

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Introduced

House Bill 2926

By Delegate C. Pritt

[Introduced January 23, 2023; Referred to the
Committee on the Judiciary]

1 A BILL to amend and reenact §48-9-102a, §48-9-206 and §48-9-209 of the Code of West Virginia,
 2 relating to the presumption of 50-50 parental custody of children in child custody court
 3 proceedings; deviation from the presumption of 50-50 custody upon clear and convincing
 4 evidence that the father encouraged the mother to get an abortion.

Be it enacted by the Legislature of West Virginia:

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

§48-9-102a Presumption in favor of equal (50-50) custodial allocation.

1 There shall be a presumption, rebuttable by a preponderance of the evidence, that equal
 2 (50-50) custodial allocation is in the best interest of the child. If the presumption is rebutted, the
 3 court shall, absent an agreement between the parents as to all matters related to custodial
 4 allocation, construct a parenting time schedule which maximizes the time each parent has with the
 5 child and is consistent with ensuring the child’s welfare: Provided, That this presumption is
 6 rebutted and the court may deviate from allocating custodial time the child spends with each
 7 parent equally (50-50) if the court finds from clear and convincing evidence that the father
 8 encouraged the mother to get an abortion.

§48-9-206. Allocation of custodial responsibility at final hearing.

1 (a) Unless otherwise resolved by agreement of the parents under §48-9-201 of this code or
 2 unless harmful to the child, the court shall allocate custodial responsibility so that, except to the
 3 extent required under §48-9-209 of this code, the custodial time the child spends with each parent
 4 shall be equal (50-50): Provided, That the court may deviate from allocating custodial time the
 5 child spends with each parent equally (50-50) if the court finds from clear and convincing evidence
 6 that the father encouraged the mother to get an abortion.

7 (b) The court shall apply the principles set forth in §48-9-403 of this code if one parent
 8 relocates or proposes to relocate at a distance that will impair the ability of a parent to exercise the

9 amount of custodial responsibility that would otherwise be ordered under this section.

10 (c) The court may consider the allocation of custodial responsibility arising from temporary
11 agreements made by the parties after separation if the court finds, by a preponderance of the
12 evidence, that such agreements were consensual. The court shall afford those temporary
13 consensual agreements the weight the court believes the agreements are entitled to receive,
14 based upon the evidence. The court may not consider the temporary allocation of custodial
15 responsibility imposed by a court order on the parties unless both parties agreed to the allocation
16 provided for in the temporary order.

17 (d) In the absence of an agreement of the parents, the court's determination of allocation of
18 custodial responsibility under this section shall be made pursuant to a final hearing, which shall be
19 conducted by the presentation of evidence. The court's order determining allocation of custodial
20 responsibility shall be in writing, and include specific findings of fact and conclusions of law
21 supporting the determination.

§48-9-209. Parenting plan; considerations.

1 (a) When entering an order approving or implementing a temporary or permanent
2 parenting plan order, including custodial allocation, the court shall consider whether a parent:

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

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

6 (3) Has committed domestic violence, as defined in §48-27-202 of this code;

7 (4) Has overtly or covertly, persistently violated, interfered with, impaired, or impeded the
8 rights of a parent or a child with respect to the exercise of shared authority, residence, visitation, or
9 other contact with the child, except in the case of actions taken for the purpose of protecting the
10 safety of the child or the interfering parent or another family member, pending adjudication of the
11 facts underlying that belief; or

12 (5) Has made one or more fraudulent reports of domestic violence or child abuse:

13 *Provided*, That a person's withdrawal of or failure to pursue a report of domestic violence or child
14 support shall not alone be sufficient to consider that report fraudulent.

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

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

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

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

24 (C) The allocation of exclusive custodial responsibility to one of the parents;

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

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

28 (4) Restraints on the parent from communication with, or proximity to, the other parent or
29 the child;

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

33 (6) Denial of overnight custodial responsibility;

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

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

38 (9) A requirement that the parent complete a program of intervention for perpetrators of

39 domestic violence, for drug or alcohol abuse, or a program designed to correct another factor; or
40 (10) Any other constraints or conditions that the court determines to be necessary to
41 provide for the safety of the child, a child's parent, or any person whose safety immediately affects
42 the child's welfare.

43 (c) If a parent or a person regularly in the home of the parent is found to have engaged in
44 any activity specified in subsection (a) of this section, the court may not allocate custodial
45 responsibility or decision-making responsibility to that parent without making special written
46 findings that the child and other parent can be adequately protected from harm by such limits as it
47 may impose under subsection (b) of this section. The parent found to have engaged in the
48 behavior specified in subsection (a) of this section has the burden of proving that an allocation of
49 custodial responsibility or decision-making responsibility to that parent will not endanger the child
50 or the other parent.

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

58 (e) (1) A parent who believes he or she is the subject of activities by the other parent
59 described in subdivision (5), subsection (a) of this section may move the court pursuant to §49-5-
60 101(b)(4) of this code for the Department of Health and Human Resources to disclose whether the
61 other parent was the source of the allegation and, if so, whether the department found the report to
62 be:

63 (A) Substantiated;

64 (B) Unsubstantiated;

65 (C) Inconclusive; or

66 (D) Still under investigation.

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

71 (f) In determining whether the presumption for an equal (50-50) allocation of physical
72 custody has been rebutted, a court shall consider all relevant factors including any of the following:

73 (1) The factors set forth in subsection (a) of this section;

74 (2) Whether the child:

75 (A) Was conceived as a result of sexual assault or sexual abuse by a parent as set forth in
76 §48-9-209a of this code;

77 (B) Has special needs, a chronic illness, or other serious medical condition and would
78 receive more appropriate care under another custodial allocation;

79 (C) Is a nursing child less than six months of age, or less than one year of age if the child
80 receives substantial nutrition through nursing: *Provided*, That the child reaching one year of age
81 shall qualify as a substantial change in circumstances per §48-9-401 of this code; or

82 (D) Will be separated from his or her siblings or the arrangement would otherwise disrupt
83 the child's opportunities to bond with his or her siblings;

84 (3) Whether a parent:

85 (A) Is willfully noncompliant with a previous order of the court regarding payment of child
86 support payments for a child or children of the parties;

87 (B) Is unwilling to seek necessary medical intervention for the child who has a serious
88 medical condition;

89 (C) Has a chronic illness or other condition that renders him or her unable to provide proper
90 care for the child;

91 (D) Has intentionally avoided or refused involvement or not been significantly involved in
92 the child's life prior to the hearing, except when the lack of involvement is the result of actions on
93 the part of the other parent which were, without good cause, designed to deprive the parent of
94 contact and involvement with his or her child or children without good cause;

95 (E) Repeatedly causes the child or children to be in the care of a third party rather than the
96 other parent when he or she is available;

97 (F) Does not have a stable housing situation: *Provided*, That a parent's temporary
98 residence with a child in a domestic violence shelter shall not constitute an unsafe housing
99 situation; or

100 (G) Is unwilling or unable to perform caretaking functions for the child as required by §48-1-
101 210 of this code;

102 (4) Whether a parent, partner, or other person living, or regularly in that parent's
103 household:

104 (A) Has been adjudicated in an abuse and neglect proceeding to have abused or neglected
105 a child, or has a pending abuse and neglect case;

106 (B) Has been judicially determined to have committed domestic violence or has a pending
107 domestic violence case;

108 (C) Has a felony criminal record;

109 (D) Is addicted to a controlled substance or alcohol;

110 (E) Has threatened or has actually detained the child with the intent to retain or conceal the
111 child from the other parent or from a third person who has legal custody: *Provided*, That a parent's
112 temporary residence with the child in a domestic violence shelter shall not be construed as
113 evidence of the parent's intent to retain or conceal the child from the other parent; or

114 (F) Has been involuntarily committed to a mental health facility, or suffers from a serious
115 mental illness;

116 (5) Whether an equal (50-50) physical allocation is:

- 117 (A) Impractical because of the physical distance between the parents' residences;
- 118 (B) Impractical due to the cost and difficulty of transporting the child;
- 119 (C) Impractical due to each parent's and the child's daily schedules;
- 120 (D) Would disrupt the education of the child; or
- 121 (E) Contrary to the firm and reasonable preferences of a child who is 14 years of age or
- 122 older; and to accommodate, if the court determines it is in the best interests of the child, the firm
- 123 and reasonable preferences of a child under 14 years of age, but sufficiently matured that he or
- 124 she can intelligently express a voluntary preference for one parent;
- 125 (6) Whether the parents cannot work cooperatively and collaboratively in the best interest
- 126 of the child; ~~or~~
- 127 (7) Whether a parent will encourage and accept a positive relationship between the child
- 128 and the other parent, including which parent is more likely to keep the other parent involved in the
- 129 child's life and activities; or
- 130 (8) Whether the presumption of equal physical allocation has been rebutted if the court
- 131 finds from clear and convincing evidence that the father encouraged the mother to get an abortion.

NOTE: The purpose of this bill is to provide that the presumption of 50-50 parental custody of children in child custody court proceedings is rebutted and the court may deviate from the presumption of 50-50 custody upon clear and convincing evidence that the father encouraged the mother to get an abortion.

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