

1 & COMMITTEE SUBSTITUTE

2 FOR

3 **H. B. 4139**

4 (By Delegates Guthrie, L. Phillips, Rowan,
5 Fleischauer, Border, Lawrence, Marshall,
6 Stagers, Poore and P. Smith)

7 (Originating in the Committee on the Judiciary)

8 [January 24, 2014]

9

10 A BILL to amend and reenact §48-9-209 of the Code of West Virginia,
11 1931, as amended; and to amend said code by adding thereto a
12 new section, designated §48-9-209a, all relating to restricted
13 parental rights of child custody and visitation when a child
14 was conceived as a result of a sexual assault or sexual abuse;
15 denying custody and visitation rights to a natural parent
16 convicted of sexual assault when a child is produced as a
17 result of the offense, unless the victim or guardian consents
18 and it is in the best interests of the child; providing
19 limited exceptions when the biological parents cohabit;
20 creating a rebuttable presumption against the granting of sole
21 or joint custody to the perpetrator of the offense under
22 certain circumstances; providing a mechanism to petition the
23 court for consideration of additional factors and protections
24 in a parenting plan when a child is the product of a sexual
25 assault or sexual abuse; burden of proof to met by the
26 petitioner; and clarifying the natural parent's continuing
27 support obligations.

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

2 That §48-9-209 of the Code of West Virginia, 1931, as amended,
3 be amended and reenacted; and that said code be amended by adding
4 thereto a new section, designated §48-9-209a, all to read as
5 follows:

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

8 Part 2 - Parenting Plans

9 **§48-9-209. Parenting plan; limiting factors.**

10 (a) If either of the parents so requests, or upon receipt of
11 credible information thereof, the court shall determine whether a
12 parent who would otherwise be allocated responsibility under a
13 parenting plan:

14 (1) Has abused, neglected or abandoned a child, as defined by
15 state law;

16 (2) Has sexually assaulted or sexually abused a child as those
17 terms are defined in articles eight-b and eight-d, chapter
18 sixty-one of this code;

19 (3) Has committed domestic violence, as defined in section
20 ~~27-202~~ two hundred two, article twenty-seven of this chapter;

21 (4) Has interfered persistently with the other parent's access
22 to the child, except in the case of actions taken for the purpose
23 of protecting the safety of the child or the interfering parent or
24 another family member, pending adjudication of the facts underlying
25 that belief; or

1 (5) Has repeatedly made fraudulent reports of domestic
2 violence or child abuse.

3 (b) If either of the parents so requests, or upon receipt of
4 clear and convincing evidence thereof, the court shall determine
5 whether a parent has otherwise sexually assaulted or sexually
6 abused the natural parent of the child, as those terms are defined
7 in articles eight-b and eight-d, chapter sixty-one of this code,
8 and a child was conceived as a result of that act.

9 ~~(b)~~(c) If a parent is found to have engaged in any activity
10 specified by ~~subsection~~ subsections (a) or (b) of this section, the
11 court shall impose limits that are reasonably calculated to protect
12 the child or child's parent from harm. The limitations that the
13 court shall consider include, but are not limited to:

14 (1) An adjustment of the custodial responsibility of the
15 parents, including but not limited to:

16 (A) Increased parenting time with the child to make up for any
17 parenting time the other parent lost as a result of the proscribed
18 activity;

19 (B) An additional allocation of parenting time in order to
20 repair any adverse effect upon the relationship between the child
21 and the other parent resulting from the proscribed activity; or

22 (C) The allocation of exclusive custodial responsibility to
23 one of them;

24 (2) Supervision of the custodial time between a parent and the
25 child;

26 (3) Exchange of the child between parents through an

1 intermediary, or in a protected setting;

2 (4) Restraints on the parent from communication with or
3 proximity to the other parent or the child;

4 (5) A requirement that the parent abstain from possession or
5 consumption of alcohol or nonprescribed drugs while exercising
6 custodial responsibility and in the twenty-four hour period
7 immediately preceding such exercise;

8 (6) Denial of overnight custodial responsibility;

9 (7) Restrictions on the presence of specific persons while the
10 parent is with the child;

11 (8) A requirement that the parent post a bond to secure return
12 of the child following a period in which the parent is exercising
13 custodial responsibility or to secure other performance required by
14 the court;

15 (9) A requirement that the parent complete a program of
16 intervention for perpetrators of domestic violence, for drug or
17 alcohol abuse, or a program designed to correct another factor; or

18 (10) Any other constraints or conditions that the court deems
19 necessary to provide for the safety of the child, a child's parent
20 or any person whose safety immediately affects the child's welfare.

21 ~~(c)~~(d) If a parent is found to have engaged in any activity
22 specified in ~~subsection~~ subsections (a) or (b) of this section, the
23 court may not allocate custodial responsibility or decision-making
24 responsibility to that parent without making special written
25 findings that the child and other parent can be adequately
26 protected from harm by such limits as it may impose under

1 subsection (b) of this section. The parent found to have engaged in
2 the behavior specified in ~~subsection~~ subsections (a) or (b) of this
3 section has the burden of proving that an allocation of custodial
4 responsibility or decision-making responsibility to that parent
5 will not endanger the child or the other parent.

6 ~~(d)~~(e) If the court determines, based on the investigation
7 described in part three of this article or other evidence presented
8 to it, that an accusation of child abuse or neglect, or domestic
9 violence made during a child custody proceeding is false and the
10 parent making the accusation knew it to be false at the time the
11 accusation was made, the court may order reimbursement to be paid
12 by the person making the accusations of costs resulting from
13 defending against the accusations. Such reimbursement may not
14 exceed the actual reasonable costs incurred by the accused party as
15 a result of defending against the accusation and reasonable
16 attorney's fees incurred.

17 (e) (1) A parent who believes he or she is the subject of
18 activities by the other parent described in subdivision (5) ~~of~~
19 subsection (a) of this section, may move the court pursuant to
20 subdivision (4), subsection (b), section one, article seven,
21 chapter forty-nine of this code for the Department of Health and
22 Human Resources to disclose whether the other parent was the source
23 of the allegation and, if so, whether the department found the
24 report to be:

25 (A) Substantiated;

26 (B) Unsubstantiated;

1 (C) Inconclusive; or

2 (D) Still under investigation.

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

8 **§48-9-209a. Child conceived as result of sexual assault or abuse;**
9 **rights of a natural parent convicted of sexual**
10 **assault or abuse; rights when a parent is the spouse**
11 **of victim; rebuttable presumption upon separation or**
12 **divorce.**

13 (a) Except as otherwise provided in subsection (b) of this
14 section, if a child custody or visitation dispute involves a child
15 who is conceived as a result of acts by which one of the child's
16 biological parents has been convicted of sexual assault as defined
17 by section three, four or five, article eight-b, chapter sixty-one
18 of this code, or of sexual abuse by a parent, guardian or custodian
19 under section five, article eight-d, chapter sixty-one of this
20 code, the court shall not award custody to the natural parent
21 convicted of the sexual assault, and the convicted parent has no
22 right to visitation with the child unless the natural mother or
23 legal guardian consents thereto and it is in the best interests of
24 the child.

25 (b) Subsection (a) does not apply if:

1 (1) The biological parents are husband and wife at the time of
2 the offense, and after the date of conviction, cohabit and
3 establish a mutual custodial environment for the child; or

4 (2) After the date of conviction, the unmarried biological
5 parents cohabit and establish a mutual custodial environment for
6 the child.

7 (c) If persons described by subsection (b) of this section
8 later separate or divorce, the conviction of sexual assault under
9 section three, four or five, article eight-b, chapter sixty-one of
10 this code or the conviction of sexual abuse by a parent, guardian
11 or custodian under section five, article eight-d, chapter sixty-one
12 of this code creates a rebuttable presumption that sole or joint
13 custody of the child by the perpetrator of the offense is not in
14 the best interests of the child, and the court shall set forth
15 findings that any custody or visitation arrangement ordered by the
16 court adequately protects the child and the victim of the sexual
17 offense.

18 (d) A denial of custody or visitation under this section does
19 not by itself terminate the parental rights of the person denied
20 visitation or custody, nor does it affect the obligation of the
21 person to support the minor child.

22 (e) If there is clear and convincing evidence presented that
23 the child was conceived as a result of a sexual assault committed
24 by one of the child's natural parents against the child's other
25 natural parent, and the natural parent who committed that act was
26 not prosecuted for or convicted of such an offense, the natural

1 parent who was the victim of the offense may petition the court for
2 consideration of the act as a factor to be considered by the court
3 when structuring an appropriate parenting plan, pursuant to section
4 two hundred nine of this article. The exercise of one's Fifth
5 Amendment rights against self-incrimination shall not be a factor
6 in determining whether clear and convincing evidence is present.