

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Introduced

House Bill 2510

BY DELEGATES FOSTER AND MCGEEHAN

[Introduced February 15, 2021; Referred to the Committee
on the Judiciary]

1 A BILL to repeal §48-1-210 of the Code of West Virginia, 1931, as amended; to amend said code
 2 by adding thereto four new sections, designated §48-1-239a, §48-1-239b, §48-1-239c,
 3 and §48-1-239d; to amend and reenact §48-9-102, §48-9-203, §48-9-204, §48-9-206,
 4 §48-9-207, §48-9-209, §48-9-401, §48-9-403, and §48-9-601 of said code; and to amend
 5 said code by adding thereto a new section, designated §48-9-204a, all relating to “The
 6 Parenting Fairness Act of 2021”; defining “shared legal custody”, “shared physical
 7 custody”, “sole legal custody”, and “sole physical custody”; establishing the presumption
 8 that co-equal shared legal and physical custody of children, and the maintaining of sibling,
 9 including half-sibling, relationships through co-equal shared legal and physical custody of
 10 children, in cases of divorce is presumed to be in the best interests of the children and
 11 families; requiring that temporary parenting plans, parenting plans and modifications to
 12 parenting plans consider the presumption of shared legal and physical custody is in the
 13 best interests of a child; require court to consider presumption when making determination
 14 as to which parent has significant decision making responsibility; and establish both
 15 parents’ rights to school and medical records of child.

Be it enacted by the Legislature of West Virginia:

ARTICLE 1. GENERAL PROVISIONS; DEFINITIONS.

§48-1-210. Caretaker and caretaking functions defined.

1 [Repealed.]

§48-1-239a. Shared legal custody defined.

1 “Shared legal custody” means a continued mutual responsibility and involvement by both
 2 parents in major decisions regarding the child’s welfare including matters of education, medical
 3 care, and emotional, moral, and religious development.

§48-1-239b. Shared physical custody defined.

1 “Shared physical custody” means a child has periods of residing with, and being under the
 2 supervision of, each parent: *Provided*, That physical custody shall be shared by the parents in

3 such a way as to assure a child frequent and continued contact with both parents. Such frequent
 4 and continued contact with both parents shall be presumptively shared equally unless after a full
 5 adversarial judicial hearing particular adjudicatory facts are found by a preponderance of the
 6 evidence of incompetence, neglect, or abuse as set forth in §48-9-204(a) of this code.

§48-1-239c. Sole legal custody defined.

1 “Sole legal custody” means one parent has the right and responsibility to make major
 2 decisions regarding the child’s welfare including matters of education, medical care and
 3 emotional, moral, and religious development.

§48-1-239d. Sole physical custody defined.

1 “Sole physical custody” means a child resides with and is under the supervision of one
 2 parent, subject to reasonable visitation by the other parent, unless the court determines that such
 3 visitation would not be in the best interest of the child.

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

§48-9-102. Objectives; best interests of the child.

- 1 (a) The primary objective of this article is to serve the child’s best interests, by facilitating:
- 2 (1) Stability of the child;
- 3 (2) Rebuttable presumption that co-equal shared legal and physical custody with both of
 4 the child’s parents is in the best interest of the child;
- 5 ~~(2)~~ (3) Parental planning and agreement about the child’s custodial arrangements and
 6 upbringing;
- 7 ~~(3)~~ (4) Continuity of existing parent-child attachments;
- 8 ~~(4)~~ (5) Meaningful contact between a child and each parent;
- 9 ~~(5)~~ (6) Caretaking relationships by adults who love the child, know how to provide for the
 10 child’s needs, and who place a high priority on doing so;

11 ~~(6)~~ (7) Security from exposure to physical or emotional harm; and
 12 ~~(7)~~ (8) Expeditious, predictable decision-making and avoidance of prolonged uncertainty
 13 respecting arrangements for the child’s care and control.

14 (9) A rebuttable presumption that keeping siblings, including half-siblings, together on at
 15 least an equal basis with the periods of physical custody and shared parenting that the child or
 16 children share with the parent of any siblings or half-siblings.

17 (b) A secondary objective of article is to achieve fairness between the parents: *Provided,*
 18 That it shall be recognized as the public policy of the State of West Virginia, as supported by the
 19 findings of leading published and peer-reviewed social science studies, that a rebuttable
 20 presumption exists and shall be applied that co-equal shared physical custody with both parents
 21 is in the best interest of the child absent limiting factors as described in §48-9-209(a), or after a
 22 full adversarial judicial hearing particular adjudicatory facts are found by a preponderance of the
 23 evidence of incompetence, neglect, or abuse as set forth in §48-9-204(a) of this code.

PART 2. PARENTING PLANS.

§48-9-203. Proposed temporary parenting plan; temporary order; amendment; vacation of order.

1 (a) A parent seeking a temporary order relating to parenting shall file and serve a proposed
 2 temporary parenting plan by motion. The other parent, if contesting the proposed temporary
 3 parenting plan, shall file and serve a responsive proposed parenting plan. Either parent may move
 4 to have a proposed temporary parenting plan entered as part of a temporary order. The parents
 5 may enter an agreed temporary parenting plan at any time as part of a temporary order. The
 6 proposed temporary parenting plan may be supported by relevant evidence and shall be verified
 7 and shall state at a minimum the following:

8 (1) The name, address, and length of residence with the person or persons with whom the
 9 child has lived for the preceding 12 months;

10 ~~(2) The performance by each parent during the last twelve months of the parenting~~

11 ~~functions relating to the daily needs of the child~~

12 ~~(3)~~ (2) The parents' work and child-care schedules for the preceding 12 months;

13 ~~(4)~~ (3) The parents' current work and child-care schedules; and

14 ~~(5)~~ (4) Any of the ~~circumstances~~ considerations set forth in §48-9-206(a)(9) and/or
15 circumstances set forth in §48-9-209 of this code that indicate an intent or effort by either parent
16 to alienate the child or children from the other parent and/or are likely to pose a serious risk to the
17 child and that warrant limitation on the award to a parent of temporary residence or time with the
18 child pending entry of a permanent parenting plan.

19 (b) At the hearing, the court shall enter a temporary parenting order incorporating a
20 temporary parenting plan which shall be consistent with §48-9-102(a)(2), §48-9-102(a)(9), and
21 §48-9-102(b), and shall include:

22 (1) A schedule for the child's time with each parent when appropriate: Provided, That it
23 shall be recognized as the public policy of the State of West Virginia, as supported by the findings
24 of leading published and peer-reviewed social science studies, that a rebuttable presumption
25 exists and shall be applied that co-equal shared physical custody with both parents is in the best
26 interest of the child absent particular adjudicatory facts that limiting factors as described in §48-
27 9-209(a), or of incompetence, neglect or abuse as set forth in §48-9-204(a) of this code, are found
28 by a preponderance of the evidence following a full adversarial judicial hearing;

29 (2) Designation of a temporary residence for the child, which, consistent with §48-9-
30 102(a)(2), §48-9-102(a)(9), and §48-9-102(b) of this code shall be presumed to be equally shared
31 with both parents;

32 (3) Allocation of decision-making authority, if any. Absent allocation of decision-making
33 authority consistent with §48-9-207 of this code, neither party shall make any decision for the child
34 other than those relating to day-to-day or emergency care of the child, which shall be made by
35 the party who is present with the child;

36 (4) Provisions for temporary support for the child; and

37 (5) Restraining orders, if applicable.

38 (c) A parent may make a motion for an order to show cause and the court may enter a
39 temporary order, including a temporary parenting plan, upon a showing of necessity.

40 (d) A parent may move for amendment of a temporary parenting plan, and the court may
41 order amendment to the temporary parenting plan, if the amendment conforms to the limitations
42 of §48-9-209 of this code and is in the best interest of the child: Provided, That full such findings
43 must be made only after an adversarial judicial hearing after which the court expressly finds
44 particular adjudicatory facts by a preponderance of the evidence the existence of the limiting
45 factors or of incompetence, neglect or abuse as set forth in §48-9-204(a) of this code.

§48-9-204. Criteria for temporary parenting plan.

1 (a) After considering the proposed temporary parenting plan filed pursuant to §48-9-203
2 of this code and other relevant evidence presented, the court shall make a temporary parenting
3 plan that is in the best interest of the child. Shared physical and shared legal custody shall be the
4 presumptive parenting arrangement in cases where the parents do not agree to shared custody
5 absent a finding by preponderance of the evidence of the existence of the limiting factors set forth
6 in §48-9-209(a) or of incompetence, neglect or abuse following a full evidentiary hearing which
7 shall be on the record and at which both parties may be represented by counsel and shall have
8 the right to present witnesses, cross-examine witnesses, and to present and challenge evidence.
9 If the court does not grant shared custody under this subsection, the court shall expressly cite all
10 the evidence of record upon which the court relies for its determination that shared custody is
11 unreasonable and not in the best interest of the child to the extent that the legal and/or physical
12 custodial relationship between the child and a parent should be severed. In making this
13 determination the court shall give particular consideration to:

14 ~~(1) Which parent has taken greater responsibility during the last twelve months for~~
15 ~~performing caretaking functions relating to the daily needs of the child; and~~

16 ~~(2) Which parenting arrangements will cause the least disruption to the child's emotional~~

17 ~~stability while the action is pending.~~

18 (b) ~~The court shall also consider the factors used to determine residential provisions in the~~
19 ~~permanent parenting plan.~~ In determining the temporary parenting plan the court shall give
20 particular consideration to:

21 (1) If the parents present a temporary custody agreement and mutually agreed plan for
22 parenting time, and the court confirms that the agreement adequately provides for the welfare of
23 the child, the agreement shall become the temporary custody order of the court.

24 (2) In making an order for temporary custody absent a mutually agreed plan by the
25 parents, there shall be a presumption, rebuttable as set forth in §48-9-204(a) of this code, that
26 the parents shall have temporary joint custody and shall share equally in parenting time.

27 (3) If a deviation from equal parenting time is warranted, the court shall construct a
28 parenting time schedule which maximizes the time each parent has with the child, including
29 overnight parenting time with each parent, and is consistent with ensuring the child's welfare as
30 set forth in this article.

31 (4) Each temporary custody order shall include specific findings of fact and conclusions of
32 law, except when the court confirms the consensual agreement of the parties.

33 (5) Subject to §48-9-401(a) and §48-9-203 of this code modification of a temporary
34 custody order may be sought when there is a material and substantial change in the
35 circumstances of the parents or child.

36 (c) Upon credible evidence of one or more of the circumstances set forth in §48-9-209(a)
37 of this code, following a full evidentiary hearing and finding as set forth in §48-9-204(a) of this
38 code, the court shall issue a temporary order limiting or denying access to the child as required
39 by that section, in order to protect the child or the other party, pending the final adjudication of the
40 underlying facts.

41 (d) Expedited procedures shall be instituted to facilitate the prompt issuance of a parenting
42 plan: Provided, That such expedited procedures must meet the requirements for the full

43 evidentiary hearing and findings as set forth in §48-9-204(a) of this code before either parent's
44 presumptive co-equal shared physical custody may be modified or denied.

§48-9-204a. Model parenting schedules.

1 The Supreme Court of Appeals shall adopt advisory model parenting schedules for use in
2 determining schedules which most effectively promote the best interests of the child or children:
3 Provided, That such model parenting schedules reflect the current state of published research in
4 child development psychology in peer reviewed publications establishing that shared parenting,
5 including overnight time with each parent is in the best interest of the child or children. Such
6 schedules shall reflect the differing needs of the child based upon age: Provided further, That
7 such schedules recognize the current state of research in child development psychology
8 establishing that shared parenting, including overnight time with each parent is in the best interest
9 of the child or children, even in children under the age of one year old. Model parenting schedules
10 shall recognize the rebuttable presumption that co-equal shared physical custody with both
11 parents, and that keeping siblings, including half-siblings, together on at least an equal basis with
12 the periods of physical custody and shared parenting that the child or children share with the
13 parent of any siblings or half-siblings is in the best interest of the child. In the event that the
14 presumption of co-equal shared parenting is rebutted as set forth in §48-9-204(a) of this code,
15 schedules shall be adjusted for each child as it grows older and its needs and ability to adjust to
16 its circumstances change including expanded parenting time for the parent who initially spends
17 less time with the child, unless the limiting factors set forth in §48-9-209 of this code or of
18 incompetence, neglect or abuse found in accordance with §48-9-204(a) of this code to remain
19 present.

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

1 (a) Unless otherwise resolved by agreement of the parents under §48-9-201 of this code
2 or unless harmful to the child, the court shall allocate custodial responsibility ~~so that, except to~~
3 ~~the extent required under §48-9-209 of this code, the custodial time the child spends with each~~

4 ~~parent may be expected to achieve any of the following objectives:~~ based upon a rebuttable
5 presumption that co-equal shared legal and physical custody is in the best interest of the child or
6 children, except in instances where a judicial officer has found by a preponderance of the
7 evidence the limiting factors set forth in §48-9-209 of this code or incompetence, neglect, or abuse
8 as set forth in §48-9-204(a) of this code. If the court denies the request for shared physical
9 custody, the determination shall be accompanied by specific findings of fact and conclusions of
10 law that the awarding of shared physical custody is not in the best interests of the child. The court
11 must document all the evidence of record upon which the court relies for its determination by a
12 preponderance of the evidence that shared physical custody would endanger the child's physical,
13 mental or emotional health:

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

16 (2) To accommodate, if the court determines it is in the best interests of the child, the firm
17 and reasonable preferences of a child who is 14 years of age or older; and to accommodate, if
18 the court determines it is in the best interests of the child, the firm and reasonable preferences of
19 a child under 14 years of age, but sufficiently matured that he or she can intelligently express a
20 voluntary preference for one parent;

21 (3) To keep siblings together when the court finds that doing so is necessary to their
22 welfare: Provided, That there shall be a rebuttable presumption that keeping siblings, including
23 half-siblings, together on at least an equal basis with the periods of physical custody and shared
24 parenting that the child or children share with the parent of any siblings or half-siblings is in the
25 best interest of the child, absent a finding of incompetence, neglect or abuse as set forth in
26 §48-9-204(a) of this code or that the limiting factors set forth in §48-9-209 of this code are or
27 remain present;

28 (4) To protect the child's welfare when, under an otherwise appropriate allocation, the child
29 would be harmed because of a gross disparity in the quality of the emotional attachments between

30 each parent and the child, or in each parent's demonstrated ability or availability to meet a child's
31 needs: Provided, That any unequal allocation of parenting time previously awarded which did not
32 take into consideration the current state of research in child development psychology recognizing
33 that shared parenting and shared legal and physical custody, including overnight time with each
34 parent is in the best interest of the child or children, even in children under the age of one year
35 old, shall not serve as the basis for any finding by the court of a gross disparity in the quality of
36 the emotional attachments between each parent and the child or in each parent's demonstrated
37 ability or availability to meet a child's needs;

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

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

46 (7) To apply the principles set forth in §48-9-403(d) of this code if one parent relocates or
47 proposes to relocate at a distance that will impair the ability of a parent to exercise the amount of
48 custodial responsibility that would otherwise be ordered under this section: Provided, That in
49 cases of proposed relocation the court's analysis shall reflect the current state of research in child
50 development psychology recognizing that shared parenting, including overnight time with each
51 parent is in the best interest of the child or children, even in children under the age of one year
52 old; and that keeping siblings, including half-siblings, together on at least an equal basis with the
53 periods of physical custody and shared parenting that the child or children share with the parent
54 of any siblings or half-siblings is in the best interest of the child, absent a finding or of
55 incompetence, neglect or abuse as set forth in §48-9-204(a) of this code or unless the limiting

56 factors set forth in §48-9-209 of this code are or remain present;

57 (8) To consider the stage of a child's development: Provided, That such consideration
58 shall recognize the current state of research in child development psychology establishing that
59 shared parenting and shared legal and physical custody, including overnight time with each parent
60 is in the best interest of the child or children, even in children under the age of one year old; and

61 (9) To consider which parent will encourage and accept a positive relationship between
62 the child and the other parent, including which parent is more likely to keep the other parent
63 involved in the child's life and activities.

64 (b) The court may consider the allocation of custodial responsibility arising from temporary
65 agreements made by the parties after separation if the court finds, by a preponderance of the
66 evidence, that such agreements were consensual. The court shall afford those temporary
67 consensual agreements the weight the court believes the agreements are entitled to receive,
68 based upon the evidence. The court may not consider the temporary allocation of custodial
69 responsibility imposed by a court order on the parties.

70 (c) If the court is unable to allocate custodial responsibility under §48-9-206(a) of this code
71 because the allocation under §48-9-206(a) of this code would be harmful to the child, or because
72 there is no history of past performance of ~~caretaking~~ parenting functions, as in the case of a
73 newborn, ~~or because the history does not establish a pattern of caretaking sufficiently dispositive~~
74 ~~of the issues of the case~~ the court shall allocate custodial responsibility based on the child's best
75 interest, taking into account the current state of research in child development psychology
76 establishing that shared parenting and shared physical custody, including overnight time with
77 each parent is in the best interest of the child or children, even in children under the age of one
78 year old, the presumptions of §48-9-102(a)(2), §48-9-102(a)(9), and §48-9-102(b) of this code,
79 the factors in considerations that are set forth in this section and in §48-9-209 and §48-9-403(d)
80 of this code and ~~preserving to the extent possible this section's priority on the share of past~~
81 ~~caretaking functions each parent performed:~~ Provided, That the court's analysis shall reflect the

82 current state of research in child development psychology recognizing that shared parenting,
83 including overnight time with each parent is in the best interest of the child or children, even in
84 children under the age of one year old; and that keeping siblings, including half-siblings, together
85 on at least an equal basis with the periods of physical custody and shared parenting that the child
86 or children share with the parent of any siblings or half-siblings is in the best interest of the child,
87 unless the limiting factors set forth in §48-9-209 of this code or incompetence, neglect or abuse
88 as set forth in §48-9-204(a) of this code are or remain present.

89 (d) In determining how to schedule the custodial time allocated to each parent, the court
90 shall take account of the economic, physical, and other practical circumstances such as those
91 listed in §48-9-206(a)(6) of this code. The court shall also consider the willingness and ability of
92 each parent to facilitate and encourage a close and continuing relationship between the other
93 parent and the child as required under §48-9-206(a)(9) of this code. If the court determines by a
94 preponderance of the evidence that a parent is not encouraging a close and continuing
95 relationship between the other parent and the child, such a finding shall create a rebuttable
96 presumption that the offending parent is alienating the other parent from the child and persistently
97 interfering with the other parent's access to the child in violation of §48-9-209(a)(4) of this code.

§48-9-207. Allocation of Significant Decision-Making Responsibility.

1 (a) Unless otherwise resolved by agreement of the parents under §48-9-201 of this code,
2 the court shall allocate responsibility for making significant life decisions on behalf of the child,
3 including the child's education and health care, to one parent or to two parents jointly, in
4 accordance with the child's best interest, in light of:

5 (1) The court's presumption that the maximum involvement and cooperation of both
6 parents regarding the physical, mental, moral, and emotional well-being of their child is in the best
7 interest of the child. This shall be accomplished, to the maximum extent feasible, through the
8 ordering of co-equal shared physical and legal custody and parenting time;

9 ~~(1)~~ (2) The allocation of custodial responsibility under §48-9-206 of this code: *Provided,*

10 That any unequal allocation of parenting time previously awarded which did not take into
11 consideration the current state of research in child development psychology recognizing that
12 shared parenting, including overnight time with each parent, is in the best interest of the child or
13 children, even in children under the age of one year old, shall not serve as the basis for any finding
14 by the court that the parent historically receiving less parenting time is not entitled to co-equal
15 custodial responsibility;

16 ~~(2)~~ (3) The level of each parent's participation in past decision-making on behalf of the
17 child: Provided, That any unequal allocation of parenting time previously awarded which did not
18 take into consideration the current state of research in child development psychology recognizing
19 that shared parenting, including overnight time with each parent, is in the best interest of the child
20 or children, even in children under the age of one year old, shall not serve as the basis for any
21 finding by the court that the parent historically receiving less parenting time is not entitled to co-
22 equal decision-making responsibility;

23 ~~(3)~~ (4) The wishes of the parents;

24 ~~(4)~~ (5) The level of ability and cooperation the parents have demonstrated in decision-
25 making on behalf of the child;

26 ~~(5)~~ (6) Prior agreements of the parties; and

27 ~~(6)~~ (7) The existence of any limiting factors, as set forth in §48-9-209 of this code, or of
28 incompetence, neglect, or abuse if found by the court as set forth in §48-9-204(a) of this code.

29 (b) If each of the child's legal parents has been exercising a reasonable share of parenting
30 functions for the child, the court shall presume that an allocation of decision-making responsibility
31 to both parents jointly is in the child's best interests. The presumption is overcome if there is a
32 history of domestic abuse, or by a showing that joint allocation of decision-making responsibility
33 is not in the child's best interest: Provided, That court must expressly document all the evidence
34 of record upon which the court relies for its determination by a preponderance of the evidence
35 that joint allocation of decision-making responsibility is not in the child's best interest.

36 (c) Unless otherwise provided or agreed by the parents, each parent who is exercising
37 custodial responsibility shall be given sole responsibility for day-to-day decisions for the child,
38 while the child is in that parent's care and control, including emergency decisions affecting the
39 health and safety of the child.

PART 2 – PARENTING PLANS

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

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

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

5 (2) Has sexually assaulted or sexually abused a child as those terms are defined in §61-
6 8B-1 *et seq.* and §61-8D-1 *et seq.* of this code;

7 (3) Has been found, subject to the same procedural and evidentiary standards set forth in
8 §48-9-204(a) of this code, to have committed domestic violence, as defined in §48-27-202 of this
9 code.

10 (4) Has ~~interfered persistently with the other parent's access to the child~~ persistently
11 violated, interfered with, impaired, or impeded the rights of a parent or a child with respect to the
12 exercise of shared or sole custodial authority, residence, visitation, or other contact with the child,
13 except in the case of actions taken for the purpose of protecting the safety of the child or the
14 interfering parent or another family member, pending the prompt and expeditious adjudication of
15 the facts underlying that belief as set forth in §48-9-204(a) of this code; or

16 (5) Has made one or more fraudulent reports of domestic violence or child abuse:
17 *Provided*, That a person's withdrawal of or failure to pursue a report of domestic violence or child
18 support shall not alone be sufficient to consider that report fraudulent.

19 (b) If a parent is found by the court as set forth in §48-9-204(a) of this code to have
20 engaged in any activity specified by §48-9-209(a) of this code, the court shall impose limits that

21 are reasonably calculated to protect the child or child's parent from harm. The limitations that the
22 court shall consider include, but are not limited to:

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

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

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

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

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

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

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

34 (5) A requirement that the parent abstain from possession or consumption of alcohol or
35 nonprescribed drugs while exercising custodial responsibility and in the 24-hour period
36 immediately preceding such exercise;

37 (6) Denial of overnight custodial responsibility;

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

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

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

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

47 (c) If a parent is found subject to the procedural and evidentiary standards set forth in §48-
48 9-204(a) of this code to have engaged in any activity specified in §48-9-209(a) of this code, the
49 court may not allocate custodial responsibility or decision-making responsibility to that parent
50 without making special written findings that the child and other parent can be adequately protected
51 from harm by such limits as it may impose under §48-9-209(b) of this code. The parent found to
52 have engaged in the behavior specified in §48-9-209(a) of this code has the burden of proving
53 that an allocation of custodial responsibility or decision-making responsibility to that parent will
54 not endanger the child or the other parent.

55 (d) If the court determines, based on the investigation described in part three of this article
56 or other evidence presented to it, that an accusation of child abuse or neglect, or domestic
57 violence made during a child custody proceeding is false and the parent making the accusation
58 knew it to be false at the time the accusation was made, the court may order reimbursement to
59 be paid by the person making the accusations of costs resulting from defending against the
60 accusations. Such reimbursement may not exceed the actual reasonable costs incurred by the
61 accused party as a result of defending against the accusation and reasonable attorney's fees
62 incurred.

63 (e)(1) A parent who believes he or she is the subject of activities by the other parent
64 described in §48-9-209(a)(5) of this code, may move the court pursuant to §49-5-101(b)(4) of this
65 code for the Department of Health and Human Resources to disclose whether the other parent
66 was the source of the allegation and, if so, whether the department found the report to be:

- 67 (A) Substantiated;
68 (B) Unsubstantiated;
69 (C) Inconclusive; or
70 (D) Still under investigation.

71 (2) If the court grants a motion pursuant to this subsection, disclosure by the Department
72 of Health and Human Resources shall be in camera. The court may disclose to the parties

73 information received from the department only if it has reason to believe a parent knowingly made
74 a false report.

PART 4. MODIFICATION OF PARENTING PLAN.

§48-9-401. Modification upon showing of changed circumstances or harm.

1 (a) Except as provided in §48-9-402 or §48-9-403 of this code, a court shall modify a
2 parenting plan order if it finds, on the basis of facts that were not known or have arisen since the
3 entry of the prior order and were not anticipated therein, that a substantial change has occurred
4 in the circumstances of the child or of one or both parents and a modification is necessary to
5 serve the best interests of the child.

6 (b) In exceptional circumstances, a court may modify a parenting plan if it finds that the
7 plan is not working as contemplated and in some specific way is manifestly harmful to the child,
8 even if a substantial change of circumstances has not occurred.

9 (c) Unless the parents have agreed otherwise, the following circumstances do not justify
10 a significant modification of a parenting plan except where harm to the child is shown:

11 (1) Circumstances resulting in an involuntary loss of income, by loss of employment or
12 otherwise, affecting the parent's economic status;

13 (2) A parent's remarriage or cohabitation; and

14 (3) Choice of reasonable caretaking arrangements for the child by a legal parent, including
15 the child's placement in day care.

16 (d) For purposes of subsection (a) of this section, the occurrence or worsening of a limiting
17 factor, as defined in §48-9-209(a) of this code, after a parenting plan has been ordered by the
18 court, constitutes a substantial change of circumstances and measures shall be ordered pursuant
19 to §48-9-209 of this code to protect the child or the child's parent.

20 (e) For purposes of subsection (a) of this section, any parent subject to unequal allocation
21 of parenting time previously awarded, which did not take into consideration the current state of
22 research in child development psychology recognizing that shared parenting, including overnight

23 time with each parent, is in the best interest of the child or children, even in children under the
24 age of one year old; and that keeping siblings, including half-siblings, together on at least an equal
25 basis with the periods of physical custody and shared parenting that the child or children share
26 with the parent of any siblings or half-siblings is in the best interest of the child (unless the limiting
27 factors set forth in §48-9-209 of this code or incompetence, abuse or neglect set forth in §48-9-
28 204(a) of this code are or remain present), as set forth in The Parenting Fairness Act of 2021,
29 which amendments are deemed by the Legislature to be a qualifying substantial change in
30 circumstances, may petition the court for a modification of his or her parenting plan. Upon such
31 motion the court shall promptly conduct an evidentiary hearing, review, and determine the proper
32 scope of modification, if any, to such unequal parenting plan. In reviewing any petition for
33 modification based on this section, the court shall take into consideration the current state of
34 research in child development psychology recognizing that shared parenting, including overnight
35 time with each parent, is in the best interest of the child or children, even in children under the
36 age of one year old; and that keeping siblings, including half-siblings, together on at least an equal
37 basis with the periods of physical custody and shared parenting that the child or children share
38 with the parent of any siblings or half-siblings is in the best interest of the child (unless the limiting
39 factors set forth in §48-9-209 of this code or incompetence, abuse or neglect set forth in §48-9-
40 204(a) of this code are or remain present). In reaching its decision, the court shall expressly cite
41 all the evidence of record upon which the court relies for its determination that the unequal
42 parenting shall or shall not be modified in accordance with The Parenting Fairness Act of 2021.

PART 4. MODIFICATION OF PARENTING PLAN.

§48-9-403. Relocation of a parent.

1 (a) The relocation of a parent constitutes a substantial change in the circumstances, under
2 §48-9-401(a) of this code, of the child only when it significantly impairs either parent's ability to
3 exercise responsibilities that the parent has been exercising.

4 (b) Unless otherwise ordered by the court, a parent who has responsibility under a

5 parenting plan who changes, or intends to change, residences for more than 90 days must give
6 a minimum of 60 days' advance notice, or the most notice practicable under the circumstances,
7 to any other parent with responsibility under the same parenting plan. Notice shall include:

8 (1) The relocation date;

9 (2) The address of the intended new residence;

10 (3) The specific reasons for the proposed relocation;

11 (4) A proposal for how custodial responsibility shall be modified, in light of the intended
12 move; and

13 (5) Information for the other parent as to how he or she may respond to the proposed
14 relocation or modification of custodial responsibility.

15 Failure to comply with the notice requirements of this section without good cause may be
16 a factor in the determination of whether the relocation is in good faith under §48-9-403(d) of this
17 code and is a basis for an award of reasonable expenses and reasonable attorney's fees to
18 another parent that are attributable to such failure.

19 The Supreme Court of Appeals shall make available through the offices of the circuit clerks
20 and the secretary-clerks of the family courts a form notice that complies with the provisions of this
21 subsection. The Supreme Court of Appeals shall promulgate procedural rules that provide for an
22 expedited hearing process to resolve issues arising from a relocation or proposed relocation.

23 (c) When changed circumstances are shown under §48-9-403(a) of this code, the court
24 shall, if practical, revise the parenting plan so as to both accommodate the relocation and maintain
25 the same proportion of custodial responsibility being exercised by each of the parents. In making
26 such revision, the court may consider the additional costs that a relocation imposes upon the
27 respective parties for transportation and communication, and may equitably allocate such costs
28 between the parties.

29 (d) When the relocation constituting changed circumstances under §48-9-403(a) of this
30 code renders it impractical to maintain the same proportion of custodial responsibility as that being

31 exercised by each parent, the court shall modify the parenting plan in accordance with the child's
32 best interests and in accordance with the following principles:

33 (1) A parent who has been exercising a significant majority of the custodial responsibility
34 for the child should be allowed to relocate with the child so long as that parent shows that the
35 relocation is in good faith for a legitimate purpose and to a location that is reasonable in light of
36 the purpose: Provided, That any unequal allocation of parenting time and/or custodial
37 responsibility previously awarded which did not take into consideration the current state of
38 research in child development psychology recognizing that shared parenting, including overnight
39 time with each parent, is in the best interest of the child or children, even in children under the
40 age of one year old, shall not serve as the basis for any finding by the court that the parent
41 historically receiving less parenting time is not entitled to co-equal parenting time and/or legal and
42 physical custodial responsibility after relocation. The percentage of custodial responsibility that
43 constitutes a significant majority of custodial responsibility is 70 percent or more. A relocation is
44 for a legitimate purpose if it is to be close to significant family or other support networks, for
45 significant health reasons, to protect the safety of the child or another member of the child's
46 household from significant risk of harm, to pursue a significant employment or educational
47 opportunity or to be with one's spouse who is established, or who is pursuing a significant
48 employment or educational opportunity, in another location. The relocating parent has the burden
49 of proving of the legitimacy of any other purpose. A move with a legitimate purpose is reasonable
50 unless its purpose is shown to be substantially achievable without moving or by moving to a
51 location that is substantially less disruptive of the other parent's relationship to the child: Provided,
52 That if after a full, adversarial evidentiary hearing on the record, the court determines that the
53 relocation is reasonable, the court shall expressly cite all the evidence of record upon which the
54 court relies for its determination that the relocation is reasonable, and the court shall to the
55 maximum extent possible require that the non-relocating parent be granted the maximum amount
56 of parenting time possible, including, but not limited to, the child or children residing with the non-

57 relocating parent during school summer vacation months and on other extended holidays and
58 scheduled vacations. All modified parenting plans shall take into consideration the current state
59 of research in child development psychology recognizing that shared parenting, including
60 overnight time with each parent, is in the best interest of the child or children, even in children
61 under the age of one year old; and that keeping siblings, including half-siblings, together on at
62 least an equal basis with the periods of physical custody and shared parenting that the child or
63 children share with the parent of any siblings or half-siblings is in the best interest of the child,
64 unless the limiting factors set forth in §48-9-209 of this code or incompetence, abuse, or neglect
65 set forth in §48-9-204(a) of this code are or remain present.

66 (2) If a relocation of the parent is in good faith for legitimate purpose and to a location that
67 is reasonable in light of the purpose and if neither has been exercising a significant majority of
68 custodial responsibility for the child, the court shall reallocate custodial responsibility based on
69 the best interest of the child, taking into account all relevant factors including the effects of the
70 relocation on the child, subject to the provisos set forth in §48-9-403(d)(1) of this code.

71 (3) If a parent does not establish that the purpose for that parent's relocation is in good
72 faith for a legitimate purpose into a location that is reasonable in light of the purpose, the court
73 may modify the parenting plan in accordance with the child's best interests and the effects of the
74 relocation on the child. Among the modifications the court may consider is a reallocation of primary
75 custodial responsibility, effective if and when the relocation occurs, but such a reallocation shall
76 not be ordered if the relocating parent demonstrates that the child's best interests would be served
77 by the relocation, subject to the provisos set forth in §48-9-403(d)(1) of this code.

78 (4) The court shall attempt to minimize impairment to a parent-child relationship caused
79 by a parent's relocation through alternative arrangements for the exercise of custodial
80 responsibility appropriate to the parents' resources and circumstances and the developmental
81 level of the child and, subject to the provisos set forth in §48-9-403(d)(1) of this code.

82 (5) If the parents are exercising a basic shared parenting schedule and all of their children

83 are under 10 years of age, the court shall consider this a factor against the approval of the
84 relocation of the custodial parent unless the relocation has been agreed to by both parties.

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

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

PART 6. MISCELLANEOUS PROVISIONS.

§48-9-601. ~~Access to a child's records~~ Parental Rights.

1 (a)(1) Each parent has the right to full and equal access to a child's educational records
2 absent a court order to the contrary. Neither parent may veto the access requested by the other
3 parent. Educational records are academic, attendance and disciplinary records of public and
4 private schools in all grades kindergarten through 12 and any form of alternative school.
5 Educational records are any and all school records concerning the child that would otherwise be
6 properly released to the primary custodial parent, including, but not limited to, report cards and
7 progress reports, attendance records, disciplinary reports, results of the child's performance on
8 standardized tests and statewide tests and information on the performance of the school that the
9 child attends on standardized statewide tests; curriculum materials of the class or classes in which
10 the child is enrolled; names of the appropriate school personnel to contact if problems arise with
11 the child; information concerning the academic performance standards, proficiencies or skills the
12 child is expected to accomplish; school rules, attendance policies, dress codes and procedures
13 for visiting the school; and information about any psychological testing the school does involving
14 the child.

15 (2) In addition to the right to receive school records, the nonresidential parent has the right
16 to participate as a member of a parent advisory committee or any other organization comprised
17 of parents of children at the school that the child attends.

18 (3) The nonresidential parent or noncustodial parent has the right to question anything in
19 the child's record that the parent feels is inaccurate or misleading or is an invasion of privacy and
20 to receive a response from the school.

21 (4) Each parent has a right to arrange appointments for parent-teacher conferences
22 absent a court order to the contrary. Neither parent can be compelled against their will to exercise
23 this right by attending conferences jointly with the other parent.

24 (b)(1) Each parent has the right to full and equal access to a child's medical records absent
25 a court order to the contrary. Neither parent may veto the access requested by the other parent.
26 If necessary, either parent is required to authorize medical providers to release to the other parent
27 copies of any and all information concerning medical care provided to the child which would
28 otherwise be properly released to either parent. For the purposes of this section, any and all
29 copies (including prior drafts or versions subsequently removed or deleted from any hospital or
30 birthing facility files, and all information contained therein) of birth registry forms completed for the
31 hospital or birthing facility by the mother, or any other person, for the purposes of registering the
32 birth of a child with the West Virginia Vital Registration Office, are deemed part of the child's
33 medical records and are fully accessible, without limitation or reservation, to each legal and/or
34 biological parent: *Provided* That either parent may request that the hospital redact their own
35 personally identifiable information that would otherwise be subject to the protections of the federal
36 Health Insurance Portability and Accountability Act ("HIPAA"), but under no circumstances may
37 either parent or the hospital or birthing facility rely on HIPAA to preclude the other parent from
38 accessing and/or obtaining copies of any and all birth registry forms (including prior drafts or
39 versions subsequently removed or deleted from any hospital or birthing facility files, and all
40 information contained therein) completed for the parent's child and submitted to the hospital or

41 birthing facility.

42 (2) If the child is in the actual physical custody of one parent, that parent is required to
43 promptly inform the other parent of any illness of the child which requires medical attention.

44 (3) Each parent is required to consult with the other parent prior to any elective surgery
45 being performed on the child, and in the event emergency medical procedures are undertaken for
46 the child which require the parental consent of either parent, if time permits, the other parent shall
47 be consulted, or if time does not permit such consultation, the other parent shall be promptly
48 informed of the emergency medical procedures: *Provided*, That nothing contained herein alters
49 or amends the law of this state as it otherwise pertains to physicians or health care facilities
50 obtaining parental consent prior to providing medical care or performing medical procedures.

51 (c) (1) Each parent has full and equal access to a child's juvenile court records, process
52 and pleadings, absent a court order to the contrary. Neither parent may veto any access
53 requested by the other parent. Juvenile court records are limited to those records which are
54 normally available to a parent of a child who is a subject of the juvenile justice system.

55 (2) Each parent has the right to be notified by the other party if the minor child is the victim
56 of an alleged crime, including the name of the investigating law-enforcement officer or agency.
57 There is no duty to notify if the party to be notified is the alleged perpetrator.

58 (d) Each parent has the right to reasonable access and telephone or other electronic
59 contact with the minor children, which shall be defined in the parenting plan.

NOTE: The Parenting Fairness Act of 2021. The purpose of this bill is to establish that co-equal shared legal and physical custody of a child, and the maintaining of sibling, including half-sibling, relationships through co-equal shared legal and physical custody of children, in cases of divorce is presumed to be in the best interests of the child; and also that certain parental rights are coordinate with and arise from shared legal and physical custody of a child and shall be so treated by the courts of this state.

§48-1-210 is repealed.

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