

WEST VIRGINIA LEGISLATURE
2019 FIRST EXTRAORDINARY SESSION

Introduced

Senate Bill 1008

BY SENATORS CARMICHAEL (MR. PRESIDENT) AND

PREZIOSO

(BY REQUEST OF THE EXECUTIVE)

[Introduced May 20, 2019]

1 A BILL to amend and reenact §49-4-601 of the Code of West Virginia, 1931, as amended, relating
 2 generally to court actions in abuse and neglect proceedings, and appointment of counsel
 3 in such proceedings; requiring a petition to include the names of all parents, guardians,
 4 custodians, and other persons standing in loco parentis with the child who is the subject
 5 of the petition as well as an express statement as to whether each person named is
 6 alleged to have abused or neglected the child; requiring courts to appoint counsel for the
 7 child and any other named person who is without counsel prior to the initial hearing;
 8 clarifying when a court may and may not appoint counsel; and establishing criteria for
 9 appointment of counsel for unrepresented persons when necessary to ensure
 10 fundamental fairness.

Be it enacted by the Legislature of West Virginia:

ARTICLE 4. COURT ACTIONS.

PART VI.

PROCEDURES IN CASES OF CHILD NEGLECT OR ABUSE.

§49-4-601. Petition to court when child believed neglected or abused; venue; notice; right to counsel; continuing legal education; findings; proceedings; procedure.

1 (a) *Petitioner and venue.* — If the department or a reputable person believes that a child is
 2 neglected or abused, the department or the person may present a petition setting forth the facts
 3 to the circuit court in the county in which the child resides, or if the petition is being brought by the
 4 department, in the county in which the custodial respondent or other named party abuser resides,
 5 or in which the abuse or neglect occurred, or to the judge of the court in vacation. Under no
 6 circumstance may a party file a petition in more than one county based on the same set of facts.

7 (b) *Contents of Petition.* — The petition shall be verified by the oath of some credible
 8 person having knowledge of the facts. The petition shall allege specific conduct including time
 9 and place, how the conduct comes within the statutory definition of neglect or abuse with

10 references ~~thereto~~ to the statute, any supportive services provided by the department to remedy
11 the alleged circumstances, and the relief sought. Each petition shall name as a party each parent,
12 guardian, custodian, other person standing in loco parentis of or to the child allegedly neglected
13 or abused and state with specificity whether each parent, guardian, custodian, or person standing
14 in loco parentis is alleged to have abused or neglected the child.

15 (c) *Court action upon filing of petition.* — Upon filing of the petition, the court shall set a
16 time and place for a hearing and shall appoint counsel for the child. When there is an order for
17 temporary custody pursuant to this article, the preliminary hearing shall be held within 10 days of
18 the order continuing or transferring custody, unless a continuance for a reasonable time is granted
19 to a date certain, for good cause shown.

20 (d) *Department action upon filing of the petition.* — At the time of the institution of any
21 proceeding under this article, the department shall provide supportive services in an effort to
22 remedy circumstances detrimental to a child.

23 (e) *Notice of hearing.* —

24 (1) The petition and notice of the hearing shall be served upon both parents and any other
25 guardian, custodian, or person standing in loco parentis, giving to ~~the parents or custodian~~ those
26 persons at least five days' actual notice of a preliminary hearing and at least 10 days' notice of
27 any other hearing.

28 (2) Notice shall be given to the department, any foster or pre-adoptive parent, and any
29 relative providing care for the child.

30 (3) In cases where personal service within West Virginia cannot be obtained after due
31 diligence upon any parent or other custodian, a copy of the petition and notice of the hearing shall
32 be mailed to the person by certified mail, addressee only, return receipt requested, to the last
33 known address of the person. If the person signs the certificate, service ~~shall be~~ is complete and
34 the certificate shall be filed as proof of the service with the clerk of the circuit court.

35 (4) If service cannot be obtained by personal service or by certified mail, notice shall be

36 by publication as a Class II legal advertisement in compliance with §59-3-1 *et seq.* of this code.

37 (5) A notice of hearing shall specify the time and place of ~~the hearing~~ hearings, the right
38 to counsel of the child, ~~and parents, or~~ and other guardians, custodians, ~~at every stage of the~~
39 ~~proceedings~~ and other persons standing in loco parentis with the child and the fact that the
40 proceedings can result in the permanent termination of the parental rights.

41 (6) Failure to object to defects in the petition and notice may not be construed as a waiver.

42 (f) *Right to counsel.* —

43 ~~(1) In any proceeding under this article, the child, his or her parents, and his or her legally~~
44 ~~established custodian or other persons standing in loco parentis to him or her has the right to be~~
45 ~~represented by counsel at every stage of the proceedings and shall be informed by the court of~~
46 ~~their right to be so represented and that if they cannot pay for the services of counsel, that counsel~~
47 ~~will be appointed~~

48 (1) In any proceeding under this article, the child shall have counsel to represent his or
49 her interests at all stages of the proceedings.

50 ~~(2) Counsel shall be appointed in the initial order. For parents, legal guardians, and other~~
51 ~~persons standing in loco parentis, the representation may only continue after the first appearance~~
52 ~~the parent or other persons standing in loco parentis cannot pay for the services of counsel~~

53 (2) The court's initial order shall appoint counsel for the child and for any parent, guardian,
54 custodian, or other person standing in loco parentis with the child if such person is without retained
55 counsel.

56 ~~(3) Counsel for other parties shall only be appointed upon request for appointment of~~
57 ~~counsel. If the requesting parties have not retained counsel and cannot pay for the services of~~
58 ~~counsel, the court shall, by order entered of record, appoint an attorney or attorneys to represent~~
59 ~~the other party or parties and so inform the parties~~

60 (3) The court shall, at the initial hearing in the matter, determine whether persons other
61 than the child for whom counsel has been appointed:

62 (A) Have retained counsel; and

63 (B) Are financially able to retain counsel.

64 (4) A parent, guardian, custodian, or other person standing *in loco parentis* with the child
65 who is alleged to have neglected or abused the child and who has not retained counsel and is
66 financially unable to retain counsel beyond the initial hearing, shall be afforded appointed counsel
67 at every stage of the proceedings.

68 ~~(4)~~ (5) Under no circumstances may the same attorney represent both the child and
69 another party. ~~the other party or parties., nor may the~~ The same attorney may not represent both
70 parents or custodians ~~more than one parent or custodian: However~~ *Provided, That* one attorney
71 may represent both parents or custodians where both parents or ~~guardians~~ custodians consent
72 to this representation after the attorney fully discloses to the client the possible conflict and where
73 the attorney ~~assures~~ advises the court that she or he is able to represent each client without
74 impairing her or his professional judgment.; ~~however, if~~ If more than one child from a family is
75 involved in the proceeding, one attorney may represent all the children.

76 ~~(5)~~ (6) A parent who is a co-petitioner is entitled to his or her own attorney.

77 ~~(6)~~ (7) The court may allow to each attorney ~~se~~ appointed pursuant to this section a fee in
78 the same amount which appointed counsel can receive in felony cases.

79 (8) The court shall, *sua sponte* or upon motion, appoint counsel to any unrepresented
80 party if, at any stage of the proceedings, the court determines doing so is necessary to satisfy the
81 requirements of fundamental fairness.

82 (g) *Continuing education for counsel.* — Any attorney representing a party under this article
83 shall receive a minimum of eight hours of continuing legal education training per reporting period
84 on child abuse and neglect procedure and practice. In addition to this requirement, any attorney
85 appointed to represent a child must first complete training on representation of children that is
86 approved by the administrative office of the Supreme Court of Appeals. The Supreme Court of
87 Appeals shall develop procedures for approval and certification of training required under this

88 section. Where no attorney has completed the training required by this subsection, the court shall
89 appoint a competent attorney with demonstrated knowledge of child welfare law to represent the
90 parent or child. Any attorney appointed pursuant to this section shall perform all duties required
91 of an attorney licensed to practice law in the State of West Virginia.

92 (h) *Right to be heard.* — In any proceeding pursuant to this article, the party or parties
93 having custodial or other parental rights or responsibilities to the child shall be afforded a
94 meaningful opportunity to be heard, including the opportunity to testify and to present and cross-
95 examine witnesses. Foster parents, pre-adoptive parents, and relative caregivers shall also have
96 a meaningful opportunity to be heard.

97 (i) *Findings of the court.* — Where relevant, the court shall consider the efforts of the
98 department to remedy the alleged circumstances. At the conclusion of the adjudicatory hearing,
99 the court shall make a determination based upon the evidence and shall make findings of fact
100 and conclusions of law as to whether the child is abused or neglected and whether the respondent
101 is abusing, neglecting, or, if applicable, a battered parent, all of which shall be incorporated into
102 the order of the court. The findings must be based upon conditions existing at the time of the filing
103 of the petition and proven by clear and convincing evidence.

104 (j) *Priority of proceedings.* — Any petition filed and any proceeding held under this article
105 shall, to the extent practicable, be given priority over any other civil action before the court, except
106 proceedings under §48-27-309 of this code and actions in which trial is in progress. Any petition
107 filed under this article shall be docketed immediately upon filing. Any hearing to be held at the
108 end of an improvement period and any other hearing to be held during any proceedings under
109 this article shall be held as nearly as practicable on successive days and, with respect to the
110 hearing to be held at the end of an improvement period, shall be held as close in time as possible
111 after the end of the improvement period and shall be held within 30 days of the termination of the
112 improvement period.

113 (k) *Procedural safeguards.* — The petition may not be taken as confessed. A transcript or

114 recording shall be made of all proceedings unless waived by all parties to the proceeding. The
115 rules of evidence ~~shall~~ apply. Following the court's determination, it shall ~~be inquired of~~ ask the
116 parents or custodians whether or not appeal is desired and the response transcribed. A negative
117 response may not be construed as a waiver. The evidence shall be transcribed and made
118 available to the parties or their counsel as soon as practicable, if the ~~same~~ transcript is required
119 for purposes of further proceedings. If an indigent person intends to pursue further proceedings,
120 the court reporter shall furnish a transcript of the hearing without cost to the indigent person if an
121 affidavit is filed stating that he or she cannot pay for the transcript. ~~therefor~~

NOTE: The purpose of this bill is related to the appointment of counsel and general changes in abuse and neglect proceedings.

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