

H. B. 4139

(By Delegates Guthrie, L. Phillips, Rowan,
Fleischauer, Border, Lawrence, Marshall,
Staggers, Poore and P. Smith)

[Introduced January 14, 2014 ; referred to the
Committee on the Judiciary.]

A BILL to amend and reenact §48-9-209 of the Code of West Virginia,
1931, as amended; and to amend said code by adding thereto a
new section, designated §48-9-209a, all relating to
restricting parental rights of child custody and visitation
when the child was conceived as a result of a sexual assault
or sexual abuse; denying custody and visitation rights to a
natural parent convicted of sexual assault, unless the victim
consents and it is in the best interests of the child;
providing exceptions when the biological parents cohabit;
providing, when the biological parents subsequently separate
or divorce after cohabiting, a rebuttable presumption that
sole or joint custody by the perpetrator of the offense is not
in the best interests of the child; providing that a parent
victim may petition the court for consideration of factors
associated with unconvicted or unprosecuted sexual assault;
and clarifying that the natural parent's continuing support

1 obligations are unaffected by an associated denial of custody
2 or visitation rights.

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

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

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

10 Part 2 - Parenting Plans

11 **§48-9-209. Parenting plan; limiting factors.**

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

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

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

21 (3) Has committed domestic violence, as defined in section
22 ~~27-202~~ two hundred two, article twenty-seven of this chapter;

23 (4) Has otherwise sexually assaulted or sexually abused the

1 natural parent of the child, as those terms are defined in articles
2 eight-b and eight-d, chapter sixty-one of this code, and a child
3 was conceived as a result of that act;

4 ~~(4)~~ (5) Has interfered persistently with the other parent's
5 access to the child, except in the case of actions taken for the
6 purpose of protecting the safety of the child or the interfering
7 parent or another family member, pending adjudication of the facts
8 underlying that belief; or

9 ~~(5)~~ (6) Has repeatedly made fraudulent reports of domestic
10 violence or child abuse.

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

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

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

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

24 (C) The allocation of exclusive custodial responsibility to

1 one of them;

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

4 (3) Exchange of the child between parents through an
5 intermediary, or in a protected setting;

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

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

12 (6) Denial of overnight custodial responsibility;

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

15 (8) A requirement that the parent post a bond to secure return
16 of the child following a period in which the parent is exercising
17 custodial responsibility or to secure other performance required by
18 the court;

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

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

1 (c) If a parent is found to have engaged in any activity
2 specified in subsection (a) of this section, the court may not
3 allocate custodial responsibility or decision-making responsibility
4 to that parent without making special written findings that the
5 child and other parent can be adequately protected from harm by
6 such limits as it may impose under subsection (b) of this section.
7 The parent found to have engaged in the behavior specified in
8 subsection (a) of this section has the burden of proving that an
9 allocation of custodial responsibility or decision-making
10 responsibility to that parent will not endanger the child or the
11 other parent.

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

23 (e) (1) A parent who believes he or she is the subject of
24 activities by the other parent described in subdivision ~~(5)~~ (6), of

1 subsection (a) of this section, may move the court pursuant to
 2 subdivision (4), subsection (b), section one, article seven,
 3 chapter forty-nine of this code for the Department of Health and
 4 Human Resources to disclose whether the other parent was the source
 5 of the allegation and, if so, whether the department found the
 6 report to be:

7 (A) Substantiated;

8 (B) Unsubstantiated;

9 (C) Inconclusive; or

10 (D) Still under investigation.

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

16 **§48-9-209a. Child conceived as result of sexual assault or abuse;**
 17 **rights of a natural parent convicted of sexual**
 18 **assault or abuse; rights when a parent is the spouse**
 19 **of victim; rebuttable presumption upon separation or**
 20 **divorce.**

21 (a) Except as otherwise provided in subsection (b) of this
 22 section, if a child custody or visitation dispute involves a child
 23 who is conceived as a result of acts by which one of the child's

1 biological parents has been convicted of sexual assault as defined
2 by section three, four or five, article eight-b, chapter sixty-one
3 of this code, or of sexual abuse by a parent, guardian or custodian
4 under section five, article eight-d, chapter sixty-one of this
5 code, the court shall not award custody to the natural parent
6 convicted of the sexual assault, and the convicted parent has no
7 right to visitation with the child unless the natural mother or
8 legal guardian consents thereto and it is in the best interests of
9 the child.

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

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

14 (2) After the date of conviction, the unmarried biological
15 parents cohabit and establish a mutual custodial environment for
16 the child.

17 (c) If persons described by subsection (b) of this section
18 later separate or divorce, the conviction of sexual assault under
19 section three, four or five, article eight-b, chapter sixty-one of
20 this code or the conviction of sexual abuse by a parent, guardian
21 or custodian under section five, article eight-d, chapter sixty-one
22 of this code creates a rebuttable presumption that sole or joint
23 custody of the child by the perpetrator of the offense is not in
24 the best interests of the child, and the court shall set forth

1 findings that any custody or visitation arrangement ordered by the
2 court adequately protects the child and the victim of the sexual
3 offense.

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

8 (e) If there is credible information that the child was
9 conceived as a result of a sexual assault committed by one of the
10 child's natural parents against the child's other natural parent,
11 and the natural parent who committed that act was not prosecuted
12 for or convicted of such an offense, the natural parent who was the
13 victim of the offense may petition the court for consideration of
14 the act as a factor to be considered by the court when structuring
15 an appropriate parenting plan, pursuant to section two hundred nine
16 of this article.

NOTE: The purpose of this bill is to clarify the rights and procedures by which a parent or guardian may object and restrict a natural parent's claimed rights of custody or visitation when a child is the product of a sexual assault committed by one of the natural parents. The bill denies custody and visitation rights to a natural parent convicted of sexual assault, unless the victim consents and it is in the best interests of the child. The bill provides exceptions when the biological parents cohabit. The bill provides, when the biological parents subsequently separate or divorce after cohabiting, a rebuttable presumption that sole or joint custody by the perpetrator of the offense is not in the best interests of the child. The bill provides that a parent victim may petition the court for consideration of factors associated with

unconvicted or unprosecuted sexual assault. The bill clarifies that the natural parent's continuing support obligations are unaffected by an associated denial of custody or visitation rights.

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

§48-9-209a is new; therefore, it has been completely underscored.

This bill was recommended for introduction and passage during the Regular Session of the Legislature by the House Select Committee for Crimes Against Children.