

H. B. 3173

(By Delegates Walker, Hunt and Frazier)

[Introduced February 17, 2011; referred to the Committee on the Judiciary.]

10 A BILL to amend and reenact §48-5-604 and §48-5-606, of the Code of  
11 West Virginia, 1931, as amended; and to amend and reenact  
12 §48-9-206, §48-9-207, §48-9-302 and §48-9-403 of said code,  
13 all relating to amending and adding to divorce, distribution  
14 of property and child custody guidelines to take into  
15 consideration the presence of an autistic child.

16 Be it enacted by the Legislature of West Virginia:

17       That §48-5-604 and §48-5-606 of the Code of West Virginia,  
18 1931, as amended, be amended and reenacted; that §48-9-206,  
19 §48-9-207, §48-9-302 and §48-9-403 of said code be amended and  
20 reenacted, all to read as follows:

## 21 ARTICLE 5. DIVORCE.

PART 6. JUDGMENT ORDERING DIVORCE.

23 §48-5-604. Use and occupancy of marital home.

24 (a) The court may award the exclusive use and occupancy of the

1 marital home to a party. An order granting use and occupancy of  
2 the marital home shall include the use of any necessary household  
3 goods, furniture and furnishings. The order shall establish a  
4 definite period for the use and occupancy, ending at a specific  
5 time set forth in the order, subject to modification upon the  
6 petition of either party.

7       (b) Generally, an award of the exclusive use and occupancy of  
8 the marital home is appropriate when necessary to accommodate  
9 rearing minor children of the parties. It is also appropriate to  
10 grant sole occupancy of the marital home to the parent that is  
11 awarded custody of a minor child that has been diagnosed with  
12 autism spectrum disorder. Otherwise, the court may award exclusive  
13 use and occupancy only in extraordinary cases supported by specific  
14 findings set forth in the order that grants relief.

15       (c) An order awarding the exclusive use and occupancy of the  
16 marital home may also require payments to third parties for home  
17 loan installments, land contract payments, rent, property taxes and  
18 insurance coverage. When requiring third-party payments, the court  
19 shall reduce them to a fixed monetary amount set forth in the  
20 order. The court shall specify whether third-party payments or  
21 portions of payments are spousal support, child support, a partial  
22 distribution of marital property or an allocation of marital debt.  
23 Unless the court identifies third-party payments as child support  
24 payments or as installment payments for the distribution of marital

1 property, then such payments are spousal support. If the court  
2 does not identify the payments and the parties have waived any  
3 right to receive spousal support, the court may identify the  
4 payments upon motion by any party.

5       (d) This section is not intended to abrogate a contract  
6 between either party and a third party or affect the rights and  
7 liabilities of either party or a third party under the terms of a  
8 contract.

9 **§48-5-606.      Relief regarding costs of health care and**  
10                     **hospitalization.**

11       (a) As an incident to requiring the payment of spousal support  
12 or child support, the court may order either party to provide  
13 medical support to the other party. Payments made to an insurer  
14 pursuant to this subdivision, either directly or by a deduction  
15 from wages, shall be deemed to be spousal support or installment  
16 payments for the distribution of marital property, in such  
17 proportion as the court shall direct: *Provided*, That if the court  
18 does not set forth in the order that a portion of the payments is  
19 to be deemed installment payments for the distribution of marital  
20 property, then all payments made pursuant to this section are  
21 spousal support. The designation of insurance coverage as spousal  
22 support under the provisions of this subdivision shall not, in and  
23 of itself, give rise to a subsequent modification of the order to  
24 provide for spousal support other than insurance for covering the

1 costs of health care and hospitalization.

2        (b) When determining which parent is responsible for the  
3 payment of health care costs, the parent whose health care coverage  
4 covers the most expenses for a child's therapy for autism spectrum  
5 disorder and treatment shall be the parent to pay for those health  
6 care costs.

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

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

10        (a) Unless otherwise resolved by agreement of the parents  
11 under section 9-201 or unless manifestly harmful to the child or  
12 unless determined subsection-d of this section, the court shall  
13 allocate custodial responsibility so that the proportion of  
14 custodial time the child spends with each parent approximates the  
15 proportion of time each parent spent performing caretaking  
16 functions for the child prior to the parents' separation or, if the  
17 parents never lived together, before the filing of the action,  
18 except to the extent required under section 9-209 or necessary to  
19 achieve any of the following objectives:

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

22        (2) To accommodate the firm and reasonable preferences of a  
23 child who is fourteen years of age or older, and with regard to a  
24 child under fourteen years of age, but sufficiently matured that he

1 or she can intelligently express a voluntary preference for one  
2 parent, to give that preference such weight as circumstances  
3 warrant;

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

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

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

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

22 (7) To apply the principles set forth in 9-403(d) of this  
23 article if one parent relocates or proposes to relocate at a  
24 distance that will impair the ability of a parent to exercise the

1 amount of custodial responsibility that would otherwise be ordered  
2 under this section; and

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

4 (b) In determining the proportion of caretaking functions each  
5 parent previously performed for the child under subsection (a) of  
6 this section, the court shall not consider the divisions of  
7 functions arising from temporary arrangements after separation,  
8 whether those arrangements are consensual or by court order. The  
9 court may take into account information relating to the temporary  
10 arrangements in determining other issues under this section.

11 (c) If the court is unable to allocate custodial  
12 responsibility under subsection (a) of this section because the  
13 allocation under that subsection would be manifestly harmful to the  
14 child, or because there is no history of past performance of  
15 caretaking functions, as in the case of a newborn, or because the  
16 history does not establish a pattern of caretaking sufficiently  
17 dispositive of the issues of the case, the court shall allocate  
18 custodial responsibility based on the child's best interest, taking  
19 into account the factors in considerations that are set forth in  
20 this section and in section two hundred nine and 9-403(d) of this  
21 article and preserving to the extent possible this section's  
22 priority on the share of past caretaking functions each parent  
23 performed.

24 (d) The court shall allocate custodial responsibility to the

1 parents of child diagnosed with autism spectrum disorder based on  
2 the following factors:

3       (1) Each parent's role in obtaining the initial diagnosis of  
4 autism spectrum disorder, and any delay caused by a parent in  
5 obtaining the diagnosis;

6       (2) Each parent's acknowledgment and acceptance of the child's  
7 autistic disorder, as opposed to a denial of the condition;

8       (3) Each parent's role in obtaining early intervention and  
9 therapy for the child, and the reasons for any delay in attempting  
10 to obtain services for the child;

11       (4) Each parent's ability to reinforce and follow through on  
12 daily recommended behavioral interventions for the autistic, and  
13 the level of participation the parent has in working with the  
14 autistic child;

15       (5) Each parent's history of increasing his or her education  
16 on the needs of an autistic child, by attending seminars, joining  
17 autism spectrum disorder support groups, seeking private  
18 professional assistance and engaging in other reasonable  
19 self-education techniques;

20       (6) Each parent's history of willingness to be a tireless and  
21 effective advocate for the autistic and ability to do so;

22       (7) Each parent's ability to handle the emotional and  
23 psychological stress involved with raising a child with autism  
24 spectrum disorder on a daily basis;

1       (8) Each parent's understanding and appreciation of the window  
2 of opportunity concept and the importance of early intense  
3 intervention and potential consequences to the child and family if  
4 intervention does not take place;

5       (9) The quality of the special education, either in public or  
6 private school, the child will receive while in the parent's care;  
7 and

8       (10) Other supplemental factors the court deems relevant and  
9 appropriate on a case-by-case basis.

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

14 **§48-9-207. Allocation of significant decision-making**  
15 **responsibility.**

16      (a) Unless otherwise resolved by agreement of the parents  
17 under section 9-201, the court shall allocate responsibility for  
18 making significant life decisions on behalf of the child, including  
19 the child's education and health care, to one parent or to two  
20 parents jointly, in accordance with the child's best interest, in  
21 light of:

22      (1) The allocation of custodial responsibility under section  
23 9-206 of this article;

24      (2) The level of each parent's participation in past

1 decision-making on behalf of the child;

2       (3) The wishes of the parents;

3       (4) The level of ability and cooperation the parents have

4 demonstrated in decision-making on behalf of the child;

5       (5) Prior agreements of the parties; and

6       (6) The existence of any limiting factors, as set forth in

7 section 9-209 of this article.

8       (b) If each of the child's legal parents has been exercising

9 a reasonable share of parenting functions for the child, the court

10 shall presume that an allocation of decision-making responsibility

11 to both parents jointly is in the child's best interests. The

12 presumption is overcome if there is a history of domestic abuse, by

13 one parent's belief or disbelief in the effectiveness of autism

14 spectrum disorder therapy, or by a showing that joint allocation of

15 decision-making responsibility is not in the child's best interest.

16       (c) Unless otherwise provided or agreed by the parents, each

17 parent who is exercising custodial responsibility shall be given

18 sole responsibility for day-to-day decisions for the child, while

19 the child is in that parent's care and control, including emergency

20 decisions affecting the health and safety of the child.

21 **§48-9-302. Appointment of guardian.**

22       (a) In its discretion, the court may appoint a guardian ad

23 litem to represent the child's best interests. The court shall

24 specify the terms of the appointment, including the guardian's

1 role, duties and scope of authority.

2       (b) In its discretion, the court may appoint a lawyer to  
3 represent the child, if the child is competent to direct the terms  
4 of the representation and court has a reasonable basis for finding  
5 that the appointment would be helpful in resolving the issues of  
6 the case. The court shall specify the terms of the appointment,  
7 including the lawyer's role, duties and scope of authority.

8       (c) When substantial allegations of domestic abuse have been  
9 made, the court shall order an investigation under section 9-301 or  
10 make an appointment under subsection (a) or (b) of this section,  
11 unless the court is satisfied that the information necessary to  
12 evaluate the allegations will be adequately presented to the court  
13 without such order or appointment.

14       (d) Subject to whatever restrictions the court may impose or  
15 that may be imposed by the attorney-client privilege or by  
16 subsection 9-202(d), the court may require the child or parent to  
17 provide information to an individual or agency appointed by the  
18 court under section 9-301 or subsection (a) or (b) of this section,  
19 and it may require any person having information about the child or  
20 parent to provide that information, even in the absence of consent  
21 by a parent or by the child, except if the information is otherwise  
22 protected by law.

23       (e) The investigator who submits a report or evidence to the  
24 court that has been requested under section 9-301 and a guardian ad

1 item appointed under subsection (a) of this section who submits  
2 information or recommendations to the court are subject to  
3 cross-examination by the parties. A lawyer appointed under  
4 subsection (b) of this section may not be a witness in the  
5 proceedings, except as allowed under standards applicable in other  
6 civil proceedings.

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

11 (g) When a child has been diagnosed with autism spectrum  
12 disorder and the parents are in disagreement over a course of  
13 treatment, the guardian may retain psychological, educational or  
14 other professional help, that have expertise in autism spectrum  
15 disorder, if the guardian deems it as beneficial. Once the  
16 guardian has obtained these professional services, the court will  
17 allocate the cost between the parents in an equitable fashion in  
18 accordance with subsection-f of this section.

19                   PART 4. MODIFICATION OF PARENTING PLAN.

20 **§48-9-403. Relocation of a parent.**

21 (a) The relocation of a parent constitutes a substantial  
22 change in the circumstances under subsection 9-401(a) of the child  
23 only when it significantly impairs either parent's ability to  
24 exercise responsibilities that the parent has been exercising or

1 after a comparative analysis of the services available to a child  
2 with autism spectrum disorder in the other location are measurably  
3 worse than the current location.

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

- 10       (1) The relocation date;  
11       (2) The address of the intended new residence;  
12       (3) The specific reasons for the proposed relocation;  
13       (4) A proposal for how custodial responsibility shall be  
14 modified, in light of the intended move; and  
15       (5) Information for the other parent as to how he or she may  
16 respond to the proposed relocation or modification of custodial  
17 responsibility.

18       Failure to comply with the notice requirements of this section  
19 without good cause may be a factor in the determination of whether  
20 the relocation is in good faith under subsection (d) of this  
21 section and is a basis for an award of reasonable expenses and  
22 reasonable attorney's fees to another parent that are attributable  
23 to such failure.

24       The Supreme Court of Appeals shall make available through the

1 offices of the circuit clerks and the secretary-clerks of the  
2 family courts a form notice that complies with the provisions of  
3 this subsection. The Supreme Court of Appeals shall promulgate  
4 procedural rules that provide for an expedited hearing process to  
5 resolve issues arising from a relocation or proposed relocation.

6         (c) When changed circumstances are shown under subsection (a)  
7 of this section, the court shall, if practical, revise the  
8 parenting plan so as to both accommodate the relocation and  
9 maintain the same proportion of custodial responsibility being  
10 exercised by each of the parents. In making such revision, the  
11 court may consider the additional costs that a relocation imposes  
12 upon the respective parties for transportation and communication,  
13 and may equitably allocate such costs between the parties.

14         (d) When the relocation constituting changed circumstances  
15 under subsection (a) of this section renders it impractical to  
16 maintain the same proportion of custodial responsibility as that  
17 being exercised by each parent, the court shall modify the  
18 parenting plan in accordance with the child's best interests and in  
19 accordance with the following principles:

20             (1) A parent who has been exercising a significant majority of  
21 the custodial responsibility for the child should be allowed to  
22 relocate with the child so long as that parent shows that the  
23 relocation is in good faith for a legitimate purpose and to a  
24 location that is reasonable in light of the purpose. The

1 percentage of custodial responsibility that constitutes a  
2 significant majority of custodial responsibility is seventy percent  
3 or more. A relocation is for a legitimate purpose if it is to be  
4 close to significant family or other support networks, for  
5 significant health reasons, to protect the safety of the child or  
6 another member of the child's household from significant risk of  
7 harm, to pursue a significant employment or educational opportunity  
8 or to be with one's spouse who is established, or who is pursuing  
9 a significant employment or educational opportunity, in another  
10 location. The relocating parent has the burden of proving of the  
11 legitimacy of any other purpose. A move with a legitimate purpose  
12 is reasonable unless its purpose is shown to be substantially  
13 achievable without moving or by moving to a location that is  
14 substantially less disruptive of the other parent's relationship to  
15 the child.

16       (2) If a relocation of the parent is in good faith for  
17 legitimate purpose and to a location that is reasonable in light of  
18 the purpose and if neither has been exercising a significant  
19 majority of custodial responsibility for the child, the court shall  
20 reallocate custodial responsibility based on the best interest of  
21 the child, taking into account all relevant factors including the  
22 effects of the relocation on the child.

23       (3) If a parent does not establish that the purpose for that  
24 parent's relocation is in good faith for a legitimate purpose into

1 a location that is reasonable in light of the purpose, the court  
2 may modify the parenting plan in accordance with the child's best  
3 interests and the effects of the relocation on the child. Among  
4 the modifications the court may consider is a reallocation of  
5 primary custodial responsibility, effective if and when the  
6 relocation occurs, but such a reallocation shall not be ordered if  
7 the relocating parent demonstrates that the child's best interests  
8 would be served by the relocation.

9       (4) The court shall attempt to minimize impairment to a  
10 parent-child relationship caused by a parent's relocation through  
11 alternative arrangements for the exercise of custodial  
12 responsibility appropriate to the parents' resources and  
13 circumstances and the developmental level of the child.

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

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

NOTE: The purpose of this bill is to institute new decision points for judges to use to determine the custody, parental property rights and the removal of the child during a divorce proceeding when the parents have a child that has been diagnosed with autism spectrum disorder.

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