

1 **ENGROSSED**

2 COMMITTEE SUBSTITUTE

3 for

4 **H. B. 2750**

5 (By Delegates Frazier, Mahan, Fleischauer,  
6 Caputo, Moore, Hunt and Skaff)

7  
8 (Originating in the Committee on the Judiciary)

9 [February 1, 2011]

10

11 A BILL to amend and reenact §49-6-3 and §49-6-5 of the Code of West  
12 Virginia, 1931, as amended, all relating to making the  
13 commission of sexual assault or sexual abuse an additional  
14 consideration a judge may use in issuing an order to  
15 temporarily or permanently end a parent-child relationship.

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

17 That §49-6-3 and §49-6-5 of the Code of West Virginia, 1931,  
18 as amended, be amended and reenacted, all to read as follows:

19 **ARTICLE 6. PROCEDURE IN CASES OF CHILD NEGLECT OR ABUSE.**

20 **§49-6-3. Petition to court when child believed neglected or abused**

21 **-- Temporary custody.**

22 (a) Upon the filing of a petition, the court may order that  
23 the child alleged to be an abused or neglected child be delivered  
24 for not more than ten days into the custody of the state department  
25 or a responsible person found by the court to be a fit and proper  
26 person for the temporary care of the child pending a preliminary  
27 hearing, if it finds that:

28 (1) There exists imminent danger to the physical well-being of  
29 the child; and

1           (2) There are no reasonably available alternatives to removal  
2 of the child, including, but not limited to, the provision of  
3 medical, psychiatric, psychological or homemaking services in the  
4 child's present custody: *Provided*, That where the alleged abusing  
5 person, if known, is a member of a household, the court shall not  
6 allow placement pursuant to this section of the child or children  
7 in said home unless the alleged abusing person is or has been  
8 precluded from visiting or residing in said home by judicial order.  
9 In a case where there is more than one child in the home, or in the  
10 temporary care, custody or control of the alleged offending parent,  
11 the petition shall so state, and notwithstanding the fact that the  
12 allegations of abuse or neglect may pertain to less than all of  
13 such children, each child in the home for whom relief is sought  
14 shall be made a party to the proceeding. Even though the acts of  
15 abuse or neglect alleged in the petition were not directed against  
16 a specific child who is named in the petition, the court shall  
17 order the removal of such child, pending final disposition, if it  
18 finds that there exists imminent danger to the physical well-being  
19 of the child and a lack of reasonable available alternatives to  
20 removal. The initial order directing such custody shall contain an  
21 order appointing counsel and scheduling the preliminary hearing,  
22 and upon its service shall require the immediate transfer of  
23 custody of such child or children to the department or a  
24 responsible relative which may include any parent, guardian, or  
25 other custodian. The court order shall state:

26           ~~(1)~~ (A) That continuation in the home is contrary to the best  
27 interests of the child and why; and

28           ~~(2)~~ (B) Whether or not the department made reasonable efforts

1 to preserve the family and prevent the placement or that the  
2 emergency situation made such efforts unreasonable or impossible.  
3 The order may also direct any party or the department to initiate  
4 or become involved in services to facilitate reunification of the  
5 family.

6       (b) Whether or not the court orders immediate transfer of  
7 custody as provided in subsection (a) of this section, if the facts  
8 alleged in the petition demonstrate to the court that there exists  
9 imminent danger to the child, the court may schedule a preliminary  
10 hearing giving the respondents at least five days' actual notice.  
11 If the court finds at the preliminary hearing that there are no  
12 alternatives less drastic than removal of the child and that a  
13 hearing on the petition cannot be scheduled in the interim period,  
14 the court may order that the child be delivered into the temporary  
15 custody of the department or a responsible person or agency found  
16 by the court to be a fit and proper person for the temporary care  
17 of the child for a period not exceeding sixty days: *Provided, That*  
18 the court order shall state:

19       (1) That continuation in the home is contrary to the best  
20 interests of the child and set forth the reasons therefor;

21       (2) whether or not the department made reasonable efforts to  
22 preserve the family and to prevent the child's removal from his or  
23 her home;

24       (3) Whether or not the department made reasonable efforts to  
25 preserve the family and to prevent the placement or that the  
26 emergency situation made such efforts unreasonable or impossible;  
27 and

28       (4) What efforts should be made by the department, if any, to

1 facilitate the child's return home: *Provided, however,* That if the  
2 court grants an improvement period as provided in section twelve of  
3 this article, the sixty-day limit upon temporary custody is waived.

4 (c) If a child or children shall, in the presence of a child  
5 protective service worker, be in an emergency situation which  
6 constitutes an imminent danger to the physical well-being of the  
7 child or children, as that phrase is defined in section three,  
8 article one of this chapter, and if such worker has probable cause  
9 to believe that the child or children will suffer additional child  
10 abuse or neglect or will be removed from the county before a  
11 petition can be filed and temporary custody can be ordered, the  
12 worker may, prior to the filing of a petition, take the child or  
13 children into his or her custody without a court order: *Provided,*  
14 That after taking custody of such child or children prior to the  
15 filing of a petition, the worker shall forthwith appear before a  
16 circuit judge or a juvenile referee of the county wherein custody  
17 was taken, or if no such judge or referee be available, before a  
18 circuit judge or a juvenile referee of an adjoining county, and  
19 shall immediately apply for an order ratifying the emergency  
20 custody of the child pending the filing of a petition. The circuit  
21 court of every county in the state shall appoint at least one of  
22 the magistrates of the county to act as a juvenile referee, who  
23 shall serve at the will and pleasure of the appointing court, and  
24 who shall perform the functions prescribed for such position by the  
25 provisions of this subsection. The parents, guardians or custodians  
26 of the child or children may be present at the time and place of  
27 application for an order ratifying custody, and if at the time the  
28 child or children are taken into custody by the worker, the worker

1 knows which judge or referee is to receive the application, the  
2 worker shall so inform the parents, guardians or custodians. The  
3 application for emergency custody may be on forms prescribed by the  
4 Supreme Court of Appeals or prepared by the prosecuting attorney or  
5 the applicant, and shall set forth facts from which it may be  
6 determined that the probable cause described above in this  
7 subsection exists. Upon such sworn testimony or other evidence as  
8 the judge or referee deems sufficient, the judge or referee may  
9 order the emergency taking by the worker to be ratified. If  
10 appropriate under the circumstances, the order may include  
11 authorization for an examination as provided for in subsection (b),  
12 section four of this article. If a referee issues such an order,  
13 the referee shall by telephonic communication have such order  
14 orally confirmed by a circuit judge of the circuit or an adjoining  
15 circuit who shall on the next judicial day enter an order of  
16 confirmation. If the emergency taking is ratified by the judge or  
17 referee, emergency custody of the child or children shall be vested  
18 in the department until the expiration of the next two judicial  
19 days, at which time any such child taken into emergency custody  
20 shall be returned to the custody of his or her parent or guardian  
21 or custodian unless a petition has been filed and custody of the  
22 child has been transferred under the provisions of section three of  
23 this article.

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

28 (1) The parent has subjected the child, another child of the

1 parent, or any other child residing in the same household or under  
2 the temporary or permanent custody of the parent to aggravated  
3 circumstances which include, but are not limited to, abandonment,  
4 torture, chronic abuse and sexual abuse;

5 (2) The parent has:

6 (A) Committed murder of the child's other parent, guardian or  
7 custodian, another child of the parent, or any other child residing  
8 in the same household or under the temporary or permanent custody  
9 of the parent;

10 (B) Committed voluntary manslaughter of the child's other  
11 parent, guardian or custodian, another child of the parent, or any  
12 other child residing in the same household or under the temporary  
13 or permanent custody of the parent;

14 (C) Attempted or conspired to commit such a murder or  
15 voluntary manslaughter or been an accessory before or after the  
16 fact to either such crime; ~~or~~

17 (D) Committed unlawful or malicious wounding that results in  
18 serious bodily injury to the child, the child's other parent,  
19 guardian or custodian, to another child of the parent, or any other  
20 child residing in the same household or under the temporary or  
21 permanent custody of the parent; or

22 (E) Committed sexual assault or sexual abuse of the child, the  
23 child's other parent, guardian, or custodian, another child of the  
24 parent, or any other child residing in the same household or under  
25 the temporary or permanent custody of the parent.

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

28 **§49-6-5. Disposition of neglected or abused children.**

1       (a) Following a determination pursuant to section two of this  
2 article wherein the court finds a child to be abused or neglected,  
3 the department shall file with the court a copy of the child's case  
4 plan, including the permanency plan for the child. The term case  
5 plan means a written document that includes, where applicable, the  
6 requirements of the family case plan as provided for in section  
7 three, article six-d of this chapter and that also includes at  
8 least the following: A description of the type of home or  
9 institution in which the child is to be placed, including a  
10 discussion of the appropriateness of the placement and how the  
11 agency which is responsible for the child plans to assure that the  
12 child receives proper care and that services are provided to the  
13 parents, child and foster parents in order to improve the  
14 conditions in the parent(s) home; facilitate return of the child to  
15 his or her own home or the permanent placement of the child; and  
16 address the needs of the child while in foster care, including a  
17 discussion of the appropriateness of the services that have been  
18 provided to the child. The term "permanency plan" refers to that  
19 part of the case plan which is designed to achieve a permanent home  
20 for the child in the least restrictive setting available. The plan  
21 must document efforts to ensure that the child is returned home  
22 within approximate time lines for reunification as set out in the  
23 plan. Reasonable efforts to place a child for adoption or with a  
24 legal guardian may be made at the same time reasonable efforts are  
25 made to prevent removal or to make it possible for a child to  
26 safely return home. If reunification is not the permanency plan  
27 for the child, the plan must state why reunification is not  
28 appropriate and detail the alternative placement for the child to

1 include approximate time lines for when such placement is expected  
2 to become a permanent placement. This case plan shall serve as the  
3 family case plan for parents of abused or neglected children.  
4 Copies of the child's case plan shall be sent to the child's  
5 attorney and parent, guardian or custodian or their counsel at  
6 least five days prior to the dispositional hearing. The court  
7 shall forthwith proceed to disposition giving both the petitioner  
8 and respondents an opportunity to be heard. The court shall give  
9 precedence to dispositions in the following sequence:

10       (1) Dismiss the petition;

11       (2) Refer the child, the abusing parent, the battered parent  
12 or other family members to a community agency for needed assistance  
13 and dismiss the petition;

14       (3) Return the child to his or her own home under supervision  
15 of the department;

16       (4) Order terms of supervision calculated to assist the child  
17 and any abusing parent or battered parent or parents or custodian  
18 which prescribe the manner of supervision and care of the child and  
19 which are within the ability of any parent or parents or custodian  
20 to perform;

21       (5) Upon a finding that the abusing parent or battered parent  
22 or parents are presently unwilling or unable to provide adequately  
23 for the child's needs, commit the child temporarily to the custody  
24 of the state department, a licensed private child welfare agency or  
25 a suitable person who may be appointed guardian by the court. The  
26 court order shall state:

27       (A) That continuation in the home is contrary to the best  
28 interests of the child and why;



1 (B) Whether or not the department has made reasonable efforts,  
2 with the child's health and safety being the paramount concern, to  
3 preserve the family, or some portion thereof, and to prevent or  
4 eliminate the need for removing the child from the child's home and  
5 to make it possible for the child to safely return home;

6 (C) What efforts were made or that the emergency situation  
7 made such efforts unreasonable or impossible; and

8 (D) The specific circumstances of the situation which made  
9 such efforts unreasonable if services were not offered by the  
10 department. The court order shall also determine under what  
11 circumstances the child's commitment to the department shall  
12 continue. Considerations pertinent to the determination include  
13 whether the child should:

14 (i) Be continued in foster care for a specified period;

15 (ii) Be considered for adoption;

16 (iii) Be considered for legal guardianship;

17 (iv) Be considered for permanent placement with a fit and  
18 willing relative; or

19 (v) Be placed in another planned permanent living arrangement,  
20 but only in cases where the department has documented to the  
21 circuit court a compelling reason for determining that it would not  
22 be in the best interests of the child to follow one of the options  
23 set forth in subparagraphs (i), (ii), (iii) or (iv) of this  
24 paragraph. The court may order services to meet the special needs  
25 of the child. Whenever the court transfers custody of a youth to  
26 the department, an appropriate order of financial support by the  
27 parents or guardians shall be entered in accordance with section  
28 five, article seven of this chapter; or

1           (6) Upon a finding that there is no reasonable likelihood that  
2 the conditions of neglect or abuse can be substantially corrected  
3 in the near future and, when necessary for the welfare of the  
4 child, terminate the parental, custodial and guardianship rights  
5 and responsibilities of the abusing parent and commit the child to  
6 the permanent sole custody of the nonabusing parent, if there be  
7 one, or, if not, to either the permanent guardianship of the  
8 department or a licensed child welfare agency. The court may award  
9 sole custody of the child to a nonabusing battered parent. If the  
10 court shall so find, then in fixing its dispositional order the  
11 court shall consider the following factors:

12           (A) The child's need for continuity of care and caretakers;

13           (B) The amount of time required for the child to be integrated  
14 into a stable and permanent home environment; and

15           (C) Other factors as the court considers necessary and proper.

16 Notwithstanding any other provision of this article, the court  
17 shall give consideration to the wishes of a child fourteen years of  
18 age or older or otherwise of an age of discretion as determined by  
19 the court regarding the permanent termination of parental rights.  
20 No adoption of a child shall take place until all proceedings for  
21 termination of parental rights under this article and appeals  
22 thereof are final. In determining whether or not parental rights  
23 should be terminated, the court shall consider the efforts made by  
24 the department to provide remedial and reunification services to  
25 the parent. The court order shall state:

26           (i) That continuation in the home is not in the best interest  
27 of the child and why;

28           (ii) Why reunification is not in the best interests of the

1 child;

2 (iii) Whether or not the department made reasonable efforts,  
3 with the child's health and safety being the paramount concern, to  
4 preserve the family, or some portion thereof, and to prevent the  
5 placement or to eliminate the need for removing the child from the  
6 child's home and to make it possible for the child to safely return  
7 home, or that the emergency situation made such efforts  
8 unreasonable or impossible; and

9 (iv) Whether or not the department made reasonable efforts to  
10 preserve and reunify the family, or some portion thereof, including  
11 a description of what efforts were made or that such efforts were  
12 unreasonable due to specific circumstances.

13 (7) For purposes of the court's consideration of the  
14 disposition custody of a child pursuant to the provisions of this  
15 subsection, the department is not required to make reasonable  
16 efforts to preserve the family if the court determines:

17 (A) The parent has subjected the child, another child of the  
18 parent, or any other child residing in the same household or under  
19 the temporary or permanent custody of the parent to aggravated  
20 circumstances which include, but are not limited to, abandonment,  
21 torture, chronic abuse and sexual abuse;

22 (B) The parent has:

23 (i) Committed murder of the child's other parent, guardian or  
24 custodian, another child of the parent or any other child residing  
25 in the same household or under the temporary or permanent custody  
26 of the parent;

27 (ii) Committed voluntary manslaughter of the child's other  
28 parent, guardian or custodian, another child of the parent, or any

1 other child residing in the same household or under the temporary  
2 or permanent custody of the parent;

3 (iii) Attempted or conspired to commit such a murder or  
4 voluntary manslaughter or been an accessory before or after the  
5 fact to either such crime; ~~or~~

6 (iv) Committed a felonious assault that results in serious  
7 bodily injury to the child, the child's other parent, guardian or  
8 custodian, to another child of the parent, or any other child  
9 residing in the same household or under the temporary or permanent  
10 custody of the parent; or

11 (v) Committed sexual assault or sexual abuse of the child, the  
12 child's other parent, guardian, or custodian, another child of the  
13 parent, or any other child residing in the same household or under  
14 the temporary or permanent custody of the parent.

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

17 (b) As used in this section, "no reasonable likelihood that  
18 conditions of neglect or abuse can be substantially corrected"  
19 shall mean that, based upon the evidence before the court, the  
20 abusing adult or adults have demonstrated an inadequate capacity to  
21 solve the problems of abuse or neglect on their own or with help.  
22 Such conditions shall be considered to exist in the following  
23 circumstances, which shall not be exclusive:

24 (1) The abusing parent or parents have habitually abused or  
25 are addicted to alcohol, controlled substances or drugs, to the  
26 extent that proper parenting skills have been seriously impaired  
27 and such person or persons have not responded to or followed  
28 through the recommended and appropriate treatment which could have

1 improved the capacity for adequate parental functioning;

2       (2) The abusing parent or parents have willfully refused or  
3 are presently unwilling to cooperate in the development of a  
4 reasonable family case plan designed to lead to the child's return  
5 to their care, custody and control;

6       (3) The abusing parent or parents have not responded to or  
7 followed through with a reasonable family case plan or other  
8 rehabilitative efforts of social, medical, mental health or other  
9 rehabilitative agencies designed to reduce or prevent the abuse or  
10 neglect of the child, as evidenced by the continuation or  
11 insubstantial diminution of conditions which threatened the health,  
12 welfare or life of the child;

13       (4) The abusing parent or parents have abandoned the child;

14       (5) The abusing parent or parents have repeatedly or seriously  
15 injured the child physically or emotionally, or have sexually  
16 abused or sexually exploited the child, and the degree of family  
17 stress and the potential for further abuse and neglect are so great  
18 as to preclude the use of resources to mitigate or resolve family  
19 problems or assist the abusing parent or parents in fulfilling  
20 their responsibilities to the child;

21       (6) The abusing parent or parents have incurred emotional  
22 illness, mental illness or mental deficiency of such duration or  
23 nature as to render such parent or parents incapable of exercising  
24 proper parenting skills or sufficiently improving the adequacy of  
25 such skills; or

26       (7) The battered parent's parenting skills have been seriously  
27 impaired and said person has willfully refused or is presently  
28 unwilling or unable to cooperate in the development of a reasonable

1 treatment plan or has not adequately responded to or followed  
2 through with the recommended and appropriate treatment plan.

3       (c) The court may, as an alternative disposition, allow the  
4 parents or custodians an improvement period not to exceed six  
5 months. During this period the court shall require the parent to  
6 rectify the conditions upon which the determination was based. The  
7 court may order the child to be placed with the parents, or any  
8 person found to be a fit and proper person, for the temporary care  
9 of the child during the period. At the end of the period, the  
10 court shall hold a hearing to determine whether the conditions have  
11 been adequately improved and at the conclusion of the hearing shall  
12 make a further dispositional order in accordance with this section.