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H. B. 2406

(By Delegates Miley, Caputo, Fragale,
Iaquinta, Longstreth and Marshall)

[Introduced January 12, 2011; referred to the
Committee on the Judiciary.]

A BILL to amend and reenact §44-10-4 of the Code of West Virginia,
1931, as amended; and to amend and reenact §48-9-205, §48-9-
206 and §48-9-402 of said code, all relating to the
designation of a primary guardian for a minor child; modifying
the minor's right to nominate a guardian; increasing the age
of nomination from fourteen to sixteen; providing for the
consideration of minor's preference in parenting plan;
expanding the period of consideration regarding the parents'
comparative caretaking and other parenting responsibilities.

Be it enacted by the Legislature of West Virginia:

That §44-10-4 of the Code of West Virginia, 1931, as amended,
be amended and reenacted; and that §48-9-205, §48-9-206 and §48-9-
402 of said code be amended and reenacted, all to read as follows:

CHAPTER 44. ADMINISTRATION OF ESTATES AND TRUSTS.

ARTICLE 10. GUARDIANS AND WARDS GENERALLY.

§44-10-4. Right of minor to nominate guardian.

1 (a) If the minor is above the age of ~~fourteen~~ sixteen years,
2 he or she may in the presence of the circuit or family court, or in
3 writing acknowledged before any officer authorized to take the
4 acknowledgment of a deed, nominate his or her own guardian, who, if
5 approved by the court, shall be appointed accordingly.

6 (b) If the guardian nominated by the minor is not appointed by
7 the court, or if the minor resides outside the state, or if, after
8 being summoned, the minor neglects to nominate a suitable person,
9 the court may appoint the guardian in the same manner as if the
10 minor were under the age of ~~fourteen~~ sixteen years.

11 **CHAPTER 48. DOMESTIC RELATIONS.**

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

14 **§48-9-205. Permanent parenting plan.**

15 (a) A party seeking a judicial allocation of custodial
16 responsibility or decision-making responsibility under this article
17 shall file a proposed parenting plan with the court. Parties may
18 file a joint plan. A proposed plan shall be verified and shall
19 state, to the extent known or reasonably discoverable by the filing
20 party or parties:

21 (1) The name, address and length of residence of any adults
22 with whom the child has lived for one year or more, or in the case
23 of a child less than one year old, any adults with whom the child

1 has lived since the child's birth;

2 (2) The name and address of each of the child's parents and
3 any other individuals with standing to participate in the action
4 under section one hundred three of this article;

5 (3) A description of the allocation of care taking and other
6 parenting responsibilities performed by each person named in
7 subdivisions (1) and (2) of this subsection ~~during the twenty-four~~
8 ~~months~~ preceding the filing of an action under this article;

9 (4) A description of the work and child-care schedules of any
10 person seeking an allocation of custodial responsibility, and any
11 expected changes to these schedules in the near future;

12 (5) A description of the child's school and extracurricular
13 activities;

14 (6) A description of any of the limiting factors as described
15 in section two hundred nine of this article that are present,
16 including any restraining orders against either parent to prevent
17 domestic or family violence, by case number and jurisdiction;

18 (7) Required financial information; and

19 (8) A description of the known areas of agreement and
20 disagreement with any other parenting plan submitted in the case.

21 The court shall maintain the confidentiality of any
22 information required to be filed under this section when the person
23 giving that information has a reasonable fear of domestic abuse and
24 disclosure of the information would increase that fear.

1 (b) The court shall develop a process to identify cases in
2 which there is credible information that child abuse or neglect, as
3 defined in section three, article one, chapter forty-nine of this
4 code, or domestic violence as defined in section two hundred two,
5 article twenty-seven of this chapter has occurred. The process
6 shall include assistance for possible victims of domestic abuse in
7 complying with subdivision (6), subsection (a) of this section, and
8 referral to appropriate resources for safe shelter, counseling,
9 safety planning, information regarding the potential impact of
10 domestic abuse on children and information regarding civil and
11 criminal remedies for domestic abuse. The process shall also
12 include a system for ensuring that jointly submitted parenting
13 plans that are filed in cases in which there is credible
14 information that child abuse or domestic abuse has occurred receive
15 the court review that is mandated by subsection (b), section two
16 hundred one of this article.

17 (c) Upon motion of a party and after consideration of the
18 evidence, the court shall order a parenting plan consistent with
19 the provisions of sections two hundred six, two hundred seven, two
20 hundred eight and two hundred nine of this article, containing:

21 (1) A provision for the child's living arrangements and each
22 parent's custodial responsibility, which shall include either:

23 (A) A custodial schedule that designates in which parent's
24 home each minor child will reside on given days of the year; or

1 (B) A formula or method for determining such a schedule in
2 sufficient detail that, if necessary, the schedule can be enforced
3 in subsequent proceedings by the court;

4 (2) An allocation of decision-making responsibility as to
5 significant matters reasonably likely to arise with respect to the
6 child;

7 (3) A provision consistent with section two hundred two of
8 this article for resolution of disputes that arise under the plan,
9 and remedies for violations of the plan; and

10 (4) A plan for the custody of the child should one or both of
11 the parents as a member of the National Guard, a reserve component
12 or an active duty component be mobilized, deployed or called to
13 active duty.

14 (d) A parenting plan may, at the court's discretion, contain
15 provisions that address matters that are expected to arise in the
16 event of a party's relocation, or provide for future modifications
17 in the parenting plan if specified contingencies occur.

18 **§48-9-206. Allocation of custodial responsibility.**

19 (a) Unless otherwise resolved by agreement of the parents
20 under section two hundred one of this article or unless manifestly
21 harmful to the child, the court shall allocate custodial
22 responsibility so that the proportion of custodial time the child
23 spends with each parent approximates the proportion of time each
24 parent spent performing caretaking functions for the child prior to

1 the parents' separation or, if the parents never lived together,
2 before the filing of the action, except to the extent required
3 under section two hundred nine of this article or necessary to
4 achieve any of the following objectives:

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

7 (2) To accommodate the firm and reasonable preferences of a
8 child who is ~~fourteen~~ sixteen years of age or older, and with
9 regard to a child under ~~fourteen~~ sixteen years of age, but
10 sufficiently matured that he or she can intelligently express a
11 voluntary preference for one parent, to give that preference such
12 weight as circumstances warrant;

13 (3) To keep siblings together when the court finds that doing
14 so is necessary to their welfare;

15 (4) To protect the child's welfare when, under an otherwise
16 appropriate allocation, the child would be harmed because of a
17 gross disparity in the quality of the emotional attachments between
18 each parent and the child or in each parent's demonstrated ability
19 or availability to meet a child's needs;

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

24 (6) To avoid an allocation of custodial responsibility that

1 would be extremely impractical or that would interfere
2 substantially with the child's need for stability in light of
3 economic, physical or other circumstances, including the distance
4 between the parents' residences, the cost and difficulty of
5 transporting the child, the parents' and child's daily schedules,
6 and the ability of the parents to cooperate in the arrangement;

7 (7) To apply the principles set forth in subsection (d),
8 section four hundred three of this article if one parent relocates
9 or proposes to relocate at a distance that will impair the ability
10 of a parent to exercise the amount of custodial responsibility that
11 would otherwise be ordered under this section; and

12 (8) To consider the stage of a child's development.

13 (b) In determining the proportion of caretaking functions each
14 parent previously performed for the child under subsection (a) of
15 this section, the court shall not consider the divisions of
16 functions arising from temporary arrangements after separation,
17 whether those arrangements are consensual or by court order. The
18 court may take into account information relating to the temporary
19 arrangements in determining other issues under this section.

20 (c) If the court is unable to allocate custodial
21 responsibility under subsection (a) of this section because the
22 allocation under that subsection would be manifestly harmful to the
23 child, or because there is no history of past performance of
24 caretaking functions, as in the case of a newborn, or because the

1 history does not establish a pattern of caretaking sufficiently
2 dispositive of the issues of the case, the court shall allocate
3 custodial responsibility based on the child's best interest, taking
4 into account the factors in considerations that are set forth in
5 this section and in section two hundred nine and subsection (d),
6 section four hundred three of this article and preserving to the
7 extent possible this section's priority on the share of past
8 caretaking functions each parent performed.

9 (d) In determining how to schedule the custodial time
10 allocated to each parent, the court shall take account of the
11 economic, physical and other practical circumstances such as those
12 listed in subdivision (6), subsection (a) of this section.

13 **§48-9-402. Modification without showing of changed circumstances.**

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

17 (b) The court may modify any provisions of the parenting plan
18 without the showing of change circumstances required by subsection
19 (a), section four hundred one of this article if the modification
20 is in the child's best interests, and the modification:

21 (1) Reflects the de facto arrangements under which the child
22 has been receiving care from the petitioner, without objection, in
23 substantial deviation from the parenting plan, for the preceding
24 six months before the petition for modification is filed, provided

1 the arrangement is not the result of a parent's acquiescence
2 resulting from the other parent's domestic abuse;

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

4 (3) Is necessary to accommodate the reasonable and firm
5 preferences of a child who has attained the age of ~~fourteen~~
6 sixteen.

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

NOTE: The purpose of this bill is to increase the age at which
a minor may nominate a guardian, from fourteen to sixteen and to
expand the period of consideration regarding the parents'
comparative caretaking and other parenting responsibilities.

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