

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Introduced

House Bill 2883

BY DELEGATE FOSTER

[Introduced March 03, 2021; Referred
to the Committee on Senior, Children, and Family
Issues then the Judiciary]

1 A BILL to repeal §48-9-301 of the Code of West Virginia, 1931, as amended; and to amend and
2 reenact §48-9-302 of said code, relating to removing the discretion of the court to issue a
3 written investigation for proceedings under this article; to ensuring that the West Virginia
4 judiciary remains neutral and detached in all matters pending before any court of this state;
5 to ensuring that the West Virginia judiciary does not in any way initiate or participate in
6 investigations or other activities properly reserved to the executive consistent with the
7 separation of powers required under Article V, Section 1, of the Constitution of the State
8 of West Virginia; to ensuring that the West Virginia judiciary at all times in the performance
9 of its duties acts in a manner consistent with West Virginia Judicial Code of Conduct Rule
10 2.9, which states that “[a] judge shall not initiate, permit, or consider ex parte
11 communications, or consider other communications made to the judge outside the
12 presence of the parties or their lawyers, concerning a pending or impending matter;” and
13 to ensuring that courts are abiding by the foundational principle of Anglo-American
14 jurisprudence rooted in the Magna Carta and the Due Process clauses of the United
15 States Constitution that no person may have their rights curtailed or stripped from them
16 without the right to confront any witnesses and to rebut any evidence against them, as
17 well as to present their own witnesses and evidence to the court.

Be it enacted by the Legislature of West Virginia:

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

PART 3. FACT FINDING.

§48-9-301. Court-ordered investigation.

1 [Repealed].

§48-9-302. Appointment of guardian.

1 (a) In its discretion, the court may appoint a guardian ad litem to represent the child's best

2 interests. The court shall specify the terms of the appointment, including the guardian's role, duties
3 and scope of authority.

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

8 (c) When substantial allegations of domestic abuse have been made, the court ~~shall order~~
9 ~~an investigation~~ may take any reasonable, temporary steps as the court in its discretion deems
10 appropriate given the circumstances to protect the child's safety under section 9-301 pursuant to
11 section §48-9-301a or make an appointment under subsection (a) or (b) of this section: ~~unless~~
12 ~~the court is satisfied that the information necessary to evaluate the allegations will be adequately~~
13 ~~presented to the court without such order or appointment~~ Provided, That under no circumstances
14 shall the court initiate any investigation, nor shall it conduct any proceeding, meeting, conference,
15 teleconference, or hearing, nor shall the court accept receipt of any testimony, report or
16 information from any source, at or in which allegations or evidence shall be presented *ex parte*
17 against a parent. Any and all allegations or evidence presented against a parent shall be
18 rebuttable by pleading, motion, and subject to full adversarial judicial hearing as defined in this
19 Chapter 48 of the West Virginia Code.

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

26 (e) The investigator who submits a report or evidence to the court that has been requested
27 under section 9-301 and a guardian ad litem appointed under subsection (a) of this section who

28 submits information or recommendations to the court are subject to cross-examination by the
29 parties. A lawyer appointed under subsection (b) of this section may not be a witness in the
30 proceedings, except as allowed under standards applicable in other civil proceedings.

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

NOTE: The purpose of this bill is to remove the procedure for the court to conduct written investigations into proceedings under Article 9, to ensure that the West Virginia judiciary remains neutral and detached in all matters pending before any court of this state, and to ensure that the West Virginia judiciary does not in any way initiate or participate in investigations or other activities properly reserved to the executive consistent with the separation of powers required under Article V, Section 1, of the Constitution of the State of West Virginia.

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