

H. B. 3037

1
2
3
4
5
6
7
8
9

(By Delegates Marshall, Longstreth, Lane,
Moore, Hamilton, Hunt and Staggers)
[Introduced February 7, 2011; referred to the
Committee on the Judiciary then Finance.]

10 A BILL to amend and reenact §49-1-3 of the Code of West Virginia,
11 1931, as amended; to amend and reenact §49-6-3 of said code;
12 and to amend and reenact §61-8D-3, all relating to conduct and
13 circumstances of child abuse; creating crime and criminal
14 penalties for drug and alcohol abuse during pregnancy
15 resulting in diagnosed harm to infant.

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

17 That §49-1-3 of the Code of West Virginia, 1931, as amended,
18 be amended and reenacted; that §49-6-3 of said code be amended and
19 reenacted; and that §61-8D-3 of said code be amended and reenacted,
20 all to read as follows:

CHAPTER 49. CHILD WELFARE.

ARTICLE 1. PURPOSES; DEFINITIONS.

§49-1-3. Definitions relating to abuse and neglect.

(a) "Abused child" means a child whose health or welfare is
harmed or threatened by:

(1) A parent, guardian or custodian who knowingly or
intentionally inflicts, attempts to inflict or knowingly allows
another person to inflict, physical injury or mental or emotional

1 injury, upon the child or another child in the home; or

2 (2) Sexual abuse or sexual exploitation; or

3 (3) The sale or attempted sale of a child by a parent, guardian
4 or custodian in violation of section sixteen, article four, chapter
5 forty-eight of this code; ~~or~~

6 (4) Domestic violence as defined in section two hundred two,
7 article twenty-seven, chapter forty-eight of this code; or

8 (5) A mother who, during her pregnancy, uses drugs or alcohol
9 and, as a result, gives birth to an infant who is dependent upon a
10 controlled substance not the result of medical treatment
11 administered to the mother or infant or who is diagnosed with fetal
12 alcohol syndrome or both.

13 In addition to its broader meaning, physical injury may include
14 an injury to the child as a result of excessive corporal punishment.

15 (b) "Abusing parent" means a parent, guardian or other
16 custodian, regardless of his or her age, whose conduct, as alleged
17 in the petition charging child abuse or neglect, has been adjudged
18 by the court to constitute child abuse or neglect.

19 (c) "Battered parent" means a parent, guardian or other
20 custodian who has been judicially determined not to have condoned
21 the abuse or neglect and has not been able to stop the abuse or
22 neglect of the child or children due to being the victim of domestic
23 violence as defined by section two hundred two, article twenty-
24 seven, chapter forty-eight of this code, which domestic violence was
25 perpetrated by the person or persons determined to have abused or
26 neglected the child or children.

1 (d) "Child abuse and neglect" or "child abuse or neglect" means
2 physical injury, mental or emotional injury, sexual abuse, sexual
3 exploitation, sale or attempted sale, alcohol or drug use during
4 pregnancy not administered for medical treatment of the mother or
5 infant resulting in diagnosed harm to an infant at birth or a blood,
6 urine or meconium test of the child at birth showing the presence
7 of any amount of a controlled substance or a metabolite of a
8 controlled substance or negligent treatment or maltreatment of a
9 child by a parent, guardian or custodian who is responsible for the
10 child's welfare, under circumstances which harm or threaten the
11 health and welfare of the child.

12 (e) "Child abuse and neglect services" means social services
13 which are directed toward:

14 (1) Protecting and promoting the welfare of children who are
15 abused or neglected;

16 (2) Identifying, preventing and remedying conditions which
17 cause child abuse and neglect;

18 (3) Preventing the unnecessary removal of children from their
19 families by identifying family problems and assisting families in
20 resolving problems which could lead to a removal of children and a
21 breakup of the family;

22 (4) In cases where children have been removed from their
23 families, providing services to the children and the families so as
24 to reunify such children with their families or some portion
25 thereof;

26 (5) Placing children in suitable adoptive homes when reunifying

1 the children with their families, or some portion thereof, is not
2 possible or appropriate; and

3 (6) Assuring the adequate care of children who have been placed
4 in the custody of the department or third parties.

5 (f) "Child advocacy center" means a community-based
6 organization that is a member in good standing with the West
7 Virginia Child Abuse Network, Inc., and is working to implement the
8 following program components:

9 (1) Child-appropriate/child-friendly facility: A child
10 advocacy center provides a comfortable, private, child-friendly
11 setting that is both physically and psychologically safe for
12 clients.

13 (2) Multidisciplinary team (MDT): A multidisciplinary team for
14 response to child abuse allegations includes representation from the
15 following: Law enforcement; child protective services; prosecution;
16 mental health; medical; victim advocacy; child advocacy center.

17 (3) Organizational capacity: A designated legal entity
18 responsible for program and fiscal operations has been established
19 and implements basic sound administrative practices.

20 (4) Cultural competency and diversity: The CAC promotes
21 policies, practices and procedures that are culturally competent.
22 Cultural competency is defined as the capacity to function in more
23 than one culture, requiring the ability to appreciate, understand
24 and interact with members of diverse populations within the local
25 community.

26 (5) Forensic interviews: Forensic interviews are conducted in

1 a manner which is of a neutral, fact finding nature and coordinated
2 to avoid duplicative interviewing.

3 (6) Medical evaluation: Specialized medical evaluation and
4 treatment are to be made available to CAC clients as part of the
5 team response either at the CAC or through coordination and referral
6 with other specialized medical providers.

7 (7) Therapeutic intervention: Specialized mental health
8 services are to be made available as part of the team response
9 either at the CAC or through coordination and referral with other
10 appropriate treatment providers.

11 (8) Victim support/advocacy: Victim support and advocacy are
12 to be made available as part of the team response, either at the CAC
13 or through coordination with other providers, throughout the
14 investigation and subsequent legal proceedings.

15 (9) Case review: Team discussion and information sharing
16 regarding the investigation, case status and services needed by the
17 child and family are to occur on a routine basis.

18 (10) Case tracking: CACs must develop and implement a system
19 for monitoring case progress and tracking case outcomes for team
20 components. ~~Provided, That~~ A child advocacy center may establish
21 a safe exchange location for children and families who have a
22 parenting agreement or an order providing for visitation or custody
23 of the children that require a safe exchange location.

24 (g) "Imminent danger to the physical well-being of the child"
25 means an emergency situation in which the welfare or the life of the
26 child is threatened. Such emergency situation exists when there is

1 reasonable cause to believe that any child in the home is or has
2 been sexually abused or sexually exploited or reasonable cause to
3 believe that the following conditions threaten the health or life
4 of any child in the home:

5 (1) Nonaccidental trauma inflicted by a parent, guardian,
6 custodian, sibling or a babysitter or other caretaker;

7 (2) A combination of physical and other signs indicating a
8 pattern of abuse which may be medically diagnosed as battered child
9 syndrome;

10 (3) Nutritional deprivation;

11 (4) Abandonment by the parent, guardian or custodian;

12 (5) Inadequate treatment of serious illness or disease;

13 (6) Substantial emotional injury inflicted by a parent,
14 guardian or custodian; ~~or~~

15 (7) Sale or attempted sale of the child by the parent, guardian
16 or custodian;

17 (8) A blood, urine or meconium test of the child at birth
18 showing the presence of a controlled substance or a metabolite of
19 a controlled substance unless the presence of the substance or the
20 metabolite is the result of medical treatment administered to the
21 mother or the infant; or

22 (9) A medical diagnosis of fetal alcohol syndrome at birth.

23 (h) "Legal guardianship" means the permanent relationship
24 between a child and caretaker, established by order of the circuit
25 court having jurisdiction over the child, pursuant to the provisions
26 of this chapter and chapter forty-eight of this code.

1 (i) "Multidisciplinary team" means a group of professionals and
2 paraprofessionals representing a variety of disciplines who interact
3 and coordinate their efforts to identify, diagnose and treat
4 specific cases of child abuse and neglect. Multidisciplinary teams
5 may include, but are not limited to, medical, educational, child
6 care and law-enforcement personnel, social workers, psychologists
7 and psychiatrists. Their goal is to pool their respective skills
8 in order to formulate accurate diagnoses and to provide
9 comprehensive coordinated treatment with continuity and follow-up
10 for both parents and children. "Community team" means a
11 multidisciplinary group which addresses the general problem of child
12 abuse and neglect in a given community and may consist of several
13 multidisciplinary teams with different functions.

14 (j) (1) "Neglected child" means a child:

15 (A) Whose physical or mental health is harmed or threatened by
16 a present refusal, failure or inability of the child's parent,
17 guardian or custodian to supply the child with necessary food,
18 clothing, shelter, supervision, medical care or education when such
19 refusal, failure or inability is not due primarily to a lack of
20 financial means on the part of the parent, guardian or custodian;
21 or

22 (B) Who is presently without necessary food, clothing, shelter,
23 medical care, education or supervision because of the disappearance
24 or absence of the child's parent or custodian.

25 (2) "Neglected child" does not mean a child whose education is
26 conducted within the provisions of section one, article eight,

1 chapter eighteen of this code.

2 (k) "Parenting skills" means a parent's competencies in
3 providing physical care, protection, supervision and psychological
4 support appropriate to a child's age and state of development.

5 (l) "Sexual abuse" means:

6 (A) As to a child who is less than sixteen years of age, any
7 of the following acts which a parent, guardian or custodian shall
8 engage in, attempt to engage in, or knowingly procure another person
9 to engage in, with such child, notwithstanding the fact that the
10 child may have willingly participated in such conduct or the fact
11 that the child may have suffered no apparent physical injury or
12 mental or emotional injury as a result of such conduct:

13 (i) Sexual intercourse;

14 (ii) Sexual intrusion; or

15 (iii) Sexual contact.

16 (B) As to a child who is sixteen years of age or older, any of
17 the following acts which a parent, guardian or custodian shall
18 engage in, attempt to engage in or knowingly procure another person
19 to engage in, with such child, notwithstanding the fact that the
20 child may have consented to such conduct or the fact that the child
21 may have suffered no apparent physical injury or mental or emotional
22 injury as a result of such conduct:

23 (i) Sexual intercourse;

24 (ii) Sexual intrusion; or

25 (iii) Sexual contact.

26 (C) Any conduct whereby a parent, guardian or custodian

1 displays his or her sex organs to a child, or procures another
2 person to display his or her sex organs to a child, for the purpose
3 of gratifying the sexual desire of the parent, guardian or
4 custodian, of the person making such display, or of the child, or
5 for the purpose of affronting or alarming the child.

6 (m) "Sexual contact" means sexual contact as that term is
7 defined in section one, article eight-b, chapter sixty-one of this
8 code.

9 (n) "Sexual exploitation" means an act whereby:

10 (1) A parent, custodian or guardian, whether for financial gain
11 or not, persuades, induces, entices or coerces a child to engage in
12 sexually explicit conduct as that term is defined in section one,
13 article eight-c, chapter sixty-one of this code;

14 (2) A parent, guardian or custodian persuades, induces, entices
15 or coerces a child to display his or her sex organs for the sexual
16 gratification of the parent, guardian, custodian or a third person,
17 or to display his or her sex organs under circumstances in which the
18 parent, guardian or custodian knows such display is likely to be
19 observed by others who would be affronted or alarmed.

20 (o) "Sexual intercourse" means sexual intercourse as that term
21 is defined in section one, article eight-b, chapter sixty-one of
22 this code.

23 (p) "Sexual intrusion" means sexual intrusion as that term is
24 defined in section one, article eight-b, chapter sixty-one of this
25 code.

26 (q) "Parental rights" means any and all rights and duties

1 regarding a parent to a minor child, including, but not limited to,
2 custodial rights and ~~visitation~~ visitation rights and rights to
3 participate in the decisions affecting a minor child.

4 (r) "Placement" means any temporary or permanent placement of
5 a child who is in the custody of the state in any foster home, group
6 home or other facility or residence.

7 (s) "Serious physical abuse" means bodily injury which creates
8 a substantial risk of death, which causes serious or prolonged
9 disfigurement, prolonged impairment of health or prolonged loss or
10 impairment of the function of any bodily organ.

11 (t) "Siblings" means children who have at least one biological
12 parent in common or who have been legally adopted by the same
13 parents or parent.

14 (u) "Time-limited reunification services" means individual,
15 group and family counseling, inpatient, residential or outpatient
16 substance abuse treatment services, mental health services,
17 assistance to address domestic violence, services designed to
18 provide temporary child care and therapeutic services for families,
19 including crisis nurseries and transportation to or from any such
20 services, provided during fifteen of the most recent twenty-two
21 months a child has been in foster care, as determined by the earlier
22 date of the first judicial finding that the child is subjected to
23 abuse or neglect, or the date which is sixty days after the child
24 is removed from home.

25 **ARTICLE 6. PROCEDURE IN CASES OF CHILD NEGLECT OR BLACKGUARD.**

26 **§49-6-3. Petition to court when child believed neglected or abused**

1 **-- Temporary custody.**

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

1 reasonable available alternatives to removal. The initial order
2 directing such custody shall contain an order appointing counsel and
3 scheduling the preliminary hearing, and upon its service, shall
4 require the immediate transfer of custody of such child or children
5 to the department or a responsible relative which may include any
6 parent, guardian, or other custodian. The court order shall state:
7 (1) That continuation in the home is contrary to the best interests
8 of the child and why; and (2) whether or not the department made
9 reasonable efforts to preserve the family and prevent the placement
10 or that the emergency situation made such efforts unreasonable or
11 impossible. The order may also direct any party or the department
12 to initiate or become involved in services to facilitate
13 reunification of the family.

14 (b) Whether or not the court orders immediate transfer of
15 custody as provided in subsection (a) of this section, if the facts
16 alleged in the petition demonstrate to the court that there exists
17 imminent danger to the child, the court may schedule a preliminary
18 hearing giving the respondents at least five days' actual notice.
19 If the court finds at the preliminary hearing that there are no
20 alternatives less drastic than removal of the child and that a
21 hearing on the petition cannot be scheduled in the interim period,
22 the court may order that the child be delivered into the temporary
23 custody of the department or a responsible person or agency found
24 by the court to be a fit and proper person for the temporary care
25 of the child for a period not exceeding sixty days. ~~Provided, That~~
26 The court order shall state: (1) That continuation in the home is

1 contrary to the best interests of the child and set forth the
2 reasons therefor; (2) whether or not the department made reasonable
3 efforts to preserve the family and to prevent the child's removal
4 from his or her home; (3) whether or not the department made
5 reasonable efforts to preserve the family and to prevent the
6 placement or that the emergency situation made such efforts
7 unreasonable or impossible; and (4) what efforts should be made by
8 the department, if any, to facilitate the child's return home:
9 ~~Provided, however, That~~ If the court grants an improvement period
10 as provided in section twelve of this article, the sixty-day limit
11 upon temporary custody is waived.

12 (c) If a child or children shall, in the presence of a child
13 protective service worker, be in an emergency situation which
14 constitutes an imminent danger to the physical well-being of the
15 child or children, as that phrase is defined in section three,
16 article one of this chapter, and if such worker has probable cause
17 to believe that the child or children will suffer additional child
18 abuse or neglect or will be removed from the county before a
19 petition can be filed and temporary custody can be ordered, the
20 worker may, prior to the filing of a petition, take the child or
21 children into his or her custody without a court order. ~~Provided,~~
22 ~~That~~ After taking custody of such child or children prior to the
23 filing of a petition, the worker shall forthwith appear before a
24 circuit judge or a juvenile referee of the county wherein custody
25 was taken, or if no such judge or referee be available, before a
26 circuit judge or a juvenile referee of an adjoining county, and

1 shall immediately apply for an order ratifying the emergency custody
2 of the child pending the filing of a petition. The circuit court
3 of every county in the state shall appoint at least one of the
4 magistrates of the county to act as a juvenile referee who shall
5 serve at the will and pleasure of the appointing court and who shall
6 perform the functions prescribed for such position by the provisions
7 of this subsection. The parents, guardians or custodians of the
8 child or children may be present at the time and place of
9 application for an order ratifying custody, and if at the time the
10 child or children are taken into custody by the worker, the worker
11 knows which judge or referee is to receive the application, the
12 worker shall so inform the parents, guardians or custodians. The
13 application for emergency custody may be on forms prescribed by the
14 Supreme Court of Appeals or prepared by the prosecuting attorney or
15 the applicant and shall set forth facts from which it may be
16 determined that the probable cause described above in this
17 subsection exists. Upon such sworn testimony or other evidence as
18 the judge or referee deems sufficient, the judge or referee may
19 order the emergency taking by the worker to be ratified. If
20 appropriate under the circumstances, the order may include
21 authorization for an examination as provided for in subsection (b),
22 section four of this article. If a referee issues such an order,
23 the referee shall by telephonic communication have such order orally
24 confirmed by a circuit judge of the circuit or an adjoining circuit
25 who shall on the next judicial day enter an order of confirmation.
26 If the emergency taking is ratified by the judge or referee,

1 emergency custody of the child or children shall be vested in the
2 department until the expiration of the next two judicial days, at
3 which time any such child taken into emergency custody shall be
4 returned to the custody of his or her parent or guardian or
5 custodian unless a petition has been filed and custody of the child
6 has been transferred under the provisions of section three of this
7 article.

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

12 (1) The parent has subjected the child, 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 to aggravated
15 circumstances which include, but are not limited to, abandonment,
16 torture, chronic abuse and sexual abuse;

17 (2) The parent has:

18 (A) Committed murder of the child's other parent, another child
19 of the parent or any other child residing in the same household or
20 under the temporary or permanent custody of the parent;

21 (B) Committed voluntary manslaughter of the child's other
22 parent, another child of the parent or any other child residing in
23 the same household or under the temporary or permanent custody of
24 the parent;

25 (C) Attempted or conspired to commit such a murder or voluntary
26 manslaughter or been an accessory before or after the fact to either

1 such crime; ~~or~~

2 (D) Committed unlawful or malicious wounding that results in
3 serious bodily injury to the child, the child's other parent, to
4 another child of the parent or any other child residing in the same
5 household or under the temporary or permanent custody of the parent;

6 or

7 (E) Used alcohol or drugs not administered for medical
8 treatment during pregnancy and, as a result, the infant is born with
9 the diagnosis of fetal alcohol syndrome or with the presence of any
10 amount of a controlled substance or a metabolite of a controlled
11 substance in his or her blood, urine or meconium and such presence
12 is not the result of medical treatment administered to the mother.

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

15 **CHAPTER 61. CRIMES AND THEIR PUNISHMENT.**

16 **ARTICLE 8D. CHILD ABUSE.**

17 **§61-8D-3. Child abuse resulting in injury; child abuse or neglect**
18 **creating risk of injury; criminal penalties.**

19 (a) If any parent, guardian or custodian shall abuse a child
20 and by such abuse cause such child bodily injury as such term is
21 defined in section one, article eight-b of this chapter, then such
22 parent, guardian or custodian shall be guilty of a felony and, upon
23 conviction thereof, shall be fined not less than \$100 nor more than
24 \$1,000 and committed to the custody of the Division of Corrections
25 for not less than one nor more than five years, or in the discretion
26 of the court, be confined in jail for not more than one year.

1 (b) If any parent, guardian or custodian shall abuse a child
2 and by such abuse cause said child serious bodily injury as such
3 term is defined in section one, article eight-b of this chapter,
4 then such parent, guardian or custodian shall be guilty of a felony
5 and, upon conviction thereof, shall be fined not less than \$1,000
6 nor more than \$5,000 and committed to the custody of the Division
7 of Corrections not less than two nor more than ten years.

8 (c) Any person who abuses a child and by the abuse creates a
9 substantial risk of serious bodily injury or of death to the child
10 is guilty of a felony and, upon conviction thereof, shall be fined
11 not more than \$3,000 and confined to the custody of the Division of
12 Corrections for not less than one nor more than five years.

13 (d) Any mother who, during her pregnancy, abuses alcohol or
14 uses drugs not administered for medical treatment and, as a result,
15 gives birth to an infant diagnosed with fetal alcohol syndrome or
16 with the presence of any amount of a controlled substance or a
17 metabolite of a controlled substance in his or her blood, urine or
18 meconium and such presence is not the result of medical treatment
19 administered to the mother or the infant, is guilty of a felony and,
20 upon conviction thereof, shall be fined not less than \$100 nor more
21 than \$1,000 and committed to the custody of the Division of
22 Corrections for not less than one nor more than five years, or in
23 the discretion of the court, be confined in jail for not more than
24 one year.

NOTE: The purpose of this bill is to expressly state drug and

alcohol use during pregnancy by a mother that results in diagnosed harm to a newborn is actionable in civil child abuse proceedings and criminal child abuse proceedings, with penalty.

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