed.

6 (c) When sensitive information has been disclosed during a hearing or in pleadings,
7 evidence or documents filed in the record, the court may, sua sponte or upon motion of a party,
8 order such information sealed in the court file: *Provided*, That no ex parte information or filings
9 whatsoever, nor any investigation papers, documents or testimony obtained pursuant to §48-9-
10 301 of this code, are authorized to be sealed under this provision court unless after a full
11 adversarial judicial hearing particular adjudicatory facts are found by a preponderance of the
12 evidence which rebut the presumptions set forth in §48-1-239, §48-9-102(a)(2) and §48-9-
13 102(a)(9) of this code. The court must disclose both the existence of, and the general nature and
14 content of, any and all documents proposed for seal prior to sealing if they have not previously
15 been made available for discovery and reasonable inspection and copying to all parties. Any and

16 all documents reviewed by a court must be made available for discovery and reasonable
17 inspection and copying. Documents may be redacted of names to protect minor children or victims
18 of domestic violence. Sealed documents or court files can only be opened by order of a circuit or
19 family court judge.

20 (d) The parties, their designees, their attorneys, a duly appointed guardian ad litem or any
21 other person who has standing to seek modification or enforcement of a support order has the
22 right to examine and copy any document in a confidential court file that has not been sealed by
23 court order. Upon motion and for good cause shown, the court may permit a person who is not a
24 party to the action to examine and copy any documents that are necessary to further the interests
25 of justice: Provided, That the court shall identify the non-party person(s) granted access and the
26 documents reviewed by such person(s) to all parties and their counsel, and such persons shall
27 be subject to deposition and subpoena as a witness at the request of any party.

28 (e) The clerk of the circuit court shall keep a written log of all persons who examine
29 confidential documents as provided for in this section. Every person who examines confidential
30 documents shall first sign the clerk's written log, except for a circuit judge or family court judge
31 before whom the case is pending, or court personnel acting within the scope of their duties:
32 Provided, That the court shall identify any circuit judge, family judge or court personnel who
33 examines and the documents reviewed by such person(s) to all parties and their counsel. The
34 clerk shall record the time and date of every examination of confidential documents. The log must
35 be retained by the clerk and must be available upon request for inspection by the circuit judge or
36 the family court judge or by any party to any action whose confidential documents are inspected.

PART 1. SCOPE; OBJECTIVES; PARTIES
AND PARENT EDUCATION CLASSES.

§48-9-101. Scope of article; legislative findings and declarations.

1 (a) This article sets forth principles governing the allocation of custodial and decision-
2 making responsibility for a minor child when the parents do not live together.

3 (b) The Legislature finds and declares that;

4 (i) The Supreme Court of the United States has recognized the rights of all parents to
5 raise their own children as fundamental constitutional rights, stating expressly “[t]he liberty ... of
6 parents in the care, custody and control of their children—is perhaps the oldest of the fundamental
7 liberty interests recognized by this Court....This primary role of the parents in the upbringing of
8 their children is now established beyond debate as an enduring American tradition....It is plain
9 that the interest of a parent in the companionship, care, custody, and management of his or her
10 children ‘come(s) ... with a momentum for respect.... The rights to conceive and to raise one’s
11 children have been deemed’,’... [and] It is cardinal ... that the custody, care and nurture of the
12 child reside first in the parents, whose primary function and freedom include preparation for
13 obligations the state can neither supply nor hinder.”

14 (ii) The constitutional right as a parent is also unquestionably established in West Virginia
15 Supreme Court of Appeals decisions, “[N]o rule is more firmly established than that the right of a
16 natural parent to the custody of his or her infant child is paramount to that of any other person; it
17 is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the
18 West Virginia and United States Constitutions....A parent has the natural right to the custody of
19 his or her infant child and... the right of the parent to the custody of his or her infant child will be
20 recognized and enforced by the courts.”

21 (iii) The significant importance of maintaining sibling connections and has been expressly
22 recognized as being in the siblings’ (including half-siblings) best interests by the West Virginia
23 Supreme Court of Appeals, “the laws of this State recognize, in a variety of areas, the importance
24 of sibling bonds and encouraging sibling contact.”.... [and] .., “The best interests of a child are
25 served by preserving important relationships in that child’s life.”

26 (iv) It is the public policy of ~~this state~~ the State of West Virginia, as supported by the
27 findings of leading published and peer-reviewed social science studies, that a rebuttable
28 presumption exists and shall be applied that co-equal shared physical custody of children,
29 including children under the age of one year, with both parents, and meaningful contact with a

30 child's siblings, including half-siblings, at a ratio of time equivalent to the maximum amount of
31 parenting time any sibling or half-sibling has with a common biological parent that is greater than
32 that of another sibling or half-sibling is in the best interest of the child or children.

33 (v) The amendments and additions to the Code of West Virginia during the 2021 Regular
34 Session related to the presumption of co-equal shared physical custody of children and the
35 recognition and protection of fundamental constitutional rights of parents to raise their children
36 shall be known as "The Best Interests of the Child Protection Act of 2021."

37 (c) To assure that the best interest of children is the court's primary concern in allocating
38 custodial and decision-making responsibilities between parents who do not live together, will be
39 protected and achieved, the Legislature finds In furtherance of this policy, the Legislature declares
40 that a child's best interest will be served by assuring that minor children have frequent and
41 continuing contact with both parents on a co-equal basis, who have shown the ability to act in the
42 The Legislature further finds that the best interests of their children to will be served by educate
43 educating parents on their rights and responsibilities and the effect their separation may have on
44 children, to encourage encouraging mediation of disputes, and to encourage encouraging parents
45 to agree consensually to co-equally share in the rights and responsibilities of rearing their children
46 after the parents have separated or divorced; and that the courts of this state have a duty to
47 promote such education and encouragement with parties before them, except as otherwise
48 exempted by extenuating circumstances as stated in §48-9-1 et seq. of this code.

§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 custody and co-equal shared
4 physical custody with both of 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) Expedient, predictable decision-making and avoidance of prolonged uncertainty
13 respecting arrangements for the child's care and control.
- 14 (9) Meaningful contact with a child's siblings, including half-siblings, at a ratio of time
15 equivalent to the maximum amount of parenting time any sibling or half-sibling has with a common
16 biological parent that is greater than that of another sibling or half-sibling: *Provided*, That
17 expansion of any shared parenting time to accommodate sibling/half-sibling time will not exceed
18 an equal split of the parenting time between both parents unless agreed by the parties or the court
19 expressly finds that the presumption of an equal split of parenting time has been rebutted by
20 hearings meeting the requirements set forth in §48-9-204(a) of this code.
- 21 ~~(b) A secondary~~ The objective of this article is to achieve fairness between the parents
22 shall be achieved by the ordering of co-equal shared parenting as defined in §48-1-239 of this
23 code.
- 24 (c) As used in §48-9-102(a) of this code, "meaningful contact between a child and each
25 parent" shall mean a rebuttable presumption that co-equal shared parenting as defined in §48-1-
26 239 of this code is in a child's best interest.

PART 2. PARENTING PLANS.

§48-9-201. Parenting agreements.

- 1 (a) If the parents agree to one or more provisions of a parenting plan, the court shall so
2 order, unless it makes specific findings that:
- 3 (1) The agreement is not knowing or voluntary; or
- 4 (2) The plan would be harmful to the child.

5 (b) The court, at its discretion and on any basis it deems sufficient, may conduct ~~an~~ a full
6 adversarial judicial evidentiary hearing to determine whether there is a factual basis for a finding
7 under subdivision (1) or (2), subsection (a) of this section. When there is credible information that
8 child abuse as defined by §49-1-3 of this code or domestic violence as defined by ~~§48-27-202~~ of
9 this code has occurred, a full adversarial judicial hearing is mandatory and if the court determines
10 that abuse has occurred, appropriate protective measures shall be ordered.

11 (c) If an agreement, in whole or in part, is not accepted by the court under the standards
12 set forth in subsection (a) of this section, the court shall allow the parents the opportunity to
13 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 12 months of the parenting functions
11 relating to the daily needs of the child;

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

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

14 (5) Any of the ~~circumstances~~ considerations set forth in section §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 (6) In assessing the considerations for the temporary parenting plan listed in §48-9-
20 203(a)(1) through (5), the court will give due consideration to whether any existing unequal
21 allocation of parenting time or limitations of the opportunity to perform parenting functions has
22 resulted due to the rebuttable presumption of co-equal shared parenting, subject only to
23 applicable limitations as set forth in this code, having not been applied to both parents.

24 (b) At the hearing, the court shall enter a temporary parenting order incorporating a
25 temporary parenting plan which includes:

26 (1) A schedule for the child's time with each parent when appropriate: Provided, That it
27 shall be recognized as the public policy of the State of West Virginia that a rebuttable presumption
28 exists and shall be applied that co-equal shared physical custody with both parents is in the best
29 interest of the child absent particular adjudicatory facts found after a full adversarial judicial
30 hearing as set forth in §48-1-217a of this code;

31 (2) Designation of a temporary residence for the child which, consistent with §48-9-
32 102(a)(2), §48-9-102(a)(9), and §48-9-102(b) of this code shall be presumed to be equally shared
33 with both parents;

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

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

39 (5) Restraining orders, if applicable.

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

42 (d) A parent may move for amendment of a temporary parenting plan, and the court may
43 order amendment to the temporary parenting plan, if the amendment conforms to the limitations
44 of section §48-9-209 of this code and is in the best interest of the child: Provided, That all such
45 findings must be express and made only after a full adversarial judicial hearing as set forth in §48-
46 1-217a and §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 section 203
2 of this article, 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) of this code, findings pursuant to §48-1-217a of this code, or of incompetence,
7 neglect or abuse following a full adversarial judicial hearing as set forth in §48-1-217a of this code.
8 The court shall expressly cite all the evidence of record upon which the court relies for its
9 determination that shared custody is unreasonable and not in the best interest of the child to the
10 extent that the co-equal legal and/or physical custodial relationship between the child and a parent
11 should be severed or reduced. For the purposes of all full adversarial judicial hearings held under
12 this section, and/or of any other sections requiring a full adversarial judicial hearing consistent
13 with this section, a court may consider a parent or guardian's: (i) Adjudicated substance abuse
14 addiction; (ii) current incarceration; or (iii) conviction of a crime of murder, rape, malicious assault,
15 abduction, kidnapping, aggravated battery, child neglect, child abuse, child sexual abuse, child
16 exploitation, child trafficking, or the sale of a child under any state or federal criminal law, to be
17 grounds for a finding of incompetence, neglect or abuse sufficient to depart from the presumption
18 of shared parenting. In making this determination, the court shall give particular consideration to:

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

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

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

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

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

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

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

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

41 (c) Upon credible evidence of one or more of the circumstances set forth in ~~subsection~~
42 §48-9-209(a) of this code, following a full adversarial judicial hearing and express findings as set
43 forth in §48-9-204(a) of this code, the court shall issue a temporary order limiting or denying
44 access to the child as required by that section, in order to protect the child or the other party,
45 pending adjudication of the underlying facts.

46 (d) Expedited procedures shall be instituted to facilitate the prompt issuance of a parenting
47 plan: Provided, That such expedited procedures must meet the requirements for the full
48 adversarial judicial hearing and express findings as set forth in §48-9-204(a) of this code before
49 either parent's 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 and shall reflect the differing needs of the child based upon age: *Provided, That such model*
4 parenting schedules shall be based upon the current state of published research in child
5 development psychology in peer reviewed publications establishing that shared parenting,
6 including overnight time with each parent is in the best interest of the child or children, even in
7 children under the age of one year old. Such model parenting schedules shall recognize the
8 rebuttable presumption that co-equal shared legal and shared physical custody with both parents,
9 and that keeping siblings, including half-siblings, together on at least an equal basis with the
10 periods of physical custody and shared parenting that the child or children share with the parent
11 of any siblings or half-siblings is in the best interest of the child. In the event that the presumption
12 of co-equal shared parenting is rebutted as set forth in §48-1-217a of this code or §48-9-204(a)
13 of this code, schedules shall be adjusted for each child as he or she grows older and his or her
14 needs and ability to adjust to circumstances change including expanded parenting time for the
15 parent who initially spends less time with the child, unless the limiting factors set forth in §48-9-
16 209 of this code, the findings of §48-1-217a of this code, or of incompetence, neglect or abuse in
17 accordance with §48-9-204(a) of this code are expressly found to be or remain present after a full
18 adversarial judicial hearing.

§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 the rebuttable
5 presumption of shared parenting set forth in §48-1-239 of this code. If the court denies the request
6 for shared physical custody, the determination shall be accompanied by specific findings of fact
7 and conclusions of law that the awarding of shared physical custody is not in the best interests of
8 the child. The court must document all the evidence of record upon which the court relies for its
9 determination by a preponderance of the evidence that shared physical custody would endanger
10 the child's physical, mental or emotional health. The court shall order custodial time the child
11 spends with each parent to achieve any of the following objectives:

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

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

18 (3) To keep siblings together when the court finds that doing so is necessary to their
19 welfare: Provided, That there shall be a rebuttable presumption that keeping siblings, including
20 half-siblings, together on at least an equal basis with the periods of physical custody and shared
21 parenting that the child or children share with the parent of any siblings or half-siblings is in the
22 best interest of the child, unless the limiting factors set forth in §48-9-209 of this code, the findings
23 of §48-1-217a of this code, or of incompetence, neglect or abuse in accordance with §48-9-204(a)
24 of this code are expressly found after a full adversarial judicial hearing and express findings to be
25 or remain present;

26 (4) To protect the child's welfare when, under an otherwise appropriate allocation, the child
27 would be harmed because of a gross disparity in the quality of the emotional attachments between
28 each parent and the child, or in each parent's demonstrated ability or availability to meet a child's

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

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

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

44 (7) To apply the principles set forth in §48-9-403(d) of this code if one parent relocates or
45 proposes to relocate at a distance that will impair the ability of a parent to exercise the amount of
46 custodial responsibility that would otherwise be ordered under this section: Provided, That in
47 cases of proposed relocation the court's analysis shall reflect the current state of social science
48 research in child development psychology recognizing that shared parenting, including overnight
49 time with each parent is in the best interest of the child or children, even in children under the age
50 of one year old; and that keeping siblings, including half-siblings, together on at least an equal
51 basis with the periods of physical custody and shared parenting that the child or children share
52 with the parent of any siblings or half-siblings is in the best interest of the child, unless the limiting
53 factors set forth in §48-9-209 of this code, the findings of §48-1-217a of this code, or of

54 incompetence, neglect or abuse in accordance with §48-9-204(a) of this code are expressly found
55 after a full adversarial judicial hearing and express findings to be or remain present;

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

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

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

70 ~~(c) If the court is unable to allocate custodial responsibility under §48-9-206(a) of this code~~
71 ~~because the allocation under §48-9-206(a) of this code would be harmful to the child, or because~~
72 ~~there is no history of past performance of caretaking functions, as in the case of a newborn, or~~
73 ~~because the history does not establish a pattern of caretaking sufficiently dispositive of the issues~~
74 ~~of the case, the court shall allocate custodial responsibility based on the child's best interest,~~
75 ~~taking into account the factors in considerations that are set forth in this section and in §48-9-209~~
76 ~~and §48-9-403(d) of this code and preserving to the extent possible this section's priority on the~~
77 ~~share of past caretaking functions each parent~~

78 (c) In determining how to schedule the custodial time allocated to each parent, the court
79 shall take account of the economic, physical, and other practical circumstances such as those

80 listed in §48-9-206(a)(6) of this code. The court shall also consider the willingness and ability of
81 each parent to facilitate and encourage a close and continuing relationship between the other
82 parent and the child as required under §48-9-206(a)(9) of this code. If the court determines after
83 a full adversarial judicial hearing and express findings by a preponderance of the evidence that a
84 parent is not encouraging a close and continuing relationship between the other parent and the
85 child, such a finding shall create a rebuttable presumption that the offending parent is alienating
86 the other parent from the child and persistently interfering with the other parent's access to the
87 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 section 201 of this
2 article, the court shall allocate responsibility for making significant life decisions on behalf of the
3 child, 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 ~~(1)~~ (2) The allocation of custodial responsibility under section 206 of this article: *Provided,*
10 That any previously ordered unequal allocation of parenting time which did not take into
11 consideration the current state of social science research in child development psychology
12 recognizing that shared parenting, including overnight time with each parent is in the best interest
13 of the child or children, even in children under the age of one year old, shall not serve as the basis
14 for any finding by the court that the parent historically receiving less parenting time is not entitled
15 to co-equal 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 previously ordered unequal allocation of parenting time which did not

18 take into consideration the current state of social science research in child development
19 psychology recognizing that shared parenting, including overnight time with each parent is in the
20 best interest of the child or children, even in children under the age of one year old, shall not serve
21 as the basis for any finding by the court that the parent historically receiving less parenting time
22 is not entitled to co-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 section 209 of this article ~~or~~
28 unless only if the findings of §48-1-217a of this code, or of incompetence, neglect or abuse in
29 accordance with §48-9-204(a) of this code are expressly found after a full adversarial judicial
30 hearing and express findings to be or remain present.

31 (b) If each of the child's legal parents has been exercising a reasonable share of parenting
32 functions for the child, the court shall presume that an allocation of decision-making responsibility
33 to both parents jointly is in the child's best interests. The presumption is overcome if there is a
34 history of domestic abuse, or by a showing that joint allocation of decision-making responsibility
35 is not in the child's best interest: Provided, That the court must expressly document after a full
36 adversarial judicial hearing and express findings all the evidence of record upon which the court
37 relies for its determination by a preponderance of the evidence that co-equal and joint allocation
38 of decision-making responsibility is not in the child's best interest.

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

§48-9-208. Criteria for parenting plan; dispute resolution.

1 (a) If provisions for resolving parental disputes are not ordered by the court pursuant to
2 parenting agreement under section 201 of this article, the court shall order a method of resolving
3 disputes that serves the child's best interest in light of:

4 (1) The parents' wishes and the stability of the child: Provided, That the findings of leading
5 published and peer-reviewed social science studies, which establish that a rebuttable
6 presumption exists and shall be applied that co-equal shared physical custody of children,
7 including children under the age of one year, with both parents, and meaningful contact with a
8 child's siblings, including half-siblings, at a ratio of time equivalent to the maximum amount of
9 parenting time any sibling or half-sibling has with a common biological parent that is greater than
10 that of another sibling or half-sibling is in the best interest of the child or children;

11 (2) Circumstances, including, but not limited to, financial circumstances, that may affect
12 the parents ability to participate in a prescribed dispute resolution process; and

13 (3) The existence of any limiting factor, as set forth in section 209 of this article.

14 (b) The court may order a nonjudicial process of dispute resolution by designating with
15 particularity the person or agency to conduct the process or the method for selecting such a
16 person or agency. The disposition of a dispute through a nonjudicial method of dispute resolution
17 that has been ordered by the court without prior parental agreement is subject to de novo judicial
18 review. If the parents have agreed in a parenting plan or by agreement thereafter to a binding
19 resolution of their dispute by nonjudicial means, a decision by such means is binding upon the
20 parents and must be enforced by the court, unless it is shown to be contrary to the best interests
21 of the child, beyond the scope of the parents' agreement, or the result of fraud, misconduct,
22 corruption or other serious irregularity. The best interests of the child shall be considered in light
23 of the amendments to this code in the Best Interests of the Child Protection Act of 2021.

24 (c) This section is subject to the limitations imposed by ~~section two hundred two~~ §48-9-
25 209 of this ~~article~~ code.

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.* ~~articles eight b and eight d, chapter sixty one~~ of this code;

7 (3) Has been expressly found, pursuant to a full adversarial judicial hearing, to have
8 committed domestic violence, as defined in ~~section §48-27-202~~ of this code;

9 (4) Has ~~interfered persistently with the other parent's access to the child~~ been found after
10 a full adversarial judicial hearing and express findings to have, overtly or covertly, 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 pursuant to a full adversarial judicial hearing; 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 pursuant to a full adversarial judicial hearing to have engaged in
20 any activity specified by subsection (a) of this section, the court shall impose limits that are
21 reasonably calculated to protect the child or child's parent from harm. The limitations that the court
22 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 pursuant to a full adversarial judicial hearing to have engaged in
48 any activity specified in subsection (a) of this section, the court may not allocate custodial
49 responsibility or decision-making responsibility to that parent without making special written

50 findings that the child and other parent can be adequately protected from harm by such limits as
51 it may impose under subsection (b) of this section. The parent found to have engaged in the
52 behavior specified in subsection (a) of this section has the burden of proving that an allocation of
53 custodial responsibility or decision-making responsibility to that parent will not endanger the child
54 or the other parent.

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

63 (e) (1) A parent who believes he or she is the subject of activities by the other parent
64 described in subdivision (5) of subsection (a), may move the court pursuant to subdivision (4),
65 subsection (b), §49-5-101 ~~section one hundred and one, article five, chapter forty nine~~ of this
66 code for the Department of Health and Human Resources to disclose whether the other parent
67 was the source of the allegation and, if so, whether the department found the report to be:

- 68 (A) Substantiated;
- 69 (B) Unsubstantiated;
- 70 (C) Inconclusive; or
- 71 (D) Still under investigation.

72 (2) If the court grants a motion pursuant to this subsection, disclosure by the Department
73 of Health and Human Resources shall be in camera. The court may disclose to the parties
74 information received from the department only if it has reason to believe a parent knowingly made
75 a false report.

PART 3. FACT FINDING.

§48-9-301. Court-ordered investigation.

1 (a) In its discretion, the court may order a written investigation and report to assist it in
2 determining any issue relevant to proceedings under this article: Provided, That in any instance
3 where the court orders such a written investigation and report, it must serve notice to all parties
4 of the court's order and such notice must describe with reasonable particularity the nature and
5 objective of the investigation, and an explanation of the court's need and purpose in ordering such
6 investigation. The investigation and report may be made by the guardian ad litem, the staff of the
7 court or other professional social service organization experienced in counseling children and
8 families: Provided, That the court shall identify to all parties who the assigned investigator is, why
9 the court selected the particular investigator, and shall make any such investigator subject to
10 deposition by and a compulsory witness for any party desiring to call the investigator for hearing
11 testimony. The court shall specify the scope of the investigation or evaluation and the authority of
12 the investigator. All investigations pursuant to this section may only be ordered by the court for
13 docketed matters pending before the court, and may only be considered by the court after any
14 investigation report has been provided to the parties and after through a full adversarial judicial
15 hearing, and all investigators, witnesses and documents involved in such investigations shall be
16 subject to full discovery by all parties and no ex parte information or filings nor any ex parte
17 investigation papers, documents or testimony whatsoever may be considered by any court at any
18 time.

19 (b) In preparing the report concerning a child, the investigator may consult any person
20 who may have information about the child and the potential parenting or custodian arrangements:
21 Provided, That all such persons shall be identified to all parties by the court and they and any
22 records or documents reviewed or relied upon by them shall be subject to full discovery by all
23 parties. Upon order of the court, the investigator may refer the child to professional personnel for

24 diagnosis, but only if consented to by both of the child's parents, unless a court has ordered the
25 removal the child from parental or other legal custody for the child's protection. The investigator
26 may consult with and obtain information from medical, psychiatric or other expert persons who
27 have served the child in the past, ~~without~~ upon obtaining the consent of the parent or the child's
28 custodian, unless a court has ordered the removal the child from parental or other legal custody
29 for the child's protection; but the child's consent must be obtained if the child has reached the age
30 of 12, unless the court finds that the child lacks mental capacity to consent. If the requirements of
31 subsection (c) of this section are fulfilled, the investigator's report may be received in evidence at
32 the hearing.

33 (c) The investigator shall deliver the investigator's report to counsel and to any party not
34 represented by counsel at least ten days prior to the hearing unless a shorter time is ordered by
35 the court for good cause shown: Provided, That any such report may only be considered by the
36 court after any investigation report has been provided to the parties and any hearing must be a
37 full adversarial judicial hearing and any party may move to continue the hearing if they feel
38 discovery or preparation if necessary that cannot be adequately accomplished within 10 days.

39 The investigator shall make available to counsel and to any party not represented by counsel the
40 investigator's file of underlying data and reports, complete texts of diagnostic reports made to the
41 investigator pursuant to the provisions of subsection (b) of this section, and the names and
42 addresses of all persons whom the investigator has consulted. Any party to the proceeding may
43 depone and/or call as a hearing witness the investigator and any person whom the investigator
44 has consulted for cross-examination and all parties and any records or documents reviewed or
45 relied upon by them shall be subject to full discovery by all parties. A party may not waive the right
46 of cross-examination, nor the right to continuance and/or discovery prior to the hearing.

47 (d) Services and tests ordered under this section shall be ordered only if at no cost to the
48 individuals involved, or at a cost that is reasonable in light of the available financial resources.

PART 4. MODIFICATION OF PARENTING PLAN.

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

1 (a) Except as provided in sections 402 or 403 of this article, a court shall modify a parenting
2 plan order if it finds, on the basis of facts that were not known or have arisen since the entry of
3 the prior order and were not anticipated therein, that a substantial change has occurred in the
4 circumstances of the child or of one or both parents and a modification is necessary to serve the
5 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 subsection (a), section 209 of this article, after a parenting plan has been
18 ordered by the court, constitutes a substantial change of circumstances and measures shall be
19 ordered pursuant to section 209 of this article to protect the child or the child's parent.

20 (e)(1) For purposes of subsection (a) of this section, any parent subject to unequal
21 allocation of parenting time previously awarded, which did not take into consideration the
22 rebuttable presumption of shared parenting and that keeping siblings, including half-siblings,
23 together being in the best interest of the child or children, or did not specifically set forth the court's
24 reasoning for departure from shared parenting and maintenance of sibling/half-sibling time

25 (unless the limiting factors set forth in §48-9-209 of this code or incompetence, abuse or neglect
26 set forth in §48-9-204(a) of this code are, or remain present), then pursuant to the amendments
27 to this code made by the Best Interests of Children Protection Act of 2021 shall constitute a
28 qualifying substantial change in circumstances, and may petition the court for a modification of
29 his or her parenting plan for shared parenting: *Provided*, That any parent or guardian who: (i) Has
30 been found by a court to have a substance abuse addiction; (ii) is currently incarcerated; (iii) has
31 not had any contact with their child for two years or more, unless such lack of contact has been
32 due to parental alienation by the other parent, nor ever actively sought to obtain additional custody
33 or parenting time with their child or (iv) has been convicted of a crime of murder, rape, malicious
34 assault, abduction, kidnapping, aggravated battery, domestic violence, child neglect, child abuse,
35 child sexual abuse, child exploitation, child trafficking, or the sale of a child under any state or
36 federal criminal law, including as grounds for a finding of incompetence, neglect or abuse under
37 §48-9-204(a) of this code, shall not be allowed to petition for modification of a parenting plan
38 pursuant to this subsection. Upon such motion the court shall promptly conduct an evidentiary
39 hearing, review and determine the proper scope of modification, if any, to such unequal parenting
40 plan or insufficient sibling/half-sibling time. In reviewing any petition for modification based on this
41 section, the court shall apply the rebuttable presumption of shared parenting set forth in §48-1-
42 239 of this code, and that keeping siblings, including half-siblings, together, as being in in the best
43 interest of the child or children, even in children under the age of one year old. In reaching its
44 decision, the court shall expressly cite all the evidence of record upon which the court relies for
45 its determination that the unequal parenting or sibling/half-sibling time shall or shall not be
46 modified in accordance with the Best Interests of Children Protection Act of 2021.

§48-9-402. Modification without showing of changed circumstances.

1 (a) The court shall modify a parenting plan in accordance with a parenting agreement,
2 unless it finds that the agreement is not knowing and voluntary or that it would be harmful to the
3 child.

4 (b) The court may modify any provisions of the parenting plan without the showing of
5 change circumstances required by section 401 subsection (a) of this article if the modification is
6 in the child's best interests, and the modification:

7 (1) Reflects the de facto arrangements under which the child has been receiving care from
8 the petitioner, without objection, in substantial deviation from the parenting plan, for the preceding
9 six months before the petition for modification is filed, provided the arrangement is not the result
10 of a parent's acquiescence resulting from the other parent's domestic abuse;

11 (2) Constitutes a minor modification in the plan; or

12 (3) Is necessary to accommodate the reasonable and firm preferences of a child who has
13 attained the age of 14.

14 (c) Evidence of repeated filings of fraudulent reports of domestic violence or child abuse
15 is admissible in a domestic relations action between the involved parties when the allocation of
16 custodial responsibilities is in issue, and the fraudulent accusations may be a factor considered
17 by the court in making the allocation of custodial responsibilities.

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 section 401 subsection (a) of this article, of the child only when it significantly impairs either
3 parent's ability to 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 subsection (d) of this
17 section 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 subsection (a) of this section, 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 subsection (a) of this
30 section renders it impractical to maintain the same proportion of custodial responsibility as that
31 being exercised by each parent, the court shall modify the parenting plan in accordance with the
32 child's 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:

35 (A) ~~that~~ The relocating parent shows that the relocation is in good faith for a legitimate
36 purpose and to a location that is reasonable in light of the purpose: Provided, That any unequal

37 prior parenting plan which did not take into consideration the rebuttable presumption of co-equal
38 shared parenting and that keeping siblings, including half-siblings, together being in the best
39 interest of the child or children, shall not serve as the basis for any finding by the court that the
40 parent historically receiving less parenting time is not generally entitled to co-equal parenting
41 and/or sibling/half-sibling time and/or legal and physical custodial responsibility after relocation:
42 *Provided further,* That if relocation makes co-equal shared parenting and/or sibling/half sibling
43 time impractical, the court shall to the maximum extent possible require that the non-relocating
44 parent be granted the maximum amount of parenting time possible, including, but not limited to,
45 the child or children residing with the non-relocating parent and siblings/half-siblings during school
46 summer vacation months and on other extended holidays and scheduled vacations.

47 (B) The percentage of custodial responsibility that constitutes a significant majority of
48 custodial responsibility is seventy percent or more: *Provided,* That any such previously ordered
49 allocation of custodial responsibility has be ordered after a full, adversarial judicial hearing on the
50 record in which the court applied the rebuttable presumption of co-equal shared parenting and for
51 keeping siblings/half-siblings together. If such allocation was not ordered after proper
52 consideration of such rebuttable presumption of co-equal shared parenting and for keeping
53 siblings/half-siblings together, then the court must reevaluate such allocation consistent with §48-
54 1-239 of this code.

55 (C) A relocation is for a legitimate purpose if it is to be close to significant family or other
56 support networks, for significant health reasons, to protect the safety of the child or another
57 member of the child's household from significant risk of harm, to pursue a significant employment
58 or educational opportunity or to be with one's spouse who is established, or who is pursuing a
59 significant employment or educational opportunity, in another location. The relocating parent has
60 the burden of proving of the legitimacy of any other purpose. A move with a legitimate purpose is
61 reasonable unless its purpose is shown to be substantially achievable without moving or by
62 moving to a location that is substantially less disruptive of the other parent's relationship to the

63 child: Provided, That the court shall to the maximum extent possible require that the nonrelocating
64 parent be granted the maximum amount of parenting time possible, including, but not limited to,
65 the child or children residing with the non-relocating parent and siblings/half-siblings during school
66 summer vacation months and on other extended holidays and scheduled vacations.

67 (2) If a relocation of the parent is in good faith for legitimate purpose and to a location that
68 is reasonable in light of the purpose and if neither has been exercising a significant majority of
69 custodial responsibility for the child, the court shall reallocate custodial responsibility based on
70 the best interest of the child, taking into account all relevant factors including the effects of the
71 relocation on the child, subject to the provisos set forth in §48-9-403(d)(1) of this code.

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

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

83 (5) If the parents are exercising a basic shared parenting schedule and all of their children
84 are under 10 years of age, the court shall consider this a factor against the approval of the
85 relocation of the custodial parent unless the relocation has been agreed to by both parties; or
86 unless in the opinion of the judge the relocation is in the best interest of the child or children:
87 Provided, That the best interest of the child or children must consider the rebuttable presumption
88 of shared parenting and sibling/half-sibling time, and the court shall to the maximum extent

89 possible require that the non-relocating parent be granted the maximum amount of parenting time
90 possible, including, but not limited to, the child or children residing with the non-relocating parent
91 and siblings/half-siblings during school summer vacation months and on other extended holidays
92 and scheduled vacations.

93 (e) In determining the proportion of ~~caretaking~~ parenting functions each parent previously
94 performed for the child under the parenting plan before relocation, the court may not consider a
95 division of functions arising from any arrangements made after a relocation but before a
96 modification hearing on the issues related to relocation.

97 (f) In determining the effect of the relocation or proposed relocation on a child, any
98 interviewing or questioning of the child shall be conducted in accordance with the provisions of
99 rule 17 of the rules of practice and procedure for family law as promulgated by the Supreme Court
100 of Appeals, subject to the provisos set forth in §48-9-403(d)(1) of this code.

101 (g) Relocations found by the court to be reasonable prior to the passage of the Best
102 Interests of the Child Protection Act of 2021 may depart from the presumption of co-equal shared
103 parenting and sibling/half-sibling time if the court determines that the circumstances due to the
104 relocation make such co-equal shared parenting significantly impracticable: *Provided*, That in
105 such circumstances, upon a motion of the nonrelocating parent to modify an unequal parenting
106 plan, the court shall to the maximum amount of parenting time possible, including, but not limited
107 to, the child or children residing with the nonrelocating parent and siblings/half-siblings during
108 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 §48-9-601 of this
29 code any and all copies (including prior drafts or versions subsequently removed or deleted from
30 any hospital or birthing facility files, and all information contained therein) of birth registry forms

31 completed for the hospital or birthing facility by the mother, or any other person, for the purposes
32 of registering the birth of a child with the West Virginia Vital Registration Office, are deemed part
33 of the child's medical records and are fully accessible, without limitation or reservation, to each
34 legal and/or biological parent: *Provided*, That either parent may request that the hospital redact
35 their own personally identifiable information that would otherwise be subject to the protections of
36 the federal Health Insurance Portability and Accountability Act ("HIPAA"), but under no
37 circumstances may either parent or the hospital or birthing facility rely on HIPAA to preclude the
38 other parent from accessing and/or obtaining copies of any and all birth registry forms (including
39 prior drafts or versions subsequently removed or deleted from any hospital or birthing facility files,
40 and all information contained therein) completed for the parent's child and submitted to the
41 hospital or 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.

§48-9-602. Designation of custody for the purpose of other state and federal statutes.

1 Solely for the purposes of all other state and federal statutes which require a designation
2 or determination of custody, a parenting plan shall designate the parent with whom the child is
3 scheduled to reside the majority of the time as the custodian of the child: Provided, That However,
4 this designation shall not affect either parent’s rights and responsibilities under a parenting plan.
5 In the absence of such a designation, the parent with whom the child is scheduled to reside the
6 majority of the time is deemed to be the custodian of the child for the purposes of such federal
7 and state statutes.

PART 6. MISCELLANEOUS PROVISIONS.

§48-9-603. Effect of enactment; operative dates.

1 (a) The enactment of this article, formerly enacted as article eleven of this chapter during
2 the second extraordinary session of the 1999 Legislature, is prospective in operation unless
3 otherwise expressly indicated.

4 (b) The provisions of section 202 of this article, insofar as they provide for parent education
5 and mediation, became operative on January 1, 2000. Until that date, parent education and
6 mediation with regard to custody issues were discretionary unless made mandatory under a
7 particular program or pilot project by rule or direction of the Supreme Court of Appeals or a circuit
8 court.

9 (c) The provisions of this article that authorize the court, in the absence of an agreement
10 of the parents, to order an allocation of custodial responsibility and an allocation of significant
11 decision-making responsibility, as amended during the regular session of 2021, the “Best

12 Interests of the Child Protection Act of 2021”, became operative on January 1, 2000 90 days after
13 passage of those amendments, at which time the ~~primary caretaker doctrine was replaced with a~~
14 system that allocates custodial and decision-making responsibility to the parents ~~in accordance~~
15 ~~with this article~~ was replaced by the rebuttable presumption of co-equal shared parenting and
16 sibling/half-sibling time. Any order entered prior to ~~January 1, 2000~~ the effective date of the Best
17 Interests of the Child Protection Act of 2021, ~~based on the primary caretaker doctrine~~ remains in
18 full force and effect until modified by a court of competent jurisdiction, which modifications, upon
19 petitions authorized by the Best Interests of the Child Protection Act of 2021, shall be liberally
20 construed to further the interests of justice and the best interests of any children involved.

NOTE: The Best Interests of the Child Protection Act of 2021. 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; that parental rights are protected constitutional rights of parents that may not be infringed upon by courts except after full adversarial judicial proceedings on the record and with no consideration of *ex parte* evidence of any kind by any court or judge against any parent; and also that certain parental rights are coordinate with and directly justify the granting shared legal and physical custody equally between parents of children and shall be so enforced 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.