# WEST VIRGINIA JUDICIAL BENCHBOOK

## CHILD ABUSE AND NEGLECT PROCEEDINGS

(Revised August 2023)

**TABLE OF CONTENTS**

# SUMMARY TABLE:
# TOPICS AND STATUTORY REFERENCES TO CHAPTER 49

Note: By topic, this table lists the most commonly cited provisions of Chapter 49 of the West Virginia Code in abuse and neglect cases.

| **Topic** | **Citations from the W. Va. Child Welfare Act** |
|---|---|
| Definitions: abuse, neglect and imminent danger | §49-1-201 |
| Parent and other family terms defined | §49-1-204 |
| Sibling preference | §49-4-111(e) |
| Grandparent preference | §49-4-114(a)(3) |
| Petition (venue, contents, court action upon filing) | §§49-4-601(a) – (c) |
| Relative or Fictive Kin Placements | §49-4-601a |
| Preliminary Hearing/Temporary Custody | §49-4-602 |
| Adjudicatory Hearing | §49-4-601 |
| Disposition | §49-4-604 |
| Permanency Hearings | §49-4-608, §49-4-110(c) |
| Improvement Periods | §49-4-610 |
| Child support provisions | §§49-4-801, et seq. |
| Quarterly status reviews | §49-4-110 |

# CHAPTER 1:
# TIMELINE SUMMARY

*Chapter Contents*

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*Note: Rule 6(a) of the West Virginia Rules of Civil Procedure governs the computation of time periods established by the Rules of Procedure for Child Abuse and Neglect Proceedings. Rule 7.*

## *I. FILING OF PETITION*

### A. Initial Order

The court issues either: 1) Initial order upon filing petition and granting temporary custody to the Department of Health and Human Resources or to a responsible relative or fictive

kin; or 2) Initial order upon filing petition and not granting temporary custody.[1] W. Va. Code § 49-4-602. Temporary custody may only be ordered upon a finding of imminent danger to the physical well-being of the child. W. Va. Code § 49-4-602(a). A removal order must also state that continuation in the home is contrary to the welfare or best interests of the child and indicate whether reasonable efforts to preserve the family were made or whether reasonable efforts were not required because of the emergency situation. *Id.*

1. Initial order granting temporary custody
   W. Va. Code § 49-4-602(a); Rule 16.

   a. Sets a preliminary hearing of petition within ten days of original filing; giving at least five days notice of such hearing. Rules 20 and 22.

   b. If a parent is a co-petitioner, appoints that parent counsel separate from the prosecuting attorney. Rule 17(a); W. Va. Code § 49-4-601(f).

   c. Appoints counsel for the child, any parent, guardian, legally established custodian or other person standing *in loco parentis* to the child who is alleged to have abused or neglected the child. A court may appoint counsel for other parties if necessary to satisfy the principles of fundamental fairness. W. Va. Code § 49-4-601(f).

   d. Provides for immediate transfer of child to the Department or responsible person (relative or fictive kin).

   e. Court may appoint a CASA representative for child in areas where CASA program is in good standing. Rules 20 and 52(a).

   f. Court may also direct any party or the Department to initiate or become involved in services to facilitate reunification of the family.

2. Initial order which does not grant temporary custody
   W. Va. Code § 49-4-602.

   a. Court may set a preliminary hearing of petition upon at least five days notice to parents, if facts alleged in petition demonstrate imminent danger to child. If no preliminary hearing is set, the court should set the adjudicatory hearing, giving at least ten days notice. Rule 20. In such cases, the adjudicatory hearing must begin within 30 days of the filing of the petition, provided no preadjudicatory improvement period is granted. Rule 25.

[1] See W. Va. Code § 49-4-303 for ratification procedure when the Department takes emergency protective custody of child without prior court order. See also W. Va. Code § 49-4-301 (emergency custody by law-enforcement officers); and § 49-4-302 (emergency custody orders by family court).

b. If a parent is a co-petitioner, appoints that parent counsel separate from the prosecuting attorney. Rule 17(a); W. Va. Code § 49-4-601(f).

c. Appoints counsel for child, any parent, guardian, any legally established custodian or other person standing *in loco parentis* to the child who is alleged to have abused or neglected the child. A court may appoint counsel for other parties if necessary to satisfy the principles of fundamental fairness. W. Va. Code § 49-4-601(f).

d. Court may appoint a CASA representative for child in area where CASA program is in good standing. Rules 20 and 52(a).

## B. Notice

Notice of the first hearing should be provided with the initial order. W. Va. Code § 49-4-602(a)-(b); Rule 20.

1. Shall be sent to all parties and other persons entitled to notice and the right to be heard at the hearing. Rule 20.

2. Notice specifies time and place of hearing and statement that proceedings can result in termination of parental rights. Rule 20.

3. Notice specifies the respondent's right to counsel and right to appointed counsel upon proof of financial eligibility. Rule 17(c)(5); W. Va. Code § 49-4-601(f).

## C. Disclosures

Unless otherwise ordered, within three days of filing of petition, prosecutors shall provide all parties and other persons entitled to notice and right to be heard with discovery relevant to preparation of case. Rule 10(b). Not less than five days before any hearing, parents shall disclose to all parties evidence and witnesses they intend to offer at hearing. Rule 10(c).

## D. Disclosure of Child's Relatives or Fictive Kin

To implement the preference for placement with relatives, the Department is required to file a list of the child's relatives or fictive kin within seven calendar days of the filing of the petition. W. Va. Code § 49-4-601a. In turn, any party to the case may file a list of such persons within seven days of the Department's disclosure.

## E. Answer

The adult respondents shall file and serve a verified answer to the petition within ten days of being served with the petition or the applicable time prescribed when served by publication or other substituted service. Rule 17(b).

### F. Multidisciplinary Treatment Team

Within 30 days of the original filing of the petition, the court shall cause to be convened a meeting of a multidisciplinary treatment team (MDT) assigned to the child's case. W. Va. Code § 49-4-405; Rule 51(a). The MDT shall submit written reports to the court and shall meet with the court at least every three months until permanency is achieved, and the case is dismissed. The MDT shall be available to meet with the court for status conferences and hearings. Rule 51(c); W. Va. Code § 49-4-405(d).

## *II. PRELIMINARY HEARING*

### A. Relevant Inquiry

The court will review the petition and take evidence regarding status of the child, whether the Department made reasonable efforts to preserve the family, and whether imminent danger necessitates removal of the child from custody of the parents or continuation of previously ordered emergency custody. W. Va. Code §§ 49-4-105; 49-4-602; Rules 16 and 22.

1. Order determines temporary custody of child giving reasons for need to remove from home if removal is ordered. W. Va. Code § 49-4-602(b).

2. Order sets date for adjudicatory hearing within 30 days if the child is placed in temporary custody of the Department or responsible relative, unless a pre-adjudicatory improvement period is awarded to the parents. Rule 25.

3. Inquire about placement of the child with relatives or fictive kin. When appropriate, order placement of the child with relatives or fictive kin. W. Va. Code § 49-4-601a.

4. When a child is placed in the temporary custody of the Department or a responsible person, the adjudicatory hearing shall be given priority on the court docket. W. Va. Code § 49-4-601(j).

5. When a child has been placed in the custody of the Department or the custodial and decision-making responsibility has been altered, the order must establish a child support obligation. W. Va. Code § 49-4-801. The order shall also require the parent(s) to complete financial forms to determine Title IV-D and IV-E eligibility and the amount of any child support obligation. Rules 16a and 17(c)(5).

6. Order requires any respondent to complete forms to determine eligibility for court-appointed counsel. Rule 17(c)(5).

## *III. PRE-ADJUDICATORY IMPROVEMENT PERIOD*

At any time prior to the adjudicatory hearing, a respondent may move for a pre-adjudicatory improvement period in accordance with West Virginia Code § 49-4-610 and Rule 23.

### A. Family Case Plan

If the motion is granted, the court shall order the Department to submit a family case plan within 30 days, which family case plan shall contain the information required by Rule 28. See also W. Va. Code § 49-4-408. The family case plan shall be formulated with the assistance of all parties, counsel, and the multi-disciplinary treatment team. The family case plan and improvement period order should closely track one another and taken together should constitute a program designed to remedy the circumstances which led to the filing of the petition. Rule 23(a).

### B. Concurrent Plan

Concurrently with development of family case plan and improvement period, the Department may commence efforts to place the child for adoption or other permanent placement in the event that reunification attempts fail. Rule 23(a).

### C. Length of Pre-adjudicatory Improvement Period

A pre-adjudicatory improvement period shall not exceed three months. The court shall further order that a status conference shall be conducted within 60 days of the granting of the improvement period; or that the Department submit a status report to the court within 60 days and a status conference shall be conducted within 90 days of the award of the improvement period. W. Va. Code § 49-4-610(1)(C); Rule 23(b).

### D. Progress Reports

The court may require or accept progress reports or statements from other persons, including the parties, service providers, and persons entitled to notice and the right to be heard, provided that such reports or statements are provided to all parties. Rule 23(b).

## *IV. ADJUDICATORY PRE-HEARING CONFERENCE*

The court may convene an adjudicatory pre-hearing conference on its own motion or upon the motion of any party in preparation for the adjudicatory hearing. Rule 24. A final pre-hearing conference may be scheduled within five days in advance of the adjudicatory hearing to determine that proper notice has been provided and any other matter affecting the hearing. Rule 24(d).

## *V. ADJUDICATORY HEARING*

### A. Timing -- No Pre-adjudicatory Improvement Period

If temporary custody has been ordered, an adjudicatory hearing shall commence within 30 days of entry of the temporary custody order following the preliminary hearing unless a pre-adjudicatory improvement period has been ordered. Rule 25. If temporary custody has not been ordered, an adjudicatory hearing shall commence within 30 days of the filing of the petition.

## B. Timing -- Pre-adjudicatory Improvement Period

An adjudicatory hearing held at the end of a pre-adjudicatory improvement period shall be held as close in time as possible after the end of the improvement period and shall be held within 30 days of the termination of such improvement period. W. Va. Code §§ 49-4-601(j); 49-4-610(8); Rule 25.

## C. Procedure for Adjudicatory Hearing

1. Where a respondent has been served, no order adjudicating that such respondent has abused or neglected the child shall be entered until the time for answer for such respondent has expired and, if the answer is timely served, the respondent has been afforded at least 20 days from the date the answer was filed to prepare for adjudication or has waived such opportunity to prepare. Rule 25.

2. The adjudicatory hearing shall be conducted in accordance with the provisions of West Virginia Code § 49-4-601(h). The parties having custodial or other parental rights or responsibilities to the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses.

3. The petition shall not be taken as confessed. A transcript or recording shall be made of all proceedings unless waived by all parties to the proceeding. The rules of evidence shall apply. W. Va. Code § 49-4-601(k). Any stipulated or uncontested adjudication should conform to Rule 26. It should include agreed upon facts supporting court involvement and a statement of the problems or deficiencies to be addressed at the final disposition hearing.

4. At the conclusion of the hearing, the court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected, which shall be incorporated into the order of the court. If applicable, the court may find that a parent is a non-abusing parent because he or she is a battered parent and/or because he or she did not knowingly allow abuse. W. Va. Code § 49-1-201. The findings must be based upon conditions existing at the time of the filing of the petition and proven by clear and convincing proof. W. Va. Code §§ 49-1-201; 49-4-601(i); Rule 27.

5. The court shall enter an order including findings of fact and conclusions of law as to whether the child is abused or neglected, within ten days of the conclusion of the hearing, and the parties and all other persons entitled to notice and the right to be heard shall be given notice of the entry of this order. Rule 27.

6. When a child has been placed in the custody of the Department or custodial responsibilities have been altered, the court shall set the amount of the child support obligation according to the child support guidelines. W. Va. Code § 49-4-801; Rule 16a.

7. The court should inquire about placement of the children with relatives or fictive kin. W. Va. Code § 49-4-601a.

## *VI. DISCLOSURE CONCERNING RELATIVE PLACEMENTS*

Within 45 days of the filing of the petition, the Department is required to file a disclosure that includes its determinations as to whether any relatives or fictive kin are appropriate to serve as a placement for a child. W. Va. Code § 49-4-601a(4). Given the timing of hearings in a specific case, the court could address the disclosure either at the adjudicatory hearing or at an initial disposition hearing. If the court grants a preadjudicatory improvement period, then the matter could be addressed when the improvement period is initially awarded. When appropriate, the court may order the placement of a child with a relative or fictive kin.

## *VII. POST-ADJUDICATORY OR DISPOSITIONAL IMPROVEMENT PERIOD*

### A. Grounds for Improvement Period

After finding that a child is an abused or neglected child, a court may grant a respondent an improvement period not to exceed six months when: 1) the respondent files a written motion requesting the improvement period; 2) the respondent demonstrates, by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period; and 3) the court makes a finding, on the record, that the respondent has not previously been granted an improvement period or, has shown that since the granting of an initial improvement period, the respondent has experienced a substantial change of circumstances and that due to such change respondent is likely to fully participate in a further improvement period. Further, the court should make a finding, on the record, of the terms of the improvement period. W. Va. Code § 49-4-610(2) and (3).

### B. Family Case Plan

If a post-adjudicatory or dispositional improvement period is granted, the court shall order the Department to submit a family case plan within 30 days of the order. Concurrent efforts may be made by the Department to place the child for adoption or secure other permanent placement. Rule 37.

### C. Initial Review Hearing

When the improvement period is granted, the court shall order that a hearing be held to review the matter within 60 days of the granting of the improvement period; or, order that a hearing be held to review the matter within 90 days of the granting of the improvement period and that the Department shall submit a report as to the respondent parents' progress in the improvement period within 60 days of the order granting the improvement period. W. Va. Code §§ 49-4-610(2)(C) and (3)(C); 49-4-110; Rule 37.

### D. Subsequent Review Hearing

The court shall thereafter convene a status conference at least once every three months for the duration of the improvement period. At the status conference, the MDT shall attend and report as to progress and developments in the case. W. Va. Code §§ 49-4-610(2)(C) and (3)(C); 49-4-110; Rule 37.

### E. Extension

A court may extend an improvement period for a period not to exceed three months when the court finds that the respondent has substantially complied with the terms of the improvement period; that the continuation of the improvement period will not substantially impair the ability of the Department to permanently place the child; and that such extension is otherwise consistent with the best interest of the child. W. Va. Code § 49-4-610(6).

### F. Revocation or Termination of Improvement Period

Upon the motion by any party, the court shall terminate any improvement period when the court finds that the respondent has failed to fully participate in the terms of the improvement period. W. Va. Code § 49-4-610(7).

## *VIII. DISPOSITION HEARING*

### A. Timing -- After Adjudicatory Hearing

A disposition hearing shall commence within 45 days of the entry of the adjudicatory order. Rule 32(a). Notice of the date, time and place of the disposition hearing shall be given by the court to all parties, their counsel, and the other persons entitled to notice and the right to be heard. Rule 31. All persons entitled to notice and the right to be heard shall be provided with the child's case plan, as defined in Rule 28, and material from other parties necessary to preparation of their case at least five judicial days before the dispositional hearing. Rules 29 and 30.

### B. Accelerated Disposition Hearing

The disposition hearing may immediately follow the adjudication hearing if: 1) all the parties agree; 2) a child's case plan meeting the requirements of West Virginia Code § 49-4-604 and § 49-4-408 was completed and provided to the court or the party or the parties have waived the requirement that the child's case plan be submitted prior to disposition; and 3) notice of the dispositional hearing was provided to or waived by all parties. Rule 32(b).

### C. Timing -- After Dispositional Improvement Period

When a dispositional improvement period has been awarded as an alternative to final disposition, a final disposition hearing shall be held no later than 30 days after the end of the disposition improvement period. W. Va. Code § 49-4-610(8)(B); Rule 38.

### D. Legal Authority: Uncontested/Contested Disposition

If a parent voluntarily relinquishes parental rights or termination of parental rights is uncontested, the disposition hearing should conform to Rule 35(a). See also W. Va. Code § 49-4-607. Contested terminations and contests to case plans are governed by Rule 35(b).

### E. Disposition Order: Contents

At the conclusion of the final disposition hearing, the court shall make findings of fact and conclusions of law in accordance with West Virginia Code § 49-4-604 and Rule 36. At disposition, the court may terminate parental rights when warranted by the evidence. The court may commit the child to the permanent sole custody of a non-abusing parent, including a parent who has been found to be a battered parent. W. Va. Code § 49-4-604(c)(6). When reunification is appropriate, but the parents are not cohabiting, the court should establish a parenting plan. See W. Va. Code §§ 48-9-206 and -207.

### F. Entry of Disposition Order

Within ten days of the conclusion of the final disposition hearing, the court shall enter a disposition order. Rule 38.

## *IX. PERMANENCY HEARING*

### A. Purpose

The purpose of the permanency hearing is to determine the permanency plan and determine what efforts are necessary to provide the child with a permanent home. W. Va. Code § 49-4-608; Rule 36a. The court has exclusive jurisdiction to determine the permanent placement of a child. Rule 36(e).

### B. Timing -- Reasonable Efforts Required

If the court finds, at any stage of the proceedings, that the Department must make reasonable efforts to preserve the family or any part of the family, then a permanency hearing must be held within 12 months of when the Department obtained physical custody of a child.[2] W. Va. Code § 49-4-608. The court is also required to conduct permanency hearings for "transitioning adults." W. Va. Code § 49-4-110(c). If permanency has been achieved by the adoption of a child, the establishment of a legal guardianship, permanent placement with a fit and willing relative, or another planned, permanent living arrangement before this 12-month period has elapsed, it is not necessary for the court to conduct an

[2] Rule 36a(b) has incorporated the slightly longer federal standard for the timing of a permanency hearing, and it provides that a permanency hearing must be conducted within one year of the earlier of: 1) the date of the adjudication of abuse or neglect, or 2) the date that is 60 days after the child's removal from the home. Rule 36a(b). If a court conducts a permanency hearing according to the slightly shorter period established by West Virginia Code § 49-4-608, the court will automatically meet the federal standard.

additional hearing designated as a "permanency hearing." See Chapter 3, Section XIII. B. for a discussion of permanency hearing requirements.

### C. Timing -- Reasonable Efforts Not Required

If the court finds that the Department is not required to make reasonable efforts to preserve the family, then a permanency hearing must be held within 30 days to determine the permanency plan for the child. W. Va. Code § 49-4-608; Rule 36a(a).

### D. Additional Permanency Hearings

After the initial permanency hearing, the court must conduct a permanency hearing every 12 months for a child or "transitioning adult" who remains in the legal and physical custody of the Department. W. Va. Code §§ 49-4-608(b); 49-4-110.

## *X. PERMANENT PLACEMENT REVIEW*

### A. MDT Responsibilities

The court, with the assistance of the MDT, shall continue to monitor implementation of the court-ordered permanency plan for the child or "transitioning adult" every three months until permanent placement as defined in Rule 3 is achieved. Rules 39 and 41; W. Va. Code § 49-4-110. The court shall conduct a review conference and require the MDT to attend and report the progress towards achieving a permanent placement for the child. The MDT and Department shall provide permanent placement review reports to the court at least ten days before the review conference. Rule 40.

### B. Notice

The notice of the time and place of the permanent placement review conference shall be given to counsel and all other persons entitled to notice and the right to be heard at least 15 days prior to the conference unless otherwise provided by court order. Neither a party whose parental rights have been terminated by the disposition order nor his or her attorney shall be given notice of or the right to participate in post-disposition proceedings. The court shall hold a hearing in connection with such review and shall not merely conduct reviews by agreed order. Rule 39(c) and (d).

### C. Issues Subject to Review

If the court finds that permanent placement has not been achieved, the court's order shall address those subjects set forth in Rules 41 and 42(c). Permanent placement of each child shall be achieved within 12 months of the disposition order, unless the court specifically finds on the record extraordinary reasons sufficient to justify the delay. Rule 43.

## D. Timing for Entry of Order

Within ten days of the conclusion of the permanent placement review conference, the court shall enter an order determining whether permanent placement has been fully achieved within the meaning of Rule 6 and stating findings of fact and conclusions of law to support its determination. Rule 42(a).

## E. Dismissal

If the court finds that permanent placement has been achieved, it may order the case dismissed from the docket. Rule 42(b).

# CHAPTER 2:
# CHECKLISTS FOR ABUSE AND NEGLECT PROCEEDINGS

*Chapter Contents*

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## *PRELIMINARY HEARING CHECKLIST*

### A. Notice and Appointments

1. Have all parties and persons entitled to notice and a right to be heard received timely notice of the hearing, pursuant to Rule 20? (This includes noncustodial parents, putative fathers and custodial relatives.) (If only one parent served, see Rule 21.)

2. Has counsel been appointed for the child and is that counsel present in court for the hearing? W. Va. Code § 49-4-601(f).

3. Has a CASA been appointed and is that CASA present in court for the hearing? Rule 52.

4. If parents or other parties have counsel, is such counsel present in court for the hearing? If the parents or other parties do not already have counsel, advise them of their right to counsel, and appoint such counsel as needed. W. Va. Code § 49-4-601(f). (See Overview Section V. F.)

5. Are any of the fathers either unknown or putative? If so, what steps should be taken to establish paternity?

6. Have the adult respondents been personally served with a copy of the petition? If not, has the DHHR attempted service by certified mail? Should service by publication be allowed? If so, what is the last known county of residence for the respondent? W. Va. Code § 49-4-601(e); §§ 59-3-1 through -9; Rule 21.

## B. Temporary Custody and Placement

1. Should the child be returned home immediately or, based upon finding no alternative less drastic than removal, kept in an out-of-home placement prior to adjudication? W. Va. Code § 49-4-602(b).

2. What services, if any, would allow the child to remain safely at home? W. Va. Code § 49-4-602(a)(1)(B).

3. Will the parties voluntarily agree to participate in such services?

4. If removal ordered, what services should be provided by the Department, if any, to facilitate the child's return home? W. Va. Code § 49-4-602(b)(5).

5. Are any protective orders necessary or appropriate?

6. Are orders needed for examinations, evaluations or other immediate services? W. Va. Code § 49-4-603.

7. If removal is being ordered, make finding that continuation in the home is contrary to the child's best interests, and provide specific reasons for such finding. W. Va. Code § 49-4-602(b)(1). (See Title IV-E Checklist.)

8. If removal is being ordered, make findings as to whether the Department made reasonable efforts to prevent removal of the child, or that such reasonable efforts were not possible or not required, and provide specific reasons for such findings. W. Va. Code § 49-4-602(b) & (d); W. Va. Code § 49-4-105. (See Title IV-E Checklist.)

9. Has the Department filed a disclosure that identifies a child's relatives or fictive kin? W. Va. Code § 49-4-601a. Has any other party filed a disclosure that identifies any additional relatives or fictive kin?

10. Are there any responsible relatives or fictive kin able to serve as a placement for the child? W. Va. Code § 49-4-601a.

11. Is the placement proposed by the Department the least disruptive and most family-like setting that meets the needs of the child?

12. Does the Indian Child Welfare Act apply? (See Special Procedures Section XIV.)

**C. Other**

1. Has the MDT met, or scheduled a meeting within 30 days of the filing of the petition? W. Va. Code § 49-4-405 and Rule 51(a).

2. If removal has been ordered, is visitation with parents or other close relatives consistent with the child's well-being and best interests, and if so, what are appropriate terms and conditions of such visitation? Rule 15.

3. Has petitioner's counsel provided the required disclosures and discovery? Rule 10(b).

4. If removal ordered, what should the terms of any child support order be? W. Va. Code § 49-4-801(c) – (e). If not already done in conjunction with an earlier removal order, the affected respondents should be ordered to complete and return to the Department the financial statement forms for child support and Title IV-D and IV-E eligibility. The affected respondents should also be required to complete the forms to determine eligibility for court-appointed counsel. Rules 16a and 17(c)(5) (See Special Procedures Section XI.)

**D. Actions**

1. Mark and admit any reports and exhibits.

2. Set date for the adjudicatory hearing within 30 days:

a) If no pre-adjudicatory improvement period is granted, set adjudicatory hearing within the time frames applicable to the circumstances, as set forth in Rule 25;

b) If pre-adjudicatory improvement period is granted, set status conference within the time frames applicable to the circumstances, as set forth in Rule 25.

3. Determine whether to set adjudicatory prehearing conference. Rule 24.

4. Enter preliminary hearing order, with findings to include matters set forth in West Virginia Code § 49-4-602(b) and, if applicable, § 49-4-602(d).

## CROSS-REFERENCES

**CODE**

West Virginia Code §§ 49-4-105; 49-4-405; 49-4-601; § 49-4-601a; 49-4-602; 49-4-603; 49-4-801

**RULES**

Rule 10, Rule 15, Rule 16a, Rule 17(c)(5), Rule 20, Rule 22, Rule 23, Rule 24, Rule 25, Rule 51, Rule 52

**OVERVIEW**

V. G. Relative or Fictive Kin Placements

VI. Preliminary Hearing

VIII. Improvement Periods

**SPECIAL PROCEDURES**

X. Contrary-To-Welfare and Reasonable Efforts Findings

XI. Child Support

XIV. Indian Child Welfare Act

**CASELAW DIGEST**

IV. Preliminary Hearing

**DETAILED PROCEDURES**

III. Duties and Roles of Guardians Ad Litem

IV. Role of Counsel for Adult Respondents and DHHR

VI. Procedural Protections for Children

VII. Procedural Protections for Parents

VIII. Child Support in Abuse and Neglect Cases

## *ADJUDICATORY HEARING CHECKLIST*

### A. Service and Notice

1. Have all necessary parties been served?

2. If personal service not obtained on any parent or other custodian, ascertain and place on record whether "due diligence" efforts made under West Virginia Code § 49-4-601(e). See Rule 21.

3. If service by publication is necessary, where should the DHHR publish notice of the proceedings? If service by publication has been ordered, has the time for answer set forth in the order of publication expired?

**B. Stipulated or Uncontested Adjudication**

1. A stipulated or uncontested adjudication must include:

a) Facts supporting adjudication (which may incorporate written reports and admissions by a respondent in an answer and any written stipulation); and

b) Statement of a respondent's problems or deficiencies to be addressed at final disposition. Rule 26(a), (c) and (d).

2. Did the respondent understand the stipulation and the consequences of agreeing to a stipulation? Did the respondent voluntarily enter into the stipulation? Rule 26(b).

**C. Other Matters To Be Addressed**

1. If adjudication is contested, was alleged abuse or neglect existing at the time of the filing of the petition proven by clear and convincing evidence? W. Va. Code § 49-4-601(i). If not, petition to be dismissed.

2. Is one or more of the respondents a non-abusing parent because he or she is a battered parent or because he or she did not knowingly fail to take protective action in the face of abuse by another person? W. Va. Code §§ 49-1-201; 49-4-601(i).

3. If abuse or neglect found, consider other issues that may need to be addressed before disposition, such as:

a) Continuing child placement;

b) Placement with an appropriate relative or fictive kin;

c) Further evaluations, examinations or services;

d) Any appropriate protective orders;

e) Parental or sibling visitation as permitted under Rule 15.

4. If abuse or neglect found, direct the Department to prepare the child case plan, including the permanency plan, and (where applicable) the family case plan. W. Va. Code § 49-4-604(a); Rule 28.

5. If removal ordered, what should the terms of any child support order be? If not already done in conjunction with an earlier removal order, the affected respondents should be ordered to complete and return to the Department the

financial statement forms for child support and Title IV-D and IV-E eligibility. Rule 16a and Rule 17(c)(5). W. Va. Code § 49-4-801. (See Special Procedures Section XI.)

6. Does the Indian Child Welfare Act apply? (See Special Procedures Section XIV.)

7. Inquire on record whether respondents desire appeal. If so, direct preparation of transcript. W. Va. Code § 49-4-601(k).

8. Has the Department filed its disclosure that includes its determination as to whether any relatives or fictive kin would be appropriate to serve as a placement for the child? W. Va. Code § 49-4-601a.

**D. Actions**

1. Mark and admit any reports and exhibits.

2. Enter adjudication order with findings of fact and conclusions of law within ten days of hearing, with notice of entry to all parties and other persons entitled to notice and right to be heard. Rule 27.

3. Set date for next hearing or conference:

a) If no post-adjudicatory improvement period is granted, set disposition hearing within the 45-day time frame set forth in Rule 32; and

b) If post-adjudicatory improvement period is granted, set status conference within the time frames applicable to the circumstances, as set forth in Rule 37.

## CROSS-REFERENCES

**CODE**

West Virginia Code §§ 49-1-201; 49-4-601(i) & (k); § 49-4-601a; 49-4-604(a); 49-4-610; 49-4-801

**RULES**

Rule 15, Rule 16a, Rule 17(c)(5), Rule 26, Rule 27, Rule 28, Rule 32, Rule 37

**OVERVIEW**

X. Adjudicatory Hearing

XI. Child and Family Case Plans

**SPECIAL PROCEDURES**

XI. Child Support

XII. Access to Recorded Interviews of Children

XIV. Indian Child Welfare Act

**CASELAW DIGEST**

V. Abuse and Neglect Proceedings and the Right to Remain Silent

VII. Adjudicatory Hearing

VIII. Grounds for Adjudication

XVII. Appeals and Extraordinary Writs

**DETAILED PROCEDURES**

VI. Procedural Protections for Children

VII. Procedural Protections for Parents

VIII. Child Support in Abuse and Neglect Cases

## *DISPOSITION HEARING CHECKLIST*

### A. Notice and Procedure

1. Have all parties, counsel and persons entitled to notice and the right to be heard been given notice of the hearing? Rule 31.

2. Has the Department prepared and filed the child's case plan that complies with Rule 28? See W. Va. Code § 49-4-604(a).

3. Has the child's case plan been provided to the parties, their counsel, and persons entitled to notice and the opportunity to be heard at least five judicial days prior to the hearing? Rule 29.

4. Has the MDT developed an individualized service plan for the child and provided such to the Court prior to disposition? W. Va. Code §§ 49-4-404; -405; and -604(a). (See Overview Section VII.)

5. Did the guardian *ad litem* file the required report five days before the disposition hearing? Rule 18a(b); Appendix B.

6. Have the parties each submitted to the court, other parties, and persons entitled to notice and the right to be heard, a witness list and a list of legal and factual issues at least five judicial days prior to the hearing? Rule 30.

**B. Stipulated or Uncontested Dispositions**

1. Does the proposed stipulated or uncontested disposition comply with Rule 33(a)?

2. Is the stipulation understood and voluntary? Rule 33(b).

3. If a parent intends to relinquish his or her parental rights, does the relinquishment satisfy the requirements of West Virginia Code § 49-4-607?

4. If the parent has voluntarily relinquished parental rights or if a parent does not contest termination, have the requirements of Rule 35(a) been met?

**C. Contested Dispositions**

If a disposition involving termination is contested and opposed:

a) Have findings been made under West Virginia Cod § 49-4-604(c)(6) and, if applicable, § 49-4-604(c)(7)?

b) Should permanent sole custody of the child be awarded to a non-abusing parent, including a non-abusing parent who is a battered parent? W. Va. Code § 49-4-604(c)(6).

c) Does the case plan require amendment in light of disposition findings made? Rule 35(b).

d) Do any parties or persons entitled to notice and the right to be heard desire modification to the child's case plan, or have they offered a substitute child's case plan? If so, follow the hearing requirements set forth in Rule 35(b)(2).

**D. Items To Be Considered In All Cases Involving Temporary Custody Or Termination**

1. Are there objections to the child's case plan? If so, the court must enter an order in compliance with Rule 34.

2. If removal is being ordered, make a finding that continuation in the home is contrary to the child's best interests, and provide specific reasons for such finding. W. Va. Code § 49-4-604(c)(5). (See Title IV-E Checklist.)

3. If removal is being ordered, make findings as to whether the Department made reasonable efforts to prevent removal of the child, or that such reasonable

efforts not possible or not required, and provide specific reasons for such findings. W. Va. Code §§ 49-4-604(c)(5),(7); 49-4-105. (See Title IV-E Checklist.)

4. Has the Department filed its disclosure that includes its determination as to whether any relatives or fictive kin would be appropriate to serve as a placement for the child? W. Va. Code § 49-4-601a.

5. If termination of parental rights is considered and the child is age 14 or older or otherwise of an age of discretion, has the court been informed of the child's wishes with regard to the termination of parental rights? W. Va. Code § 49-4-604(c)(6)(C).

6. If no permanency hearing was conducted with the disposition hearing (or earlier), then a permanency hearing should be scheduled within the time frames set forth in West Virginia Code § 49-4-608.

7. If removal ordered, what should the terms of any child support order be? If not already done in conjunction with an earlier removal order, the affected respondents should be ordered to complete and return to the Department the financial statement forms for child support and Title IV-D and IV-E eligibility. Rule 16a and Rule 17(c)(5). W. Va. Code §§ 49-4-604(c)(5) and 49-4-801. (See Special Procedures Section XI.)

## E. Actions

1. Mark and admit any reports and exhibits.

2. Make findings of fact and conclusions of law as to the appropriate disposition under West Virginia Code § 49-4-604, or under West Virginia Code § 49-4-610(3) if an improvement period is granted as an initial disposition.

3. If the court determines not to adopt the MDT's recommended service plan for the child (if such plan was provided by the MDT prior to disposition), schedule and hold a hearing within ten days to consider evidence from the MDT as to its rationale for the proposed service plan. W. Va. Code § 49-4-404.

4. If a post-dispositional improvement period is granted, order the preparation of the family case plan within 30 days, and set a status conference within the 60 or 90-day time frames provided under Rule 37.

5. Following final disposition hearing, enter disposition order containing the items set forth in Rule 36(c) within ten days of the hearing.

6. The final disposition order shall also set the date and time of the permanency hearing under West Virginia Code § 49-4-608, or if the permanency plan is already in place, a permanent placement review conference under Rule 36(b) within 90 days.

## CROSS-REFERENCES

### CODE

West Virginia Code §§ 49-4-105; 49-4-404; 49-4-405; 49-4-408; § 49-4-601a; 49-4-604; 49-4-607; 49-4-608; 49-4-610(3); 49-4-801

### RULES

Rule 29, Rule 30, Rule 32, Rule 33, Rule 35, Rule 36, Rule 36a, Rule 37

### OVERVIEW

XII. Disposition Hearing

### SPECIAL PROCEDURES

X. Contrary-To-Welfare and Reasonable Efforts Findings

XI. Child Support

### CASELAW DIGEST

IX. Dispositional Hearing -- Procedural Issues

X. Placement with a Parent

XI. Disposition Pursuant to West Virginia Code § 49-4-605(c)(5)

XII. Grounds for Termination of Parental Rights

XIII. Relinquishment of Parental Rights

XIV. Achievement of Permanency

XVI. Children's Right to Continued Association

## *IMPROVEMENT PERIOD CHECKLIST*

### A. Requirements of Pre-Adjudicatory Improvement Period

1. A written motion filed at any time prior to the adjudication hearing.

2. Respondent demonstrates, by clear and convincing evidence, that he or she is likely to fully participate in improvement period; and findings made, on the record, of the terms of improvement period.

3. Is the improvement period in the child's best interests? *State ex rel. DHHR v. Dyer*, 836 S.E.2d 472 (W. Va. 2019).

4. Has the Department filed its disclosure that includes its determination as to whether any relatives or fictive kin would be appropriate to serve as a placement for the child? W. Va. Code § 49-4-601a.

5. Has there been acknowledgment by the parent seeking an improvement period that abuse/neglect has occurred, and/or has requesting parent identified abuser? *DHHR v. Doris S.*, 475 S.E.2d 865 (W. Va. 1996).

6. Court orders hearing to be held to review the matter within 60 days of granting improvement period **OR** court orders hearing to be held to review the matter within 90 days of the granting of improvement period and orders the Department to submit a progress report in 60 days of the order granting improvement period.

7. Order requires Department to prepare and submit a family case plan that complies with West Virginia Code § 49-4-408.

8. Improvement period not to exceed a period of three months, with no extensions allowed. W. Va. Code § 49-4-610(1) and Rule 23.

## B. Requirements of Post-Adjudicatory Improvement Period and Post-Dispositional Improvement Period

1. A written motion filed following adjudicatory hearing and prior to disposition hearing.

2. Respondent demonstrates, by clear and convincing evidence, that he or she is likely to fully participate in improvement period; and findings made, on the record, of the terms of improvement period.

3. The court finds that the improvement period is in the child's best interest. *State ex rel. DHHR v. Dyer*, 836 S.E.2d 472 (W. Va. 2019).

4. Court orders hearing to be held to review the matter within 60 days of granting improvement period **OR** court orders hearing to be held to review the matter within 90 days of the granting of improvement period and orders the Department to submit a progress report in 60 days of the order granting improvement period.

5. No previous improvement period has been granted, or respondent demonstrates by clear and convincing evidence that a substantial change of circumstances has occurred, and that respondent is now likely to fully participate in a further improvement period.

6. The order requires Department to prepare and submit a family case plan that complies with West Virginia Code § 49-4-408.

7. Improvement period can be no longer than six months, unless later extended as set forth below. W. Va. Code § 49-4-610(2),(3); Rule 37.

**C. Other Matters**

1. The Department may be ordered to pay expenses associated with any improvement period services when respondent is unable to bear such expenses. W. Va. Code §§ 49-4-610(4)(A) and 49-4-108.

2. With respect to any improvement period, respondent is required to execute a release of all medical information regarding that respondent. W. Va. Code § 49-4-610(4)(B).

3. With respect to a post-adjudicatory improvement period or a disposition improvement period, the court may extend such improvement period for a period not to exceed three months upon finding that respondent has substantially complied with the terms of the improvement period; that continuation will not substantially impair the ability of the Department to permanently place the child; and that such extension is otherwise consistent with the best interest of the child. W. Va. Code § 49-4-610(6).

4. No combination of improvement periods or extensions should result in a child remaining in foster care for more than 15 months of the most recent 22 months unless the court finds compelling circumstances that it is in the child's best interests to extend this time limit. W. Va. Code § 49-4-610(9).

5. Any party may move to revoke an improvement period. W. Va. Code § 49-4-610(7).

6. Any hearing scheduled for the end of the improvement period shall be held as close in time possible at the end of the improvement period, and it shall be held no later than 30 days after the conclusion or termination of the improvement period. W. Va. Code § 49-4-610(8)(B).

## CROSS-REFERENCES

**CODE**

West Virginia Code §§ 49-4-108; 49-4-404; 49-4-405; 49-4-408; § 49-4-601a; 49-4-610

**RULES**

Rule 23, Rule 37, Rule 38

**OVERVIEW**

VIII. Improvement Periods

XI. Child and Family Case Plans

**CASELAW DIGEST**

VI. Improvement Periods

***PERMANENCY HEARING CHECKLIST***

**A. Notice and Procedure**

1. Has notice of at least five judicial days been provided to any parents whose rights have not been terminated, any foster parent, preadoptive parent or relative who provides care for the child, any party, the child's attorney and the child, if the child is 12 years of age or older? If an adoption case has been transferred to a child-placing agency, has that agency received notice of the hearing? Rule 36a; W. Va. Code § 49-4-608.

2. Has the Department filed a report that details its efforts to place the child in a permanent home and has the report been provided to any parent whose rights have not been terminated, other parties, the child's guardians, foster parents, any preadoptive parent, any relative providing care for the child, the child's attorney and the child if he or she is of 12 years of age or older, and to a child-placing agency if the adoption case has been transferred such an agency?

3. If the child is 12 years of age or older, is he or she present or has his or her presence been waived by the child's attorney at the child's request or because the child would suffer emotional harm?

4. Are any of the following persons, in addition to any parties, present: any foster parent, any preadoptive parent or any relative providing care for the child?

**B. Discuss**

1. Has the court found that the Department is not required to make reasonable efforts to preserve the family? See W. Va. Code § 49-4-608(a); Rule 36a. For a list of circumstances in which the Department is not required to make reasonable efforts to preserve the family, see West Virginia Code §§ 49-4-604(c)(7); 49-4-605. If so, has the permanency hearing been conducted within 30 days of such a finding?

2. If the Department was required to make reasonable efforts to preserve the family, has 12 months elapsed since the Department received physical custody of the child? W. Va. Code §§ 49-4-608(b);[3] 49-4-110.

[3] Rule 36a incorporated the slightly longer federal standard for the scheduling of a permanency hearing. See 42 U.S.C. § 675(c)(5). If a court meets the standard for a permanency hearing established by West Virginia Code § 49-4-608, the court will also meet the federal timeline for conducting a permanency hearing set forth in Rule 36a.

3. If an initial permanency hearing has been conducted, has 12 months elapsed while the child has remained in the physical or legal custody of the Department? W. Va. Code § 49-4-608(b).

4. What is the appropriate permanent placement for the child and the likely date for the achievement of permanency? Rule 36a.

5. Under what conditions should the child's commitment to the Department continue? W. Va. Code § 49-4-608(b).

6. What efforts are necessary to provide a child with a permanent home? W. Va. Code § 49-4-608(b).

7. Has the Department made reasonable efforts to finalize the permanency plan for the child in a timely manner? W. Va. Code § 49-4-608(e), Rule 42.

8. Identify any services the child needs. W.Va. Code § 49-4-608(e).

9. If the child will be placed in an out-of-state placement, is such a placement in the child's best interest? Is there an in-state facility or program that would meet the child's needs? W. Va. Code § 49-4-608(d).

10. If a child has reached 14 years of age, what services does the child need to make the transition from foster care to independent living? W. Va. Code § 49-4-608(c);Rule 28(c)(8); Rule 42(c)(5).

11. If a youth is aged 17 or older, has a personalized transition plan been developed? Rules 28(c)(8).

**C. Actions**

1. Schedule next permanent placement review. Rule 36a(c).

2. Mark and admit any reports and exhibits.

3. Enter order within ten days that addresses the subjects noted above. W. Va. Code § 49-4-608(e), Rule 41 and Rule 42.

## CROSS-REFERENCES

**CODE**

West Virginia Code §§ 49-4-110; 49-4-604(c)(7); 49-4-605; 49-4-608

**RULES**

Rule 28, Rule 36a, Rule 39, Rule 40, Rule 41, Rule 42, Rule 43

**OVERVIEW**

XIII. Permanent Placement

**CASELAW DIGEST**

X. Placement with a Parent

XIV. Achievement of Permanency

XV. Placement with Grandparents

XVI. Children's Right to Continued Association

***PERMANENT PLACEMENT REVIEW CHECKLIST***

**A. Notice and Procedure**

1. Has 15-day notice been provided to the parties, counsel, and other persons entitled to notice and the right to be heard? Rule 39(c).

2. Has the permanency hearing been conducted, with a permanency plan for the child determined? W. Va. Code § 49-4-608; Rule 36a.

3. Has the Department and the MDT prepared and filed with the court a progress report describing the efforts to implement the permanency plan and any obstacles to permanent placement? Rule 40; W. Va. Code § 49-4-608(b).

4. Were copies of the progress reports provided to the parties and others ten days in advance of the review conference? Rule 40.

5. Are there any progress reports or statements from other persons, including the parties, CASA, or any service providers, and if so, have such reports or statements been provided in advance to all parties? Rule 40.

**B. Discuss**

1. Has permanent placement been achieved? If so, dismissal of the case is proper. Rule 42(b).

2. Have reasonable efforts been made to finalize permanency plan in effect and secure a permanent placement, including all items set forth in Rule 41(a)?

3. What changes should be made to the child's case plan to effect a permanent placement? Rule 42(c)(1).

4. What other changes should be made, or actions taken, to accomplish permanent placement? Rule 42(c)(2-7).

5. If a youth is aged 14 or older, have services been identified to assist the youth with transition to adulthood? If a youth is aged 17 or older, has a personalized transition plan been developed? Rules 28(c)(8) and 42(c)(5); W. Va. Code § 49-4-608.

6. Will permanent placement be achieved within 12 months of the final disposition order? If not, what extraordinary reasons justify delay? Rule 43.

7. Is the youth a transitioning adult as defined in West Virginia Code § 49-1-202 and subject to the review requirements of West Virginia Code § 49-4-110?

8. Should the annual permanency hearing be scheduled concurrently with the next permanent placement review? See W. Va. Code §§ 49-4-608; 49-4-110.

**C. Actions**

1. If no permanent placement yet achieved, set date for next review conference (within three months). Rules 39 and 42(c)(8).

2. Mark and admit any reports and exhibits.

3. Enter order within ten days regarding whether permanent placement has been achieved and making findings of fact and conclusions of law in support thereof. Rule 42.

## CROSS-REFERENCES

**CODE**

West Virginia Code §§ 49-1-202; 49-4-110; 49-4-608

**RULES**

Rule 28, Rule 36a, Rule 39, Rule 40, Rule 41, Rule 42, Rule 43

**OVERVIEW**

XIII. Permanent Placement

**SPECIAL PROCEDURES**

X. Contrary-To-Welfare and Reasonable Efforts Findings

**CASELAW DIGEST**

IX. Dispositional Hearing -- Procedural Issues

X. Placement with a Parent

XIIV. Achievement of Permanency

XVI. Children's Right to Continued Association

## *TITLE IV-E FINDINGS CHECKLISTS*

### Contrary to Welfare or Best Interests (CW)

### A. When Required

1. *First* order that sanctions child's removal (even temporarily) from family home.

2. Any return to out-of-home placement after a "trial home visit" (e.g., improvement period) exceeding the time period deemed appropriate by the court, would be considered a new removal requiring CW findings.

3. A removal has *not* occurred when an order removes legal custody from parents, but child remains in home with agency discretion for removal. At the time of any subsequent actual removal from the home, another hearing and order with CW findings would be necessary. See Rule 16(d).

### B. What Required

1. Court must find on a case-specific basis whether:

   a) remaining in the home would be contrary to the welfare of the child, and if so, why; or

   b) out-of-home placement is in the child's best interest, and if so, why.

2. CW finding must be supported by specific facts/reasons summarized in order:

   a) by court's own wording; or

   b) by selecting applicable items from a detailed checklist; or

   c) by cross-reference to matters in the petition or in a report submitted to the court.

### C. Comments

1. First removal order must contain the required CW findings, even if initial placement is not IV-E eligible.

2. Absence of appropriate findings in first removal order makes child ineligible for IV-E funding throughout entire custody period.

Best Practice
*Include CW findings in every order making an out-of-home placement of the child.*

a) Only acceptable substitute would be hearing transcript showing findings were made.

b) *Nunc pro tunc* orders are not an acceptable substitute.

**Reasonable Efforts to Prevent Removal (RE-PR)**

**A. When Required**

1. *Within 60 days* of child's removal from home.

2. Any return to out-of-home placement after a "trial home visit" (e.g., improvement period) exceeding the time period deemed appropriate by the court, would be considered a new removal requiring RE-PR findings.

3. A removal has *not* occurred when an order removes legal custody from parents, but child remains in home with agency discretion for removal. At the time of any subsequent actual removal from the home (or within 60 days thereafter) another hearing and order with RE-PR findings would be necessary. See Rule 16(d).

**B. What Required**

1. Court must find on a case-specific basis:

a) whether reasonable efforts were made to prevent the child's initial removal from the home; or

b) that due to an emergency situation or imminent risk involving the safety or well-being of the child, it is reasonable under present circumstances to make no effort to maintain the child in the home; or

c) that reasonable efforts were not required in child abuse or neglect case due to aggravated circumstances, commission of specified crimes, the parent is required to register as a sex offender under state or federal law or prior involuntary termination of parental rights regarding a sibling. See W. Va. Code § 49-4-604(c)(7).

2. RE-PR finding must be supported by specific facts/reasons summarized in order:

a) by court's own wording; or

b) by selecting applicable items from a detailed checklist; or

c) by cross-reference to matters in the petition or in a report submitted to the court.

## C. Comments

1. Even though the RE-PR determination may be in any order within 60 days following initial removal, the findings must relate to efforts prior to the actual removal.

2. If reasonable efforts information is unavailable at the time of initial removal order, make sure a follow-up order with these findings is made within 60 days.

3. Absence of appropriate findings in either first removal order or another order within 60 days makes child ineligible for IV-E funding throughout entire custody period.

   a) Only acceptable substitute would be hearing transcript showing findings were made.

   b) *Nunc pro tunc* orders not acceptable substitute.

Best Practice
*Include RE-PR findings in every order making an out-of-home placement of the child.*

## Reasonable Efforts to Finalize Permanency in a Timely Manner (RE-FP)

## A. When Required

1. *Within 12 months* of the date the child is "considered to have entered foster care" *and* at least once every 12 months thereafter. If the court makes this finding at a permanency hearing scheduled according to West Virginia Code § 49-4-604(c)(7), one year after receipt of physical custody of a child, it will automatically meet the federal standard. For the purpose of calculating the initial 12-month period under **federal** law, a child is considered to have entered foster care either 60 days following the child's removal from home, or on the date the court made a finding that the child was abused or neglected, whichever date comes first.

2. If the court determines at any stage of the case that reasonable efforts to return the child home are not required due to aggravated circumstances, commission of a crime, a requirement to register as a sex offender under state or federal law, or prior sibling TPR [W. Va. Code § 49-4-604(c)(7)], a permanency hearing must be held *within 30 days* of that determination, unless permanency hearing requirements are fulfilled at the same hearing where the no-reasonable-efforts-to-reunify determination was made.

*Note: If the court makes this finding at any stage of the proceeding, then the initial permanency hearing must be held within 30 days of entry of the order containing that finding. Rule 36a.*

## B. What Required

1. Court must find on a case-specific basis:

   a) whether reasonable efforts have been made to finalize the permanency plan in a timely manner (reunification if possible, or adoption, legal guardianship, or placement with a non-abusive parent or other fit and willing relative).

2. RE-FP finding must be supported by specific facts/reasons summarized in order:

a) by court's own wording; or

b) by selecting applicable items from a detailed checklist; or

c) by cross-reference to matters in a report submitted to the court.

3. Court must document a compelling reason for rejecting the ASFA-preferred permanency options (reunification, adoption, legal guardianship, placement with a non-abusive parent or other fit and willing relative) before accepting any other planned permanent living arrangement, such as independent living or long-term foster care. [Examples appear in the Comments below.]

**C. Comments**

1. If a court orders a placement with a specific provider, without *bona fide* consideration of the agency's recommendation regarding a different placement, the court has assumed the State agency's placement responsibility, and the child may be disallowed IV-E funding for that placement. This does not mean the court must always concur with the agency's recommendation in order for the child's placement to be eligible for IV-E funding. As long as the court hears the relevant testimony, works with the parties and agency, and makes findings in arriving at what the court determines the appropriate placement decision, IV-E funding should not be disallowed.

2. Absence of appropriate finding, reasonable efforts to finalize the permanency plan in a timely manner, within each 12-month interval will make the child ineligible for additional IV-E funding until the court makes such determination.

Best Practice *Include RE-FP findings in every placement review order once the permanency plan is established.*

3. Examples of compelling reason for establishing a permanency plan other than an ASFA-preferred option:

a) Older teen who does not wish to proceed with TPR, and requests that emancipation be established as the permanency plan.

b) Parent and child with significant bond but parent unable to care for child due to physical or emotional disability and child's foster parents are committed to raising child and facilitating visitation with disabled parent.

**Best Interests in Voluntary Placement (BI-VP)**

**A. When Required**

1. *Within 180 days* of child's voluntary placement in foster care.

Best Practice *Include BI-VP finding in first quarterly judicial review order.*

**B. What Required**

1. Court must find whether the continued voluntary placement is in the best interests of the child.

**C. Comments**

1. Absence of appropriate finding within the 180-day initial period will make the placement ineligible for additional federal financial participation for foster care expenditures.

## CHECKLIST: INFANT AND TODDLER CARE*

**A. Physical Health**

1. Has the child received a comprehensive health assessment since entering foster care?

2. Are the child's immunizations complete and up-to-date for his or her age?

3. Has the child received a hearing and vision screen?

4. Has the child been screened for lead exposure?

5. Has the child received regular dental services?

6. Has the child been screened for communicable diseases?

7. Does the child have a "medical home" where he or she can receive coordinated, comprehensive, continuous health care?

**B. Developmental Health**

1. Has the child received a development evaluation by a provider with experience in child development?

2. Are the child and his or her family receiving the necessary early intervention services, e.g., speech therapy, occupational therapy, educational interventions, family support?

**C. Mental Health**

1. Has the child received a mental health screening, assessment, or evaluation?

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2. Is the child receiving necessary infant mental health services?

**D. Educational/Childcare Setting**

1. Is the child enrolled in a high-quality early childhood program?

2. Is the early childhood program knowledgeable about the needs of children in the child welfare system?

**E. Placement**

1. Is the child placed with caregivers knowledgeable about the social and emotional needs of infants and toddlers in out-of-home placements, especially young children who have been abused, exposed to violence, or neglected?

2. Do the caregivers have access to information and support related to the child's unique needs?

3. Are the foster parents able to identify problem behaviors in the child and seek appropriate services?

4. Are all efforts being made to keep the child in one consistent placement?

**CHECKLIST: INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN**

1. Treat Interstate Compact on the Placement of Children (ICPC) cases as concurrent planning cases. W. Va. Code §§ 49-7-101, *et seq*. For example, direct the DHHR to pursue the ICPC process even when seeking to reunite the child and the parent.

2. Enter foster care orders immediately upon conclusion of placement hearings. The order must be included with the ICPC package.

3. Direct lawyers and CASA to promptly inform the court when interstate movement (e.g., placement with out-of-state relatives) is a possibility.

4. Direct the DHHR to give potential placement resources forms to the parents and other parties at the beginning of the court process, so they can provide required information for the agency to consider. Have these forms available at court as well.

5. Enter detailed ICPC orders once it is determined that interstate placement should be pursued.

   a. Determine if the case is a Regulation 7 (priority placement) case and, if so, immediately enter the order. If timelines are not met in Regulation 7 cases, take action by contacting the appropriate judicial officer in the receiving state.

b. Set timelines for action by the DHHR office and by the state ICPC office (such as strict timelines for when DHHR caseworker must submit the ICPC packet to the West Virginia ICPC office).

c. Establish a report-back mechanism, so you know when actions have occurred. For example, identify a responsible party - prosecutor, caseworker, lawyer for child/parent - to check on ICPC progress at least 7 days prior to hearings and have that party file a report with the court, copying all parties/counsel.

d. Schedule hearings for updates on progress of the ICPC no more than 30 days after it is determined that interstate placement should be pursued to:

i. Determine status of home study by receiving state.

ii. Determine education/medical/financial needs for child.

6. When ICPC progress slows, determine the cause and seek a solution.

a. Speak with the local caseworker and counsel for the parties in open court.

b. With the consent of all parties and counsel, or in an open process where they can participate:

i. Call your state ICPC office.

ii. Call the receiving state ICPC office.

iii. Call a local judge in the other state where child is going seek his/her help either informally (e.g., by calling local agency to inquire about reason for delay) or formally through available UCCJEA methods (see 8 below).

7. Obtain the contact information regarding 6b. above from the Supreme Court website for the receiving state, from the Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC):

(http://www.icpcstatepages.org).

8. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) applies to child abuse and neglect proceedings in this state (W. Va. Code § 48-20-102(d)). Before calling a judge in the receiving state, check to verify that the receiving state also has UCCJEA (or UCCJA), and that the receiving state's version of the law applies to abuse and neglect cases. (Check most current Table of Jurisdictions at Part 1 of W. Va. Code, Chap. 48, art. 20, or Uniform Law Commission website at http://www.uniformlaws.org).

a. Make sure the judge in the other state understands that the UCCJEA (or UCCJA) applies.

b. Discuss the portions of the UCCJEA that apply to assistance one court may provide to the other and propose a method to get the placement delay resolved. See W. Va. Code § 48-20-112.

c. Also reference, if necessary, the federal Safe and Timely Interstate Placement of Foster Children Act (effective July 3, 2006) and the requirement that the home study must be completed by the receiving state in 60 days.

## CROSS-REFERENCES

### CODE

West Virginia Code §§ 49-7-101, *et seq.*; 48-20-111(a)

### RULES

Rule 14 (telephone conferencing)

Trial Court Rule 14.02 (videoconferencing)

ICPC Regulations

### SPECIAL PROCEDURES

XVI. Interstate Placements Proceedings

## CHECKLIST: QUESTIONS TO ENSURE THAT THE EDUCATIONAL NEEDS OF CHILDREN AND YOUTH IN FOSTER CARE ARE BEING ADDRESSED*

### I. GENERAL EDUCATION INFORMATION

### A. Enrollment

1. Is the child or youth enrolled in school?

-At which school is the child or youth enrolled?

-In what type of school setting is the child enrolled (e.g., specialized school)?

* *Asking the Right Questions: A Judicial Checklist to Ensure That the Educational Needs of Children and Youth in Foster Care Are Being Addressed*, published by the National Council of Juvenile and Family Court Judges, Reno, Nevada, © 2008. Reproduced with permission from the National Council of Juvenile and Family Court Judges, Reno, Nevada.

2. How long has the child or youth been attending his/her current school?

-Where is this school located in relation to the child's or youth's current foster care placement?

3. If currently not in a school setting, what educational services is the child or youth receiving and from whom?

-Is the child or youth receiving homebound or home-schooled educational services?

-If Yes: Who is responsible for providing educational materials and what information is available about their quality?

-If Yes: How frequently are educational sessions taking place?

❒ What is the duration of each session? (e.g., how many hours?)

**B. Provision of Supplies**

1. Does the child or youth have appropriate clothing to attend school?

2. Does the child or youth have the necessary supplies and equipment (e.g., pens, notebooks, musical instrument) to be successful in school?

**C. Transportation**

1. How is the child or youth getting to and from school?

2. What entity (e.g., school, child welfare agency) is responsible for providing transportation?

3. If the child has remained in the school he or she was enrolled at the time of placement, is the child welfare agency utilizing funding for Title IV-E foster care maintenance payment to fund reasonable travel for the child?

**D. Attendance**

1. Is the child or youth regularly attending school?

2. Has the child or youth been expelled, suspended or excluded from school this year/ever?

-If Yes: How many times?

-Have proper due process procedures been followed for the expulsions, suspensions or exclusions from school?

-What was the nature/reason for the child's or youth's most recent expulsion, suspension or exclusion from school?

-How many days of school will the child or youth miss as a result of being expelled, suspended or excluded from school?

-If currently not attending school, what educational services is the child or youth receiving and from whom?

3. How many days of school has the child or youth missed this year?

-What is the reason for these absences?

-What steps have been taken to address these absences?

-Has the child or youth received any truancies, and if so, for how many days?

-Has the child or youth been tardy, and if so, for how many times?

**E. Performance Level**

1. When did the child or youth last receive an educational evaluation or assessment?

-How current is this educational evaluation or assessment?

-How comprehensive is this assessment?

2. At which grade level is this child or youth currently performing? [Is the child or youth academically on target?]

-Is this the appropriate grade level at which the child or youth should be functioning?

❒ If No: What is the appropriate grade level for this child or youth?

❒ Is there a specified plan in place to help this child or youth reach that level?

3. What is this child or youth's current grade point average?

-If below average, what efforts are being made to address this issue?

4. Is the child or youth receiving any tutoring or other academic supportive services?

-If Yes: In which subjects?

## II. TRACKING EDUCATION INFORMATION

1. Does this child or youth have a responsible adult serving as an educational advocate?

-If Yes: Who is this adult?

❒ How long has this adult been advocating for the child's or youth's educational needs?

❒ How often does this adult meet with the child or youth?

❒ Does this adult attend scheduled meetings on behalf of the child or youth?

❒ Is this adult effective as an advocate?

2. If there is no designated educational advocate, who ensures that the child's or youth's educational needs are being met?

-Who is making sure that the child or youth is attending school?

-Who gathers and communicates information about the child's or youth's educational history and needs?

-Who is responsible for educational decision-making for the child or youth?

-Who monitors the child's or youth's educational progress on an ongoing basis?

-Who is notified by the school if the child or youth is absent (i.e., foster parent, social worker)?

-Who could be appointed to advocate on behalf of the child or youth if his or her educational needs are not met?

## III. CHANGE IN PLACEMENT/CHANGE IN SCHOOL

1. Has the child or youth experienced a change in schools as a result of a change in his or her foster care placement?

-If Yes: How many times has this occurred?

-What information, if any, has been provided to the child's or youth's new school about his or her needs?

-Did this change in foster care placement result in the child or youth missing any school?

❒ If Yes: How many days of school did the child or youth miss?

❒ Have any of these absences resulted in a truancy petition?

2. At initial placement or for subsequent foster placement changes, was the appropriateness of the current educational setting and proximity to the child's current school taken into account?

❒ Does the child welfare agency case plan include documentation that these factors were considered?

3. Has the child welfare agency coordinated with the appropriate local educational agencies to ensure that the child remains in the original school setting, if it is in the best interest of the child to do so?

❒ Does the child welfare agency case plan include documentation of this coordination between agencies?

4. If it is not in the best interest of the child to remain at the current school, has the child welfare agency coordinated with the appropriate local educational agencies to ensure immediate enrollment in the new school?

❒ Does the child welfare agency case plan include documentation of this coordination between agencies?

❒ Has the child welfare agency arranged for the prompt release of all educational records to the new school?

## IV. HEALTH FACTORS IMPACTING EDUCATION

### A. Physical Health

1. Does the child or youth have any physical issues that impair his or her ability to learn, interact appropriately, or attend school regularly (e.g., hearing impairment, visual impairment)?

-If Yes: What is this physical issue?

❒ How is this physical issue impacting the child's or youth's education?

❒ How is this need being addressed?

### B. Mental Health

1. Does the child or youth have any mental health issues that impair his or her ability to learn, interact appropriately, or attend school regularly?

-If Yes: What is this mental health issue?

❒ How is this mental health issue impacting the child's or youth's education?

❒ How is this need being addressed?

2. Is the child or youth currently being prescribed any psychotropic medications?

-If Yes: Which medications have been prescribed?

❒ Has the need for the child or youth to be taking this medication been clearly directly explained to him or her?

❒ How will this medication affect the child's or youth's educational experience?

**C. Emotional Issues**

1. Does the child or youth have any emotional issues that impair his or her ability to learn, interact appropriately, or attend school regularly?

-If Yes: What is this emotional issue?

❒ How is this emotional issue impacting the child's or youth's education?

❒ How is this need being addressed?

2. Is the child or youth experiencing any difficulty interacting with other children or youth at school (e.g., Does the child or youth have a network of friends? Has he or she experienced any difficulty with bullying?)

-If Yes: What is being done to address this issue?

**D. Special Education and Related Services Under IDEA and Section 504**

1. If the child or youth has a physical, mental health or emotional disability that impacts learning, has this child or youth (birth to age 21) been evaluated for Special Education/Section 504 eligibility and services?

-If No: Who will make a referral for evaluation or assessment?

-If Yes: What are the results of such an assessment?

❒ Have the assessment results been shared with the appropriate individuals at the school?

2. Does the child or youth have an appointed surrogate pursuant to IDEA (e.g., child's or youth's birth parent, someone else meeting the IDEA definition of parent, or an appointed surrogate parent)?

-If No: Who is the person that can best speak on behalf of the educational needs of the child or youth?

-Has the court used its authority to appoint a surrogate for the child or youth?

-Has the child's or youth's education decision-maker been informed of all information in the assessment and does that individual understand the results?

3. Does this child or youth have an Individualized Education Plan (IEP)?

-If Yes: Is the child's or youth's parent or caretaker cooperating in giving IEP information to the appropriate stakeholders or signing releases?

-Is the plan meeting the child's or youth's needs?

-Is the child's or youth's educational decision-maker fully participating in developing the IEP and do they agree with the plan?

4. Does this child or youth have a Section 504 Plan?

-If Yes: Is this plan meeting his or her needs?

-Is there an advocate for the child or youth participating in meetings and development of this plan?

## V. EXTRACURRICULAR ACTIVITIES AND TALENTS

1. What are some identifiable areas in which the child or youth is excelling at school?

2. Is this child or youth involved in any extracurricular activities?

-If Yes: Which activities is the child or youth involved in?

❒ Are efforts being made to allow this child or youth to continue in his or her extracurricular activities (e.g., provision of transportation, additional equipment, etc.)?

3. Have any of the child's or youth's talents been identified?

-If Yes: What are these talents?

❒ What efforts are being made to encourage the child or youth to pursue these talents?

## VI. TRANSITIONING

1. Does the youth have an independent living plan?

   -If Yes: Did the youth participate in developing this plan?

   -Does this plan reflect the youth's goals?

   -If Yes: Does the plan include participation in Chafee independent living services?

   -Does this plan include vocational or post-secondary educational goals and preparation for the youth?

2. Is the youth receiving assistance in applying for post-secondary schooling or vocational training?

3. Is the youth being provided with information and assistance in applying for financial aid, including federally-funded Education and Training Vouchers (see Chafee Foster Care Independence Program)?

4. If the youth has an IEP, does it address transition issues?

   -If Yes: What does this transition plan entail?

   -Did the youth participate in developing the transition plan?

   -Is this transition plan coordinated with the youth's independent living plan?

**Practice Tip:** When appropriate, consider addressing these questions directly to the children and youth.

See Rules 28, 41 and 42.

# CHAPTER 3:
# OVERVIEW OF CHILD ABUSE AND NEGLECT PROCEEDINGS

*Chapter Contents*

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## *I. INTRODUCTION*

The guiding purpose of child abuse and neglect laws is to provide a safe, stable, and permanent home for abused and neglected children. W. Va. Code § 49-1-105. In furtherance of this purpose, the Rules of Procedure for Child Abuse and Neglect Proceedings (hereinafter "the Rules" or "Rule ____.") are intended to provide: 1) a fair and timely disposition of child abuse and neglect cases; 2) judicial oversight of case planning; 3) a coordinated decision-making process; 4) a reduction of unnecessary delays in case management; and 5) encouragement of involvement of all parties in the

litigation as well as the involvement of all community agencies and resource personnel providing services to any party.

Child abuse and neglect proceedings are divided into five main stages:

*See Special Procedures Section XV. for a discussion of pre-petition proceedings relating to child abuse and neglect matters.*

1. **Petition**: The child abuse and neglect proceeding generally commences with the filing of a petition alleging abuse and neglect. An emergency removal of the child may precede the petition;

2. **Preliminary hearing**: The preliminary hearing is typically the first hearing held in a child abuse and neglect proceeding. The court will consider whether it should commit (or continue, if an emergency removal occurred) the child to the temporary custody of the Department of Health and Human Resources ("the Department") or some responsible person; and may consider, if requested, whether to grant a pre-adjudicatory improvement period for the parents or custodians;

3. **Adjudicatory hearing**: At the adjudicatory hearing the court determines whether the child was abused or neglected based upon the allegations in the petition. If abuse or neglect is found, the court may commit (or continue if an emergency removal occurred) the child to the temporary custody to the Department or a responsible person; and may consider a request for a post-adjudicatory improvement period for the parents or custodians;

4. **Disposition hearing**: At the disposition hearing, the court determines the proper disposition of a child who has been adjudged abused and neglected. The court may find that any previous improvement period has been successful and dismiss the petition, the court may grant a request for a dispositional improvement period; or the court may terminate parental rights and begin implementing a permanency plan that does not involve reunification;

5. **Permanency Hearing**: The purpose of the permanency hearing is to determine the permanent placement and plan for the child; and

6. **Permanent Placement Review**: The court will continue to regularly monitor the child's progress with quarterly reviews until the child is permanently placed.

Child abuse and neglect cases have priority over all civil proceedings, except for domestic violence proceedings and trials already in progress. W. Va. Code § 49-4-601(j). Upon the filing of a petition before the circuit court, a hearing must be docketed immediately. W. Va. Code § 49-4-601. Under no circumstances shall an abuse and neglect proceeding be delayed pending the initiation, investigation, prosecution, or resolution of any other related proceeding, including, but not limited to, criminal proceedings arising from the allegations of abuse or neglect. Rule 5.

With regard to the procedure for abuse and neglect cases, the West Virginia Supreme "has insisted that the directives of applicable rules and legislative enactments must be

carefully identified, respected, and incorporated within our court system." *In re Edward B.*, 558 S.E.2d 620, 631 (W. Va. 2001). Furthermore, "[t]he Rules of Procedure for Child Abuse and Neglect Proceedings and the related statues detailing fair, prompt, and thorough procedures for child abuse and neglect cases are not mere general guidance; rather, they are stated in mandatory terms and vest carefully described and circumscribed discretion in our courts, intended to protect the due process rights of the parents as well as the rights of the innocent children." *Id.*

## *II. JURISDICTION*

It is well settled that jurisdiction for abuse and neglect proceedings lies in the circuit courts. Syl. Pt. 3, *State ex rel. Paul B. v. Hill*, 496 S.E.2d 198 (W. Va. 1997). While a case is pending, the circuit court retains exclusive jurisdiction over the child's placement. Rule 6. The court also retains jurisdiction over subsequent requests for modification, including any changes in permanent placement or requests for visitation. The two circumstances in which a circuit court would not retain jurisdiction over subsequent placements of a child include the following: 1) the case is dismissed for failure to state a claim under Chapter 49; or 2) the child's legal and physical custody is returned to the child's cohabitating parents and the court had not entered an order regarding visitation or child support. In those circumstances, any future child custody, visitation or child support action may be brought in family court. Rule 6.

## *III. UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT*

The Uniform Child Custody Jurisdiction and Enforcement Act, West Virginia Code §§ 48-20-101, et seq., applies to all child custody cases, and the purpose of the act is to eliminate competition between jurisdictions over child custody cases. *Rosen v. Rosen*, 664 S.E.2d 743, 747-48 (W. Va. 2008). However, it also applies to abuse and neglect cases. See e.g., *In re J.C.*, 832 S.E.2d 91 (W. Va. 2019). Under this article, the methods for establishing jurisdiction over a child include: 1) home state jurisdiction; 2) significant connection jurisdiction; 3) declination jurisdiction; or 4) default jurisdiction. W. Va. Code § 48-20-201.

The first category, "home state" jurisdiction, is established when a child has been living in a state for the six months immediately before the commencement of a case involving child custody. W. Va. Code § 48-20-102. If a child is less than six months old, then this type of jurisdiction will lie in the state where a child lived with a parent or custodian from birth to case initiation. *Id.* However, the jurisdiction where a parent lived before birth and where the child lives after the case begins are not relevant to the question of "home state" jurisdiction. Syl. Pt. 7, *In re Z.H.*, 859 S.E.2d 399 (W. Va. 2021). It should be noted that a newborn child's hospital stay is not sufficient to establish "home state" jurisdiction. Syl. Pt. 8, *In re Z.H.*, 859 S.E.2d 399.

The second category, "significant connection" jurisdiction, is established when there is no "home state" jurisdiction or the home state declines to exercise jurisdiction over the child. W. Va. Code § 48-20-201(a)(2). In addition, the child or one of his parents or custodians must have a "significant connection" with the state, and it must be more than the person's

physical presence in the state. Further, there must be substantial evidence in the state that relates to the child, such as the child's care, protection, training, or relationships. *Id.*

If another state has either "home state" or "significant connection" jurisdiction but that jurisdiction declines to exercise jurisdiction over the child, then "declination" jurisdiction may be established. This method for establishing jurisdiction occurs when another state that would have either "home state" or "significant connection" jurisdiction declines to exercise jurisdiction based upon the grounds that this state is a more appropriate forum for deciding the child's custody. W. Va. Code § 48-20-201(a). The Supreme Court has established that a court of another state must decline jurisdiction, not another state agency, or other person. Syl. Pt. 4, *In re J.C.*, 832 S.E.2d 91. The modification of an original custody determination is governed by West Virginia Code § 48-20-203.

The fourth method to establish jurisdiction, default jurisdiction, is found in West Virginia Code § 48-20-201(a)(4). This type of jurisdiction can only be assumed or exercised if no other court would have jurisdiction under the preceding three types of jurisdiction -- home state, significant connection, or declination jurisdiction. For a court to exercise default jurisdiction, the West Virginia Supreme Court has emphasized that the court must find that "no state" has jurisdiction, not that a court of this state has no other basis for jurisdiction. *In re K.R.*, 735 S.E.2d 882, 893-94 (W. Va. 2012).

A fifth method, temporary emergency jurisdiction, is set forth in West Virginia Code § 48-20-204. This method allows a court to issue temporary order(s) if a child is present in the state, the child has been abandoned or the child, the child's sibling or parent is subject to or at risk of maltreatment or abuse. If there is a pre-existing custody order from another state that has jurisdiction over the child, the temporary order should specify a time period that it determines is adequate for the person seeking the order to obtain an order from the state that has jurisdiction over the child. W. Va. Code § 48-20-204(c). The temporary order should only remain in effect until an order from the state with jurisdiction is issued or the time period expires. If there is no pre-existing custody determination or order but there is another state that would otherwise have jurisdiction, then the temporary order would remain in effect until the state that should have jurisdiction issues an order. W. Va. Code § 48-20-204(b). If a proceeding is never commenced in another state, then a court may assume jurisdiction, provided it has jurisdiction under one of the four bases for establishing jurisdiction under the UCCJEA.

## *IV. EMERGENCY CUSTODY*

### A. Pre-Petition Removal

If a child in the presence of a child protective services worker is in imminent danger to the physical well-being of the child (as defined in W. Va. Code § 49-1-201), and if the worker has probable cause to believe the child will suffer additional abuse or neglect or will be removed from the county before petition can be filed, the worker may take the child into his or her custody prior to filing a petition. W. Va. Code § 49-4-303. If this pre-petition action is taken, the worker must "forthwith" appear before a circuit judge or a juvenile

referee (a magistrate appointed by the circuit court) and apply for an order ratifying the emergency custody.

The application should be made to the judge or referee in the county where custody was taken. If neither a judge nor a referee can be located, the worker may apply to a judge or referee in an adjoining county. The application must set forth facts sufficient to support a probable cause finding. In the event the emergency taking is ratified by a juvenile referee, the referee must obtain oral confirmation from the circuit court or an adjoining circuit court, which must then enter an order of confirmation on the next judicial day.

If the court or referee ratifies custody, the child may remain with the Department no longer than two judicial days unless a petition is filed, and the court awards temporary custody as discussed below. W. Va. Code § 49-4-303.

### B. Post-Petition Removal

Rule 16 establishes procedural protections that address circumstances when the Department, without a court order, takes physical custody of a child while a child abuse and neglect case is pending. Even if the Department has been previously granted legal custody of the child, it must immediately notify the court when it takes physical custody of (or removes) the child without a court order. In turn, the court must conduct a hearing within ten days to determine whether there is imminent danger to the physical well-being of the child and whether there is no reasonably available alternative to removal of the child. Rule 16(d).

### C. Required Findings for Removal Order

Any court order that authorizes the removal of the child from his or her home must include case-specific findings concerning the following:

1. There is reasonable cause to believe that the child is in imminent danger;

2. Continuation in the home is contrary to the welfare of the child;

3. Whether the Department made reasonable efforts to preserve the family or that an emergency situation made such efforts unreasonable or impossible; and

4. What efforts, if any, should be made to return the child to his or her home. Rule 16(e).

## *V. FILING A PETITION*

### A. Petitioners

Either the Department or a reputable person may file a petition based upon a belief that a child is abused or neglected. W. Va. Code § 49-4-601(a). The petition must be verified by a credible person who has knowledge of the facts. W. Va. Code § 49-4-601; Rule 17(a).

## B. Co-Petitioners

Two or more parties, including the Department and a non-abusing parent, may consent to bring a petition as co-petitioners against an allegedly abusive and neglectful parent. Rule 17(a). Rule 25a(e) of the Rules for Domestic Violence Proceedings indicates that a petitioner in a domestic violence protective order proceeding may also appear as a co-petitioner in a child abuse and neglect case, as long as both the petitioner and the Department agree. Although Rule 25a(e) identifies a petitioner in a domestic violence proceeding as a possible co-petitioner, this rule provides that it should not be construed to require a petitioner in a domestic violence case to appear as a co-petitioner in a child abuse and neglect case. Similarly, Rule 25a(e) further provides that it should not be construed to prevent a petitioner in a domestic violence case from filing an abuse and neglect petition if the Department does not do so.

Similar to Rule 25a(e) of the Rules for Domestic Violence Proceedings, Rule 13(b) of the Rules for Minor Guardianship Proceedings provides that a petitioner in a minor guardianship case may be allowed to appear as a co-petitioner in an abuse and neglect case, if both the Department and the minor guardianship petitioner agree. However, the minor guardianship petitioner may, but is not required to, appear as a co-petitioner with the Department.

When co-petitioners bring a petition, each party shall indicate which of the allegations that he or she is verifying. When a co-petitioner is a parent, he or she shall be appointed counsel who is separate from the prosecuting attorney. Rule 17(a).

After an initial abuse and neglect petition is filed, the Department, a parent or other reputable person may move to be joined as a co-petitioner. Rule 17(a). If allegations of abuse and neglect arise against a co-petitioner while a case is pending, the court may amend the petition and realign the parties. Rule 19(c).

## C. Venue

Either a reputable person or the Department may file an abuse and neglect petition in the county where the child normally resides. W. Va. Code § 49-4-601(a); Rule 4a. If the Department is the petitioner, the petition may be filed where the abuse and/or neglect occurred or where the custodial respondent or other respondents reside. However, a party may not file petitions in more than one county based upon the same set of facts. W. Va. Code § 49-4-601(a); Rule 4a.

## D. Contents of the Petition

A child abuse and neglect case is formally commenced with the filing of a verified petition. Rule 17(a). The petition must contain the following:

1. **Specific allegations of misconduct:** The petition should allege how the misconduct comes within the statutory definition of abuse and/or neglect. Rule 18(a), (c); W. Va. Code § 49-4-601(b); see also W. Va. Code § 49-1-201

(definitions relating to child abuse and neglect). In addition to the statutory references, the petition should allege specific conduct, including the time and place of the misconduct or whether the person responsible for the care of the child is incapacitated. Rule 18(c); W. Va. Code § 49-4-601(b). The petition should also contain a description of any supportive services already provided by the State to remedy the circumstances. W. Va. Code § 49-4-601(b); Rule 18(c).

The court must ensure that the facts in the petition are sufficiently specific; and the sufficiency of each petition should be judged individually. *State v. Scritchfield*, 280 S.E.2d 315 (W. Va. 1981) (holding that a petition is insufficient when it only alleges one fact: that the mother had been a mental patient from time to time). Mere conclusions alone are insufficient. One reason for the specificity requirement is to provide notice to the offending parents or custodians, thus, allowing them an opportunity to defend the factual allegations. See *Moore v. Munchmeyer*, 197 S.E.2d 648 (W. Va. 1973).

2. **Parties to the case:** The petition must name the following persons as parties to the case: each parent, guardian, custodian or other person standing *in loco parentis* to the allegedly abused or neglected child. The petition must state with specificity whether any of the persons allegedly abused or neglected the child or children. W. Va. Code § 49-4-601(b).

3. **Description of children:** The petition should also contain a description of all the children in the home or temporary care of the offending parents or custodians, including children who are not alleged to be abused or neglected. W. Va. Code § 49-4-602(a); Rule 18(b). All children in the home for whom relief is sought shall be made a party to the proceeding. W. Va. Code § 49-4-602(a)(3). This information should include, the name, age, sex, and the current location of the children. The petition need not include the location if disclosing the location would endanger the children or seriously risk disruption of the current placement following an emergency removal;

4. **The relief sought:** The petition should state the relief sought, such as temporary custody (W. Va. Code § 49-4-601) and any disposition permitted by West Virginia Code § 49-4-604, including the termination of parental rights. Rule 18(d); and

5. **Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA):** The petition or attached affidavit should contain the information required by the UCCJEA. W. Va. Code § 48-20-209; Rule 18(e).

The information required by the UCCJEA includes the children's current residence, the children's residences for the last five years, and the names and current addresses for persons with whom the children have lived for the last five years. Additionally, the petition should include information, if known, about any court proceeding that concerns custody, visitation, any domestic violence proceedings affecting the children, termination of parental rights and adoption of the children. Further, the petition should identify any

person, including any known address, who is not a party to the proceeding but has physical custody of the children or who claims legal rights to custody or visitation. W. Va. Code § 48-20-209(a). If the disclosure of any of this required information would jeopardize the safety of a party or a child, the court may seal the information in the court file upon the submission of an affidavit. W. Va. Code § 48-20-209(e).

## E. Amendments to Petition

The court may allow the petition to be amended at any time until the final adjudicatory hearing begins, provided that an adverse party is granted sufficient time to respond to the amendment. Rule 19(a). If the petition is amended after the conclusion of a preliminary hearing in which custody has been temporarily transferred to the Department or a responsible person, another preliminary hearing is not required. Rule 19(d). If new allegations of abuse and/or neglect arise after the final adjudicatory hearing, the allegations should be included in an amended petition, as opposed to filing another petition in a new case. When a petition is amended in this manner, the adjudicatory hearing must be re-opened for the purpose of hearing evidence on the new allegations. Rule 19(b).

## F. Initial Order

The initial order entered upon the filing of a petition must address:

### 1. First Hearing Date

The court must set an initial hearing date when the petition is filed. W. Va. Code § 49-4-601; Rule 20. If the court orders a temporary placement at the time of the filing of the petition, a preliminary hearing must be initiated within ten days. W. Va. Code § 49-4-602(a); Rule 22. Even if a transfer of custody is not made at the time the petition is filed, the court may set a preliminary hearing if facts alleged in the petition indicate existing imminent danger. Rule 20; W. Va. Code § 49-4-602(b). In any event, the court must give the respondents at least five days actual notice of the preliminary hearing. Rule 20; W. Va. Code § 49-4-602(b). If a preliminary hearing is not held, the adjudicatory hearing should be set to commence within 30 days of the filing of the petition. Rule 25. The court may grant a continuance for a reasonable period of time upon a showing of good cause, provided that the reasons for finding good cause are stated in the order. Rule 7.

### 2. Appointment of Counsel

The initial order must include appointment of counsel for the child. W. Va. Code § 49-4-601(f). The parents, guardians, legally established custodians or persons standing *in loco parentis* to the child also have a right to be represented by counsel in any child abuse and neglect proceeding. The initial order shall appoint counsel for any parent, guardian, custodian or person standing *in loco* parentis to the child if such a person does not have retained counsel. The order should provide, consistent with the statute, that the appointed representation will only continue

after the first hearing if the represented party submits a financial affidavit showing an inability to pay for services of counsel. W. Va. Code § 49-4-601(f).

Counsel for other parties should only be appointed upon request and upon the filing of a qualifying financial affidavit. W. Va. Code § 49-4-601(f).

In no circumstance shall a lawyer represent both the child and any of the parents or custodians. A lawyer may represent multiple parents or custodians only if the parties consent to the multiple representations after full disclosure and consultation by the lawyer regarding possible conflicts. The lawyer must also assure the court that his or her professional judgment will not be impaired during the representation of multiple clients. However, a parent who is a co-petitioner is entitled to his or her own attorney. One lawyer may represent multiple children in the same matter. W. Va. Code § 49-4-601(f).

Pursuant to West Virginia Code § 49-4-601(a) and Rule 17, an individual may serve as a co-petitioner with the Department, provided that both parties consent. When a parent has been named as a co-petitioner with the Department, he or she is entitled to the appointment of his or her own counsel, separate from the prosecuting attorney. Rule 17(a); W. Va. Code § 49-4-601(f).

Counsel appointed for any of the parties must complete at least eight hours of CLE training per each two-year reporting period on child abuse and neglect procedure and practice. Any attorney appointed to represent a child must first complete training on representing children that has been approved by the Supreme Court Administrative Office. If no attorney is available who has completed the required training, the court may appoint a competent attorney who has demonstrated knowledge of child welfare law. W. Va. Code § 49-4-601(g).

3. Appointment of CASA

In the areas of the State where a Court-Appointed Special Advocate (CASA) Program is functioning, the court may appoint a CASA representative to advocate for the child. If a CASA representative is appointed, the court should provide him or her with a copy of the petition and the notice of the first hearing. Rule 20. The CASA representative shall by such appointment have access to information and court filings, receive notice of hearings and copies of orders, and be afforded the right to be heard. Rules 3(o) and 52.

4. Temporary Custody

The court may order the temporary transfer of custody to the Department, or a responsible person based solely on the facts alleged in the petition. W. Va. Code § 49-4-602. The transfer of custody may only be ordered if the Court makes the following specific findings:

a. **Imminent danger**: The court must find that there exists imminent danger to the physical well-being of the child (See W. Va. Code § 49-1-201); *and*

b. **No reasonable alternatives**: The court must also find that no reasonable alternatives to removal exist. Some reasonable alternatives that the court may consider are medical, psychological, psychiatric, family preservation, or homemaking services in the child's present custody setting.

When the court makes a determination granting temporary custody based on the petition, it must not allow placement of the child in the household of the alleged abusing person, unless there is a judicial order precluding the offending person from residing in or visiting the home. A preliminary hearing must be initiated within ten days of the continuation (see Preliminary Hearing Section below) or transfer of out-of-home custody. Rule 22. Even if the allegations of abuse or neglect do not pertain to some of the children in the home, the court should also remove those children if the court finds they are in imminent danger and there are no reasonable alternatives to removal. W. Va. Code § 49-4-602(a).

When the court orders the temporary change of custody of a child based on the facts alleged in the petition, the order must also contain findings:

a. That continuation in the home is contrary to the best interest of the child, and why; and

b. Whether or not the Department made reasonable efforts to prevent the placement, or that an emergency situation exists making such efforts unreasonable or impossible, or that reasonable efforts were not required due to certain aggravating circumstances specified by statute. See W. Va. Code §§ 49-4-105; 49-4-602(d).

The order may also contain a direction to the Department or any other person to become involved in the process in order to facilitate the reunification of the family. W. Va. Code § 49-4-602(a).

5. Visitation While Case is Pending

*For a discussion of post-termination visitation, see Overview Section XIV. Post-Termination Visitation.*

If the court transfers custody of the children in the initial order, it may grant or deny visitation or other contact in a manner consistent with the child's best interest and well-being. The person requesting visitation or other contact, such as telephone or video calls, e-mail or other communication, shall inform the court of her or his relationship with the child and the amount of previous contact with the child. If the court orders supervised visitation, the court should consider the child's age, condition, and whether the surroundings are a safe, dignified and otherwise suitable place for visitation. When siblings are placed separately, visitation between siblings should continue and a plan for regular contact should

be implemented, unless the court finds that the visitation and contact is not in the child's best interests. Rule 15.

In addition to visitation that is requested pursuant to Rule 15, the circuit court has jurisdiction to address requests for grandparent visitation if an abuse and neglect petition concerning the same child or children is pending. W. Va. Code §§ 48-10-401(c) and 402(d). Otherwise, petitions or motions for grandparent visitation fall within the family court's jurisdiction.

## G. Relative or Fictive Kin Placements

West Virginia Code § 49-4-601a has established a legislative preference for placing children with relatives[4] or fictive kin[5] if an out-of-home placement is necessary, and it has also established a procedure for notification to such persons and to the court. This statute reflects the federally established preference for placement with relatives and the requirement that the Department to conduct a diligent search for a child's relatives and provide notice to the relative that the child had been placed in foster care. See 42 U.S.C. § 671(a)(19). It should be noted that West Virginia Code § 49-2-126(a) refers to a child having a right to a kinship placement, when such placement is appropriate. However, the West Virginia Supreme Court held that this statute does not establish an adoptive placement preference for relatives. Syl. Pt. 6, *In re G.G.*, 2023 W. Va. Lexis 208.

To implement this preference, the Department is required to conduct a search for such persons, relatives or fictive kin, and provide notice of the child's removal from his or her home and placement in foster care. This search must be conducted within days of a child's removal. W. Va. Code § 49-4-601a. Within seven days of the filing of the petition, the Department is required to file a list of such persons and indicate whether or not any of them are willing to serve as a placement for the child. In turn, any party to the case may file a list of any additional relatives or fictive kin, including their addresses, within seven days of the Department's filing. *Id.*

The Department has a duty to investigate and determine whether any of the identified persons could serve as a placement for the child. Within 45 days of the filing of the petition, the Department is required to file a pleading that indicates its determinations concerning whether such persons could serve as a placement. W. Va. Code § 49-4-601a.

The primary benefit of this procedure is to locate and notify relatives or fictive kin of the child's placement as soon as possible. Another benefit is to provide notice to the court and all parties as to any relatives or fictive kin with whom the child has a bond and could

[4] A relative of a child "means an adult of at least 21 years of age who is related to the child, by blood or marriage, within at least three degrees." W. Va. Code § 49-1-206.

[5] The term "fictive kin" is defined as: "an adult of at least 21 years of age, who is not a relative of the child, as defined herein, but who has an established, substantial relationship with the child, including but not limited to, teachers, coaches, ministers, and parents, or family members of the child's friends." W. Va. Code § 49-1-206.

serve as placement resource. Further, it should prevent situations in which a child develops a significant bond with a foster parent during a placement only to have relatives or fictive kin raise a claim for custody later in a case. See, e.g., *Kristopher O. v. Mazzone*, 706 S.E.2d 381 (W. Va. 2011); *K.L.*, 826 S.E.2d 671.

### H. Answer

An adult respondent must file and serve a verified answer upon the petitioner and his or her counsel no later than ten days after being personally served with the petition. Rule 17(b). A respondent who is served by publication or other substituted service shall file his or her answer within the time allowed for such substituted service. Although a respondent is required to file an answer, the petition shall not be taken as confessed. Rule 17(a). It is not necessary, however, to continue a preliminary hearing when an answer has not been filed or served. Rule 17(b).

## *VI. PRELIMINARY HEARING*

### A. When Held

If the court orders the child or children to be temporarily removed from parental custody at the time the petition is filed, a preliminary hearing must be initiated within ten days. W. Va. Code § 49-4-602; Rule 22(a). If a transfer of custody is not ordered at the time the petition is filed, the court *may* schedule a preliminary hearing if facts alleged in the petition indicate imminent danger to a child. W. Va. Code § 49-4-602(b).

### B. Notice

Notice of the preliminary hearing date, time, and place must be served upon on the following parties and persons entitled to notice and a right to be heard: known parents, any other custodian, and guardian or other person standing *in loco parentis* to the child, any foster or preadoptive parent, any relative providing care for the child, the Department, and any CASA representative who has been appointed. Rules 3(o) and 20. Notice at least five days in advance of the hearing is required. Rule 20. The computation of the time periods shall be in accordance with Rule 6(a) of the West Virginia Rules of Civil Procedure. Rule 7.

The respondents should be served in person if such service is readily obtained. If personal service is not reasonably obtainable, then a respondent may be served by certified mail, addressee only, return receipt requested directed to the last known address. In either case, service should include the notice of hearing and a copy of the petition. If the party cannot be served by personal service or certified mail, the party may be served by publication (Class II legal advertisement). W. Va. Code § 49-4-601(e).

### C. Temporary Custody

In general, the court should consider at the preliminary hearing whether to order (or continue) a temporary transfer of custody. If the court finds that the child is in imminent

danger at the preliminary hearing, it may order temporary custody of the child to the Department or to another responsible person. W. Va. Code § 49-4-602(b). At the conclusion of the preliminary hearing, the court must determine the following:

1. Whether there is reasonable cause to believe that the child is in imminent danger;

2. Whether continuation in the home is contrary to the welfare of the child, and the reasons for this determination;

3. (a) Whether the Department made reasonable efforts to preserve the family and to prevent the removal of the child (and what efforts were made); or (b) Because an emergency situation existed, such efforts were unreasonable or impossible; or (c) That reasonable efforts were not required due to aggravating circumstances. W. Va. Code §§ 49-4-105; 49-4-602(d);

4. Whether the Department made reasonable accommodations in accordance with the Americans with Disabilities Act to disabled parents to allow them meaningful access to reunification and family preservation services. W. Va. Code § 49-4-602(b);

5. What efforts, if appropriate, should be made by the Department to facilitate the child's return to the home. W. Va. Code § 49-4-602(b); Rule 3(g). (See also Special Procedures Chapter 4.); and

6. Whether there are any appropriate relatives or fictive kin that could serve as a placement. W. Va. Code § 49-4-601a.

The court may transfer the temporary custody of the child for up to 60 days (or longer when an improvement period is granted). W. Va. Code § 49-4-602(b).

### D. Waiver or Stipulation of Preliminary Hearing

An adult respondent may waive his or her right to a preliminary hearing or stipulate to certain matters set forth in the petition, such as whether the child was in imminent danger. Before a court may accept such a waiver or stipulation, it must determine that the parties and persons entitled to notice and a right to be heard understand and voluntarily consent to the waiver or stipulation. Additionally, the court must conclude that the waiver or stipulation meets the purpose of the governing rules and statutes and is in the child's best interests. The court must resolve any objection to a waiver or stipulation raised by a party, or a person entitled to notice and an opportunity to be heard. The preliminary hearing order must include the waiver or any specific stipulations. Rule 22(c).

### E. Appointment of Counsel

At the initial hearing, the court shall determine whether any parties, other than the children, have retained counsel and are financially able to retain counsel. Any person

(parent, guardian, custodian or other person standing *in loco parentis* to the child) who is alleged to have abused or neglected the child has the right to appointed counsel at every stage of the proceedings, if he or she is financially unable to retain counsel. W. Va. Code § 49-4-602 (f)(4).

A co-petitioner who is a parent is entitled to his or her own counsel, and counsel may be appointed for a co-petitioner provided that he or she is financially eligible for appointed counsel. The court should require any person to complete the necessary forms to determine whether they are entitled to appointed counsel. Rule 17(c)(5). Although this subsection limits court-appointed attorneys to persons who are alleged to have abused or neglected the children, the court has the option to appoint counsel for any unrepresented party if the court finds that appointing counsel is necessary to satisfy principles of fundamental fairness. W. Va. Code § 49-4-602(f).

In most cases, an attorney may not represent more than one party to the case. However, an attorney may represent both parents or custodians if the attorney fully discloses any possible conflict to the parties and the attorney informs the court that he or she can represent the clients without impairing his or her professional judgment. W. Va. Code § 49-4-602(f)(5).

### F. Other Matters

The court may order an improvement period consistent with West Virginia Code § 49-4-610(1) (pre-adjudicatory improvement period). The court may also require a party to pay child support. (See Special Procedures Chapter 4.) The court must require the parents to complete necessary financial forms to determine the amount of any child support obligation, and Title IV-D and IV-E eligibility. Rule 17(c)(5). The circuit court may not transfer or remand the case or a portion of it to the family court for the entry of a support order. Syl. Pt. 3, *DHHR v. Smith*, 624 S.E.2d 917 (W. Va. 2005). Unless waived by the parties, the court shall make a transcript of the proceeding. The rules of evidence apply to all hearings in child abuse and neglect cases, including preliminary hearings. W. Va. Code § 49-4-601(k).

## *VII. MULTIDISCIPLINARY TREATMENT TEAMS*

### A. Convening MDTs

A multidisciplinary treatment team (MDT) must be convened within 30 days after the petition is filed. Rule 51; W. Va. Code § 49-4-405. Rule 51 refers to the court causing an MDT to be convened, and West Virginia Code § 49-4-405 refers to the Department convening an MDT. The practical way to interpret these two provisions is that the Department case manager should convene the MDT. However, the court should provide any necessary assistance or oversight to ensure that an MDT is convened. For example, the court could include the dates for MDT meetings in an order. In addition, any case manager for a child or family may obtain an order from the court to schedule a meeting and to direct attendance at a meeting. W. Va. Code § 49-4-403(b).

## B. Multidisciplinary Treatment Team Members

The MDT shall include the following individuals:

1. The child or family's case manager in the Department;

2. The child's parents or guardians;

3. Any co-petitioner;

4. Any adult respondent;

5. The attorneys representing any of the parties;

6. The child, unless the team determines that the child's participation is inappropriate (Rule 8(d));

7. The child's counsel or guardian *ad litem*;

8. The prosecuting attorney, or his or her designee;

9. A member of a child advocacy center (If a child has been processed through one of the center's programs, a representative from the center shall be included; otherwise, a representative is included when appropriate);

10. An appropriate school official;

11. The managed care case coordinator;

12. Any other agency, person or professional who may be helpful to the MDT's efforts, such as any CASA representative, a domestic violence service provider or any other service providers; and

13. Foster parents, preadoptive parents, or custodial relatives providing care for the child. Rules 3(o) and 51; W. Va. Code § 49-4-405.

If a party's parental rights have been terminated, that party and his or her counsel, unless otherwise ordered by the court, should not be given notice of any MDT meeting and do not have the right to participate in an MDT meeting. W. Va. Code § 49-4-405(b).

Members may participate by telephone or video conferencing. W. Va. Code § 49-4-403(b). Each team director must keep records of attendance and case discussions for each meeting. W. Va. Code § 49-4-407. The Department may designate a person, other than the case manager, to facilitate a treatment team meeting.

### C. Use Immunity for Statements

To facilitate the development of case plans for children and families, the Legislature has provided use immunity for subsequent criminal prosecutions, with the exception of prosecutions for perjury or false swearing, if a respondent or co-petitioner admits any underlying allegations of abuse or neglect in a multidisciplinary treatment team meeting. W. Va. Code § 49-4-405(e). This statutory provision was designed to address the Supreme Court's observation that the immunity provided to adult respondents for court-ordered examinations under various statutes would **not** extend to statements made during MDT meetings. *In re Daniel D.*, 562 S.E.2d 147, 159 (W. Va. 2002). Subsection (e) has, therefore, modified *Daniel D.* with regard to statements made during MDT meetings.

### D. Purpose of Multidisciplinary Treatment Teams

The purpose of the MDT is to assess, plan, implement, and monitor a comprehensive, individualized service plan for children in abuse and neglect proceedings. W. Va. Code § 49-4-405. See also W. Va. Code § 49-1-207. The MDT will be involved throughout the circuit court proceedings until permanency is achieved for the child, and it should assist the court with quarterly status review hearings. W. Va. Code § 49-4-110. The duties of the multidisciplinary treatment team shall not be abrogated by an adoption review committee or other administrative process of the Department. Rule 51(c). MDT recommendations and reports are most often reviewed by the court at status conferences held during improvement periods, at disposition, and at permanent placement review conferences.

If the MDT provides the court with a recommended service plan prior to disposition (W. Va. Code § 49-4-403(b)), the court must review the service plan to determine if its implementation is in the child's best interests. If the court decides not to adopt the plan or the members cannot agree on a plan, it must hold a hearing within ten days of such determination to hear from the MDT regarding its rationale for a proposed plan or any objections. If the court does not accept the plan, it must make specific written findings as to why the MDT's recommended service plan was not adopted. W. Va. Code § 49-4-404. An MDT recommendation (and any resulting hearing under the circumstances just discussed) is not required for any temporary out-of-home placement in an emergency circumstance or for assessment purposes. W. Va. Code § 49-4-412. See also Overview Section XI. Child and Family Case Plans.

## *VIII. IMPROVEMENT PERIODS*

A court may order an improvement period during the proceeding. W. Va. Code § 49-4-610. The purpose of an improvement period is to give a respondent the opportunity to rectify the circumstances that gave rise to the child abuse or neglect proceeding. Improvement periods may be custodial or non-custodial. However, if the child was removed from his or her home because of imminent danger, the child should remain in an out-of-home placement "until the circumstances which constitute the imminent danger have ceased to exist or the alleged abusing person has been precluded from residing in

or visiting the home." Syllabus, in part, *In the Interest of Renae Ebony W.*, 452 S.E.2d 737 (W. Va. 1994). See also Syl. Pt. 2, *In the Interest of Betty J.W.*, 371 S.E.2d 326 (W. Va. 1988).

When any improvement period is granted, the burden of initiation and completion of all its terms rests with the respondent seeking the improvement period. The court may, however, direct the Department to pay expenses associated with the services provided if the respondent is unable to bear the costs. W. Va. Code § 49-4-610(4). The respondent will generally be required to execute a release of all medical information, to permit access to such records by the Department and counsel. W. Va. Code § 49-4-610(4). Finally, the Department is required to monitor the progress of the respondent during the improvement period, and report to the court any failures to comply. If such failure is substantiated, the court should forthwith terminate the improvement period. W. Va. Code § 49-4-610(7).

Although the Court may grant different types of improvement periods and extensions as discussed below, any combination of improvement periods should not result in a child remaining in foster care more than 15 of the most recent 22 months. W. Va. Code § 49-4-610(9). The reason for this limitation is to ensure compliance with federal guidelines established by the Adoption and Safe Families Act. However, a court may allow this time limit to be extended if it finds compelling circumstances by clear and convincing evidence that it is in the child's best interests to do so. W. Va. Code § 49-4-610(9). See also W. Va. Code § 49-4-605.

### A. Pre-adjudicatory Improvement Periods

At any time between the filing of the petition and an adjudication, the court may grant a respondent a pre-adjudicatory improvement period. The improvement period may only be granted after the respondent files a written motion requesting the improvement period and upon the demonstration by the respondent, by clear and convincing evidence, that he or she is likely to fully participate in the improvement period. Further, the court must set forth on the record the terms of the improvement period. The improvement period may last no longer than three months.

Any order granting an improvement period must provide, in addition to those items mentioned above:

1. That the Department submit a family case plan within 30 days; and

2. That a status conference be held within 60 days; or

3. That the Department submit a written progress report within 60 days, in which case a status conference must be held within 90 days. W. Va. Code §§ 49-4-610(1); 49-4-110; Rule 23.

The MDT must attend the status conference and report as to progress and developments in the case. The court may also require or accept reports or statements from other persons. The court may, at any time prior to its completion, revoke the improvement

period upon the motion of any party if the respondent has failed to comply with its terms or if the parties show an inability to remediate the circumstances that gave rise to the abuse and neglect. Rule 23; W. Va. Code § 49-4-610(7).

### B. Post-adjudicatory Improvement Periods

The court may order an improvement period after a final adjudicatory hearing provided that the findings required for a pre-adjudicatory improvement period (see above) are made, and that the order contains the same provisions as those required for a pre-adjudicatory improvement period. Additionally, the court must find that the respondent has not previously been granted an improvement period, or that since the initial improvement period there has been a substantial change in circumstances that would render it likely that the respondent will participate in a further improvement period. W. Va. Code § 49-4-610(2); Rule 37.

The post-adjudicatory improvement period may be for up to six months. An extension of up to three additional months may be granted by the court based upon findings that: the respondent has substantially complied with the improvement period; that continuation will not substantially impair the ability of the Department to permanently place the child; and that an extension is in the best interest of the child. W. Va. Code § 49-4-610(2) and (6).

During a post-adjudicatory improvement period, the Department may proceed with reasonable efforts to place the child for adoption or with a legal guardian or to find other permanent placement. Rule 37. The development of a concurrent plan is considered to be in a child's best interests. Syl. Pt. 5, *In re Billy Joe M.*, 521 S.E.2d 173 (W. Va. 1999).

A hearing is to be held at the end of an improvement period, and it must be conducted no more than 30 days after the conclusion or termination of an improvement period. W. Va. Code § 49-4-610(8).

### C. Disposition Improvement Periods

The court may grant an improvement period as a disposition. The required findings, order provisions, and time frames are identical to a post-adjudicatory improvement period. W. Va. Code § 49-4-610(3). Within 30 days after the end of the improvement period, the court must conduct a hearing to determine the final disposition of the case. Rule 38; W. Va. Code § 49-4-610(8).

### D. Timing

The hearings scheduled in relation to an improvement period may only be continued for good cause. The party seeking the continuance must file a written motion and serve the motion on all parties. If the court grants such a continuance, the order must state the future date when the hearing will be held. W. Va. Code § 49-4-610(8)(A). The hearing held at the end of the improvement period should be held as close to the end of the period as possible. In no circumstances should the hearing at the end of the improvement period

be held more than 30 days after the termination of the improvement period. W. Va. Code § 49-4-610(8)(B); Rule 38.

## *IX. QUARTERLY STATUS REVIEW HEARINGS*

West Virginia Code § 49-4-110[6] requires a circuit court to conduct status review conferences for each child in foster care on a quarterly basis commencing three months from the date a child is placed the Department's custody. The purpose of the hearing is to review the following issues: the safety of the child, whether continued placement is necessary and appropriate, compliance with the case plan, the progress towards remedying the conditions of abuse and neglect, and the likely date for reunification, placement in an adoptive home, in a legal guardianship, or other appropriate permanent placement. W. Va. Code § 49-4-110(a). Although the court is required to conduct these reviews, a court may conduct them in conjunction with other required hearings, such as a status review during an improvement period or a permanent placement review conference. W. Va. Code § 49-4-110(d); Rule 54. See also W. Va. Code §§ 49-4-610(1)-(3); Rules 23, 37 and 39.

This quarterly review requirement applies to both children and to "transitioning adults." Pertinent to abuse and neglect proceedings, the term "transitioning adult" means individuals who have reached the age of 18 but are under 21 years of age and have entered into a contract with the Department to continue in an educational, training or treatment program which was initiated prior to the individual's 18th birthday. W. Va. Code § 49-1-202; Rule 54. Although the statute (W. Va. Code § 49-4-110(b)) refers to a transitioning adult who remains in foster care, the incorporating reference to the definition in Section 49-1-202 makes it clear that it applies to a transitioning adult who is in the legal and/or physical custody of the Department at the time he or she turns 18, and, for example, is participating in a residential treatment program or is attending school under an independent living arrangement. The court's duty to conduct such reviews will end when permanency is achieved or when the individual turns 21.

## *X. ADJUDICATORY HEARING*

The purpose of the adjudicatory hearing is to allow the parties to present evidence to support or refute the allegations of abuse and neglect.

All parties must be provided a meaningful opportunity to be heard. This includes the right to present and cross-examine witnesses. Unless waived, a transcript shall be made available to all the parties. The rules of evidence apply to final adjudicatory hearings. W. Va. Code § 49-4-601(h) and (k). Foster parents, preadoptive parents, and relative caregivers shall also be afforded a meaningful opportunity to be heard.

At the conclusion of the hearing, the court must determine whether the child is abused or neglected as defined by West Virginia Code § 49-1-201. If applicable, the court may find

[6] Although this statute, West Virginia Code § 49-4-110, applies to children, juveniles or transitioning adults who are in the Department's custody as a result of an abuse and neglect case or a juvenile case, the discussion above focuses on abuse and neglect cases.

that a parent, guardian, or custodian of the child is a battered parent or is a non-abusing parent. W. Va. Code §§ 49-1-201; 49-4-601(i). The court's findings must be based on clear and convincing proof that the conditions supporting the petition existed at the time the petition was filed. W. Va. Code § 49-4-601(i); Rule 25. *See also Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388 (1982) (Due process requires clear and convincing evidence before termination of parental rights). After an adjudicatory hearing, a parent or custodian may appeal an adverse ruling. W. Va. Code § 49-4-601(k).

### A. Hearing Time Frames

If the child was previously placed in the temporary custody of the Department or a responsible person without an improvement period having been awarded to a respondent, the hearing must be held within 30 days of the temporary custody order entered following the preliminary hearing. If a pre-adjudicatory improvement period was granted, the hearing must be held within 30 days after the end of the improvement period. W. Va. Code § 49-4-601(j); Rule 25. If no temporary custody was ordered, the hearing must be held within 30 days after the filing of the petition. Rule 25.

### B. Order

Upon conclusion of the adjudicatory hearing, the court must enter an order of adjudication containing findings of fact and conclusions of law. The order must be entered within ten days of the conclusion of the hearing. Rule 27. Provided that the court found that child was an abused or neglected child, the order must require the Department to compile the child's case plan, which includes a permanency plan. W. Va. Code § 49-4-604(a). The order should also include any provisions for an improvement period, if applicable.

### C. Stipulated Adjudication and Uncontested Petitions

On those occasions where the respondent does not contest the petition or the parties agree upon a stipulated adjudication, the court may enter an adjudication order without taking evidence. Any stipulated or uncontested adjudication order must include:

1. Agreed-upon facts that support the court's involvement, including the respondent's conduct, condition, or problems; and

2. A statement of the respondent's problems to be addressed at the final disposition hearing. Rule 26(a).

The court must ensure that the parties fully understand the consequences and the content of the stipulated adjudication and must find that the parties have voluntarily consented to the stipulation. The court must further find that the stipulation or uncontested adjudication is in the best interest of the child. Rule 26(b).

### D. Placement with Relatives or Fictive Kin

As required by West Virginia Code § 49-4-601a, the Department is required to file a pleading or other document that includes its determination as to whether any relatives or fictive kin should serve as a temporary placement. This should be filed within 45 days of the filing of the petition. Most typically, this issue should be addressed at the adjudicatory hearing.

## *XI. CHILD AND FAMILY CASE PLANS*

A case plan includes comprehensive information about a child and his or her family and should also include plans for addressing the conditions of abuse and neglect. As a matter of primary importance, a case plan should address the safety of the child and the effects of abuse and neglect on the child. For example, a case plan should explain the terms of any safety plan if a child remains at home or should explain how an out-of-home placement assures a child's safety. It also must include a permanency plan and concurrent plan for the child. If the child requires services, such as therapy, a plan for providing the services should be included in the case plan. A case plan, if the Department is required to make reasonable efforts to preserve the family, must include a plan for addressing the adult respondents' role in the conditions of abuse and neglect. For that reason, a treatment plan for adult respondents must be included in a family case plan. In addition to these issues, a case plan should summarize important information about a child or his or her family. For example, it should include information about the child's health, any special needs and relatives who were contacted as potential placements. Finally, a case plan should also detail the care and development of a child. For example, it should address the child's education, any visitation plan for the child, any recommended evaluations and a transition plan, if the child is 16 years of age or older. Case plans, their contents and the times that they must be filed with the court are governed by state and federal law. 42 U.S.C. § 675; W. Va. Code §§ 49-4-604; 49-4-610; 49-4-408; Rules 23, 28 and 37.

The West Virginia Supreme Court and the Department have adopted a form for case plans that includes all information that must be included in a case plan. This form should be completed and submitted to the court at the times required by law. Rule 28.

Although the relevant rules and statutes refer to family and child case plans, these types of case plans are similar and, ideally, should contain much of the same information. The primary difference between a child and family case plan arises when reunification of the child is **not** the permanency plan for the child. If reunification is not the permanency plan for the child, the section of the plan that emphasizes treatments for and expectations of adult respondents will be omitted. As discussed below, the times for submission of child and family case plans are different.

### A. Contents of Case Plans

1. **General requirements.** The following requirements should be included in all case plans.

a. A statement of necessary changes that will correct problems that led to Department intervention and a timetable for the achievement of the identified changes;

b. A description of the type of services that will assist the family in correcting the identified problems, along with an explanation of the appropriateness and availability of suggested services; and

c. The permanency plan and concurrent permanency plan for the child, which is designed to achieve timely permanency in the least restrictive setting available. Timelines for implementing the permanency plan must be included. If the permanency plan is another planned permanent living arrangement (APPLA), the Department must document the efforts it has made to place a child permanently with a parent, relative, guardianship or adoptive placement.

2. **Placement of the child.** Both child and family case plans should provide detailed information about the placement of the child. The following information must be incorporated into either type of plan:

a. The terms of a safety plan or services provided to the family if the child has remained in his or her home;

b. A description of any recommended out-of-home placement, which details the distance from a child's home and whether the placement is the least restrictive, i.e., most family-like one available;

c. A description of the efforts made by the Department to prevent placement or an explanation as to why such efforts were not viable;

d. A description of the efforts the Department made to keep the child enrolled in the school he or she attended at the time of removal when it selected a particular out-of-home placement for a child. Details should show that the Department coordinated with local educational agencies concerning this goal, including consultation with local school authorities concerning reasonable transportation;

e. The location of any siblings, the reason if the siblings are separated, and steps required to unite them if possible and plans for sibling visitation;

f. A description of friends and relatives who were contacted about providing a suitable and safe permanent placement for the child;

g. The steps taken to ensure that a foster family follows the "reasonable prudent parent standard," and has allowed the child regular opportunities to engage in age or developmentally appropriate activities; and

h. Any plan for child's visitation with the adult respondents and other contact with the child.

3. **Treatment plan for adult respondents.** A family case plan must include the following information that primarily addresses corrective actions for adult respondents:

a. A description of services for the child, parents, and foster parents or relative caregivers that will assist the family in remedying the identified problems, including an explanation of the appropriateness and availability of suggested services. Rule 28(a)(2);

b. The case plan should detail reasonable accommodations under the Americans with Disabilities Act provided to parents with disabilities that allows them meaningful access to reunification and family preservation services;

c. A description of behavioral changes that must be evidenced by the respondents to correct the identified problems. Rule 28(a)(3); and

d. The ability of parents to contribute financially to placement.

The court should see that the case plan can be easily understood by the participants accountable under the plan. In addition, the court shall inform the participants of the consequences likely to follow from their failure to meet any of the goals listed in the case plan. The plan may be modified with court approval as appropriate during the course of its implementation. W. Va. Code § 49-4-408(a)-(b).

4. **Information related to the care and education of the child.** In addition to the treatment of adult respondents and considerations about placement, case plans should include specific information about a child's health and education. Of particular note, case plans should contain the following information:

a. Any special needs of the child and how they will be met in placement;

b. A description of the educational placement of the child, including a consideration of continued attendance at the school in which the child was enrolled before removal or efforts to ensure that educational records have been transferred to any new school;

5. **Information related to transition into adulthood.** For all children who have reached 16, case plans must include information about transition planning and services.

a. For a child who is age 16, services that will assist with transition into adulthood must be identified;

b. A child who is age 17 is entitled to immediate assistance with the development of a personalized transition plan. It must include specific options for housing, health insurance, education, local opportunities for mentors, continuing support services, work force support and employment services; and

c. A child who is age 17 and who also has special needs is entitled to an adult services worker on his or her MDT team. The MDT should coordinate with other transition planning teams, such as individualized education planning (IEP) teams.

6. **When termination of parental rights is requested**.

a. A description of the efforts made by the Department to prevent placement or an explanation as to why offering services was not a viable option;

b. A description of efforts made towards reunification or why these efforts should not be made; and

c. Any objections by any party to the case plan.

## B. Participants in the Development of Case Plans

Although the Department has the primary responsibility for the preparation and filing of case plans, parents, their counsel, a child who is capable of expressing his or her preferences, the child's counsel, relative caregivers, foster parents and other multidisciplinary treatment team members should assist with the development and preparation of the case plan. W. Va. Code §§ 49-4-405; 49-4-408; Rules 23, 28 and 37.

## C. Filing of Case Plans

1. **Family Case Plan:** A family case plan must be filed with the court within 30 days after an improvement period is granted. W. Va. Code § 49-4-610(1)(D), (2)(E) and (3)(E); Rules 23(a) and 37. It should be served on all parties and persons who are entitled to notice and a right to be heard.

2. **Child Case Plan:** A child's case plan must be provided to parties, their counsel and persons entitled to notice and the right to be heard at least five judicial days before the disposition hearing. Rule 29. The time for the submission of a child case plan is sometimes confusing because a possible disposition is an improvement period. A practical way to avoid the duplication of efforts would be for the multidisciplinary treatment team to prepare a case plan that includes the components of a family case plan when it is anticipated that a dispositional improvement period will be granted. Alternatively, the adult respondents could waive the right to the submission of a case plan prior to disposition.

3. **Modifications:** Once a case plan has been filed, it is not necessary to file another copy of the case plan at each review hearing. Updated information may

be filed with the court in the form of a court summary or progress report. The West Virginia Supreme Court and the Department have adopted a progress report which can summarize the status or progress of a case. A revised or modified case plan, however, should be filed with the court.

### D. Objections to Case Plans

A party may object to the child's case plan at the disposition hearing. In each case, the court must enter an order:

1. Approving the plan;

2. Ordering compliance with all or part of the plan;

3. Modifying the plan in accordance with the evidence presented at the hearing; or

4. Rejecting the plan and ordering the Department to submit a revised plan within 30 days. If the court rejects the child's case plan, the court shall schedule another disposition hearing within 45 days. Rule 34.

## *XII. DISPOSITION HEARING*

### A. Timing

The court shall begin the disposition hearing within 45 days of the entry of the adjudicatory order if no post-adjudicatory improvement period has been granted, or within 30 days after the post-adjudicatory improvement period ends. W. Va. Code § 49-4-610(8); Rule 32.

The parties may choose to have an accelerated disposition hearing. In order to proceed with an accelerated disposition hearing, the following requirements must be met: 1) the parties must agree to the accelerated hearing; 2) the child case plan must have been completed and provided to the court and the parties, unless the parties have waived the right to the filing of child's case plan before disposition; and 3) notice of the disposition hearing was either provided or was waived by the parties. Rule 32.

### B. Disposition

At the disposition hearing, the court must give the parties an opportunity to be heard. The rules of evidence apply in the hearing, and the respondents shall be given the opportunity to present and cross-examine witnesses. W. Va. Code § 49-4-601. At the conclusion of the hearing, the court must make findings of fact and conclusions of law on the record or in writing. According to West Virginia Code § 49-4-604(c)(1)-(6), the court must give precedence to dispositions in the following sequence:

1. Dismiss the petition;

2. Dismiss the petition *and* refer the child, the abusing parent, and/or battered parent to a community agency for assistance;

3. Return the child to the home under the supervision of the Department;

4. Order terms of supervision;

5. Commit the child to the temporary custody of the Department, a licensed private welfare agency or a suitable person who may be appointed guardian by the court; or

6. Terminate parental rights with the option of placing the child in the sole permanent custody of a non-abusing parent, including a battered parent.

Alternatively, under appropriate circumstances, the court may grant a dispositional improvement period prior to making a final disposition in accordance with the earlier-discussed options. W. Va. Code § 49-4-610(3). (See Section VIII. C. above.)

**C. Order**

The court must enter an order within ten days of the conclusion of the hearing. The order must set forth findings of fact and conclusions of law. Rule 36(a). The court should include the following, if applicable, in the dispositional order:

1. The date and time for the permanency hearing, if scheduling would be appropriate;

2. The date and time for the first permanent placement review conference or review of an improvement period;

3. The terms of visitation;

4. Services provided to the child and the family;

5. Restraining orders controlling the conduct of any party that may frustrate the disposition order;

6. Corrective actions that any parties must take to alleviate problems;

7. Conditions regarding the placement of the child, including any special needs the child may have;

8. Steps to unite the child with siblings and/or steps to maintain contact between siblings; and

9. The terms and conditions of the child's case plan or family case plan. Rule 36(b), (c).

## D. Improvement Period

The court may order an improvement period in lieu of making a final disposition at the dispositional hearing. An improvement period ordered at the dispositional hearing may not exceed six months, with a 3-month extension being permissible upon findings of substantial compliance; continuation will not significantly impair achievement of permanent placement; and that the extension is in the child's best interest. If the court orders the improvement period, it should hold a final disposition hearing within 30 days after the improvement period ends. W. Va. Code § 49-4-610. If the court finds that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected, the court may not order an improvement period. Syl. Pt. 3, *In re Darla B.*, 331 S.E.2d 868 (W. Va. 1985). A court should only grant an improvement period if it is in a child's best interests. Syl. Pt. 3, *State ex rel. DHHR v. Dyer*, 836 S.E.2d 472 (W. Va. 2019).

## E. Temporary Custody

The court may order as a disposition that the child be committed to the temporary custody of the Department, a private child welfare agency, or a responsible person. W. Va. Code § 49-4-604(c)(5). When ordering this type of disposition, the court may not, however, delay the achievement of permanency for a period that exceeds the 12-month standard set by Rule 43 except in extraordinary circumstances. See Syl. Pt. 6, *In re Cecil T.*, 717 S.E.2d 873 (W. Va. 2011).

If the court orders temporary custody, and this is the first removal or a subsequent removal after an attempted reunification, it must include the following in its order:

1. Continuation in the home is contrary to the welfare of the child, and the reasons why;

2. Whether the Department made reasonable efforts to prevent the placement, and what those reasonable efforts were, or that an emergency situation existed making efforts unreasonable or impossible, or that such reasonable efforts were not required due to aggravating circumstances. (See also Special Procedures Chapter 4.);

3. Whether the Department has provided reasonable accommodations, as required by the Americans with Disabilities Act, to parents with disabilities so that they have meaningful access to reunification and family preservation services;

4. The circumstances under which the temporary custody shall continue, and in examining these circumstances, the court should consider whether the child should:

   a. Be continued in foster care for a specified period;

   b. Be considered for adoption;

c. Be considered for legal guardianship;

d. Be considered for permanent placement with a fit and willing relative; or

e. Be placed in another permanent living arrangement if there are compelling reasons not to follow one of the above options;

5. An order for financial support, if appropriate, from the parents if the child is transferred to the custody of the Department; and

6. An order requiring services for the child.

## F. Reunification with Non-Cohabitating Parents

When reunification is ordered and the parents are not cohabitating, the court is required to allocate custodial and decision-making responsibilities, that is to say, to establish the terms of a parenting plan. Syl. Pt. 5, *In re T.M.*, 835 S.E.2d 132 (W. Va. 2019). In these circumstances, the court should apply the factors set forth in West Virginia Code §§ 48-9-206, -207 and -209. The court should indicate how provisions in the parenting plan will protect the children from further abuse or neglect.

## G. Uncontested Termination of Parental Rights

### 1. Uncontested Termination

A natural parent may, in some circumstances, fail to contest the termination of his or her parental rights. If a parent is present at a disposition hearing but does not contest the termination of his or her parental rights, the court should determine whether the parent understands the consequences of the termination of parental rights, whether the parent is aware of less drastic alternatives to termination, and whether the parent has been informed of the right to a hearing and to representation. Rule 35(a)(1).

If a parent fails to appear at a termination hearing, the petitioner must make a *prima facie* showing that there is a legal basis for terminating parental rights. In addition, the court must determine whether the parents were properly notified of the hearing. Rule 35(a)(2).

### 2. Relinquishments

The statute governing relinquishments, West Virginia Code § 49-4-607, indicates that a parent must relinquish his or her parental rights in writing. Similarly, Rule 35(a)(3) or (4) also refers to relinquishing parental rights in writing. The West Virginia Supreme Court has recognized, however, that a parent may orally relinquish parental rights under Rule 35(a)(1), if he or she is present in court. *In re Tessla M.*, 566 S.E.2d 221 (W. Va. 2002). Although an oral relinquishment in court is permissible, it is best practice to require a parent to sign a written relinquishment.

If a parent is present and has signed or signs a relinquishment during a disposition hearing, the court must determine whether the parent understands the consequences of relinquishing his or her parental rights. The court should determine whether the parent understands the possibility of less drastic alternatives, whether the parent was informed of the right to a disposition hearing and the right to counsel at a dispositional hearing. Rule 35(a)(3). In addition, the court must determine whether the parent was subject to either fraud or duress when he or she signed the relinquishment. W. Va. Code § 49-4-607.

If a parent has signed a relinquishment but is not present at the disposition hearing, the court must determine whether the document complies with statutory requirements, i.e., whether the document has been acknowledged and whether circumstances in which the parent signed the relinquishment were free from fraud and duress. Rule 35(a)(4); W. Va. Code § 49-4-607. The court must also determine whether the parent was both thoroughly advised and understood the consequences of signing a relinquishment. Further, the court must determine whether the parent was made aware of the possibility of less drastic alternatives, the right to a disposition hearing and the right to counsel at a disposition hearing. Rule 35(a)(4).

In some circumstances, the Department or other party may object to a parent's voluntary relinquishment of his or her parental rights. The common reason for such an objection is that the parent would not be subject to a mandatory child abuse and neglect petition under West Virginia Code § 49-4-605(a) for a later born child. However, the West Virginia Supreme Court has established that the circuit court has the discretion to accept a voluntary relinquishment or to reject it and proceed with a hearing on the issue of involuntary termination. Syl. Pt. 4, *In re James G.*, 566 S.E.2d 226 (W. Va. 2002).

3. Relinquishments as Evidence of Abuse and Neglect

At times, a parent may opt to voluntarily relinquish his or her parental rights before a court has conducted or completed an adjudicatory or dispositional hearing. In those circumstances, a court may treat the relinquishment as the evidentiary basis for a finding of abuse and neglect. The court is not required to hear other evidence. W. Va. Code § 49-4-607. This particular provision of West Virginia Code § 49-4-607 is a codification of Syllabus Point 4 of *In re Marley M.*, 745 S.E.2d 572 (W. Va. 2013), which allows a court to find that a child was abused or neglected based solely upon a relinquishment. As explained in *Marley M.*, a parent's silence or failure to contest allegations by the submission of a voluntary relinquishment may serve as the evidentiary basis for a finding of abuse or neglect, and no further evidence would need to be presented to the court.

4. Subsequent Challenges to a Relinquishment

After a parent has signed a relinquishment and it has been accepted by the court, a parent may subsequently challenge a relinquishment based upon a showing of

fraud or duress. W. Va. Code § 49-4-607. A court may conduct a hearing to determine whether the circumstances were, in fact, free from fraud or duress. Syl. Pt. 3, *State ex rel. Rose L. v. Pancake*, 544 S.E.2d 403 (W. Va. 2001). Whether the court conducts such a hearing is within its sound discretion. *In re Cesar L.*, 654 S.E.2d 373 (W. Va. 2007).

As explained by Justice Davis in her concurring opinion in *Rose L.*, a parent who attempts to challenge a relinquishment faces an extremely high threshold. *Rose L.*, 544 S.E.2d at 408. As a starting point, Justice Davis observed that duress "means a condition that exists when a natural parent is induced by the unlawful or unconscionable act of another to consent to the adoption of his or her child. Mere 'duress of circumstance' does not constitute duress[.]" *Rose L.*, 544 S.E.2d at 408 (citing Syl. Pt. 2, *Wooten v. Wallace*, 351 S.E.2d 72 (W. Va. 1986)). In addition, she noted that the elements of fraud include the following:

> 1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it. *Rose L.*, 544 S.E.2d at 408 (citing Syl. Pt. 1, *Lengyel v. Lint*, 280 S.E.2d 66 (W. Va. 1981)).

Finally, Justice Davis aptly pointed out that: "Importantly, the inquiry does not end even if a parent satisfies that burden. Ultimately, lower courts must always return to the polar star principle: the best interests of the child." *Rose L.*, 544 S.E.2d at 408. A court must, therefore, consider a child's best interests when it determines whether to set aside a relinquishment, even when the parent has shown that fraud or duress was used to obtain the parent's agreement to relinquish parental rights.

## H. Contested Termination of Parental Rights

The court may determine at the dispositional hearing that parental or custodial rights should be terminated. To support such a determination, the court must find that there is "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future" and that the welfare of the child necessitates termination of the parental or custodial rights. W. Va. Code § 49-4-604(c)(6). The statute provides that there is "no reasonable likelihood that the conditions of neglect and abuse can be substantially corrected" when the abusing adult has demonstrated an inability to solve the problems leading to the abuse or neglect on their own or with help. W. Va. Code § 49-4-604(d). This code section provides examples of circumstances that support this determination:

> 1. The abusing adult has an addiction to alcohol or controlled substances that seriously impairs parenting skills, and the abusing adult has not responded to the recommended treatment;

2. The abusing adult has willfully refused to participate in the development of a reasonable family case plan;

3. The abusing adult has not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to prevent the abuse and neglect of the child, as evidenced by the continuation or insubstantial diminution of the conditions of abuse or neglect, such that the conditions that threatened the welfare of the child have not diminished in a substantial way;

4. The abusing parent has abandoned the child;

5. The abusing adult has repeatedly seriously injured the child physically or emotionally, or has engaged in sexual abuse such that the degree of family stress and potential for further abuse are so great that the use of resources to resolve or mitigate the family problems has been precluded;

6. The battered parent's parenting skills have been seriously impaired and said person has refused or is presently unable to cooperate in the development of a reasonable treatment plan or has not adequately responded to or followed through with a recommended treatment plan.

Of course, this list is not exhaustive, and there are other circumstances that can lead the court to find that termination of parental rights is necessary. Furthermore, the court should generally consider the following factors when deciding whether parental rights should be terminated:

1. The child's need for continuity of caretakers;

2. The amount of time needed to integrate the child into a stable, permanent home; and

3. Other factors relating to the child's safety, well-being, and permanency the court considers necessary and proper. W. Va. Code § 49-4-604(c)(6)(A).

If the child is age 14 or older or is of an age of discretion as determined by the court, the child's wishes shall be considered. W. Va. Code § 49-4-604(c)(6)(C). See *In the Interest of Jessica G.*, 697 S.E.2d 53 (W. Va. 2010). If the court terminates parental rights, the court may commit the child to the sole custody of the non-abusing parent, including a battered parent, or to the permanent custody of the Department. W. Va. Code § 49-4-604(c)(6).

If the termination involves the first removal of the child from the home (or follows an extended improvement period in the home) the contrary-to-welfare and reasonable efforts to prevent placement findings must be made. If removal occurred earlier, reasonable efforts findings regarding finalizing the permanency plan are likely due. (See Special Procedures Chapter 4.)

Although West Virginia Code § 49-4-604(c) provides extensive guidance on the termination of parental rights, subsection (f) provides that a court may not terminate parental rights if the sole reason is the parent's participation in a medication-assisted treatment program. As noted in the statute, the key word is "sole," and to avoid termination, the only basis for termination would be the parent's participation in this type of treatment program. In addition, the parent must be fulfilling his or her treatment obligations in the program. See *In re M.M.*, 853 S.E.2d 556 (W. Va. 2020) for a discussion of medication-assisted programs in an abuse and neglect case.

## I. Mandatory Petitions for Termination of Parental Rights

In specific circumstances established by statute, the Department is required to seek the termination of parental rights. W. Va. Code § 49-4-605. These circumstances include when a child has been in foster care for 15 of the most recent 22 months. The beginning date for entry into foster care is defined as the earlier of the following dates: 1) the date of the first judicial finding that the child was subject to abuse or neglect; or 2) 60 days after the child was removed from his or her home. The second circumstance is when a court determines that a child has been abandoned, tortured, sexually abused or chronically abused. Third, the Department is required to seek termination if a court finds that a parent has committed any of the following acts: 1) the murder or voluntary manslaughter of another of his or her children, another child in the household or the other parent of his or her children; 2) has attempted or conspired to commit such a murder or voluntary manslaughter of another of his or her children or the other parent of his or her children; 3) has been an accessory before the fact or after the fact of either of these crimes; 4) has committed unlawful or malicious wounding resulting in serious bodily injury to the child, another of his or her children, another child in the household or to the other parent of his or her children; or 5) has committed sexual assault or sexual abuse of the child, the child's other parent, guardian or custodian, another child of the parent or any other child residing in the household on either a temporary or permanent basis. Fourth, the Department is required to seek the termination of parental rights if the parent's parental rights to another child have been involuntarily terminated. Finally, the Department is required to seek the termination of parental rights if a child has been removed pursuant to a court order and the parent has failed to have contact with or attempt to contact the child for a consecutive period of 18 months. However, the statute provides that the following circumstances should not be considered voluntary behavior: incarceration, being in a medical or drug treatment or recovery facility or being on active military duty. W. Va. Code § 49-4-605(a).

Despite these statutory mandates, subsection (b) of West Virginia Code § 49-4-605 establishes situations in which the Department is relieved of its obligation to request the termination of parental rights. First, the Department may opt not to request termination if the child has been placed with a relative by a court order. Secondly, the Department is not required to seek termination of parental rights if the child's case plan documents a compelling reason not to do so that includes but is not limited to the child's age and preference regarding termination, the child's placement in the Department's custody as a result of a juvenile proceeding (Part VII of Article 4 of Chapter 49 of the West Virginia

Code) or the child's best interests. Finally, the Department does not have to seek termination if it was required to provide reasonable efforts to reunify a family but has not done so.

The statutory mandate is placed upon the Department to request termination of parental rights. The court, however, has the option to determine whether parental rights should, in fact, be terminated. With regard to a similar, but earlier version of the statute, the West Virginia Supreme Court held that: "Although the requirement that such a petition be filed does not mandate termination in all circumstances, the Legislature has reduced the minimum threshold of evidence necessary for termination where one of the factors outlined in West Virginia Code § 49-6-5b(a) (1998) is present." Syl. Pt. 2, in part, *In the Matter of George Glen B., Jr.*, 518 S.E.2d 863 (W. Va. 1999). In cases of prior involuntary terminations, the Court held that: "prior to the lower court's making any disposition regarding the petition, it must allow the development of evidence surrounding the prior involuntary termination(s) and what actions, if any, the parent(s) have taken to remedy the circumstances which led to the prior termination(s)." Syl. Pt. 3, in part, *George Glen B., Jr.*, 518 S.E.2d 863.

The relevant statute is now W. Va. § Code 49-4-605(a).

## *XIII. PERMANENT PLACEMENT*

### A. Jurisdiction

The presiding circuit court has exclusive authority or jurisdiction to determine the permanent placement of a particular child. Rule 36(e). The permanent placement of a child shall not be disrupted or delayed by an administrative process or other determination by the Department, such as an adoption review committee or a grievance procedure. *Id.*; W. Va. Code § 49-4-606(a).

In addition to an initial determination of permanency, the circuit court retains jurisdiction over any subsequent request for the modification of the permanent placement of a child. See Rules 6, 45(b) and 46. The two circumstances in which a circuit court would **not** retain jurisdiction over subsequent placements includes: 1) a case in which an abuse and neglect petition is dismissed for failure to state a claim under Chapter 49; or 2) the court returns a child to the custody of his or her cohabiting parents and does not establish terms of visitation or child support. Rule 6. In the cases of a disruption or dissolution of a permanent placement, the circuit court of origin will retain jurisdiction to determine any subsequent placement for a child. Rule 45. Similarly, the circuit court retains jurisdiction over any proceeding involving the restoration of parental rights. W. Va. Code § 49-4-606(c).

## B. Permanency Hearing

The purpose of the permanency hearing is to determine the appropriate plan for achieving permanent placement for a child or a "transitioning adult."[7] Rule 36a; W. Va. Code § 49-4-110(c). Included in such a determination is a finding as to whether the child shall remain in the Department's custody, the efforts that must be made to place a child in a permanent home, and the likely date for achieving permanent placement. W. Va. Code §§ 49-4-608(b); 49-4-110(a).

The scheduling of a permanency hearing is dependent upon the court's finding as to whether the Department is required to make reasonable efforts to preserve the family. Rule 36a; W. Va. Code § 49-4-608. If the court finds that the Department is **not** required to make reasonable efforts to preserve the family, then the permanency hearing must be held within 30 days of the order that makes this finding. Such a finding arises in cases involving aggravated circumstances.[8] W. Va. Code § 49-4-604(c)(7); see also W. Va. Code § 49-4-602(d). Rather than hold a separate hearing, the court can satisfy the permanency hearing requirement (i.e., determine the permanent plan for the child) at the same hearing in which the determination is made that reasonable efforts to reunify the family are not required. 45 C.F.R. § 1356.21(h)(2).

Alternatively, absent a finding that the Department is not required to make reasonable efforts to preserve the family, then a court is required by West Virginia Code § 49-4-608(b) to conduct a permanency hearing within 12 months after the Department has obtained physical custody of a child if the child has not been placed in one of the following types of placements: an adoptive home, with a natural parent, a legal guardianship, or permanent placement with a fit and willing relative. One issue to note is that under this state statute, the time period is one to two months shorter than the federal standard that specifies when a permanency hearing shall be conducted. Rule 36a mirrors the federal time standard for a permanency hearing, and both the federal statute and this rule provide that a permanency hearing must be conducted within 12 months of a child's entry into foster care. See also W. Va. Code § 49-4-110 (Requiring a permanency hearing within 12 months of the entry into foster care.) The date the "child entered foster care" is defined as the earlier of: (i) the date of the first judicial finding that the child has been subject to abuse or neglect; or (ii) 60 days after the date on which the child was removed from the home. Rule 36a(b); 42 U.S.C. § 675(5)(F). If a court conducts a permanency hearing according to the 12-month period after receiving physical custody of a child as required by West Virginia Code § 49-4-608(b), then the court would necessarily be in compliance with the slightly longer federal standard.

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[7] A "transitioning adult" is defined as an individual who has reached 18 years of age but is under 21 years of age, was adjudicated as an abused or neglected child and has entered into a contract with the Department to continue in an educational, training or treatment program which was initiated prior to the 18th birthday. W. Va. Code § 49-1-202.

[8] The term "aggravated circumstances" is a shorthand reference in this Benchbook for all circumstances covered by subsections (A) through (D) of West Virginia Code § 49-4-604(c)(7).

Another question arises with regard to the requirement of a permanency hearing. The language of the state statute refers to the placement of a child in an "adoptive" home as a situation in which a permanency hearing would no longer be required. Under a literal reading of the statute, it would seem to obviate the need for a permanency hearing if a child has been placed in an adoptive home but an adoption had not yet been finalized.[9] However, the other permanency options identified in the statute connote that the placement has been finalized by its reference to placement with a natural parent, in a legal guardianship, or permanently placing a child with a fit and willing relative. In addition, the definition of "permanent placement" with regard to adoption indicates that permanency has been achieved "when the child has been adopted," thereby indicating that the adoption has been finalized. Rule 3(n). Further, permanent placement reviews are required until permanency is actually achieved. See Rules 39-42. A permanency hearing should, therefore, be conducted if a child has been placed in an adoptive home, but the adoption has not been finalized and it has been 12 months since the Department obtained custody. In other words, to meet the apparent intent of the state statute (and comply with the federal time standard) the phrase placement "in an adoptive home" in West Virginia Code § 49-4-608 should be read to negate the permanency hearing requirement only when an adoption has been finalized.

It should be noted that Rule 3(n)(3) recognizes another planned permanent living arrangement (APPLA) as a permanency option. Subsection (e)(6) of West Virginia Code § 49-4-608 outlines specific findings and inquiries that must be made when this permanency option is proposed because it is the least preferred permanency option. First, the court should ask the child what type of permanency option he or she would like. Secondly, the court must explain why APPLA is the best option based upon the circumstances of the case. Finally, the court must articulate why it is not in the child's best interests to implement one of the other more preferable permanency options, such as adoption or guardianship.

A court is required to conduct additional permanency hearings every 12 months after the initial permanency hearing for each child who remains in the legal or physical custody of the Department. This requirement will continue until a child is placed in one of the following permanent placements: in an adoptive home; returned to a natural parent, placed in a legal guardianship or permanently placed with a fit and willing relative. W. Va. Code §§ 49-4-608; 49-4-110.

When a permanency hearing is scheduled, notice must be given to the following persons: the child's attorney; the child, if he or she is 12 years or older; the child's parents (and counsel); the child's guardians; the child's foster parents; any preadoptive parent or any custodial relative of the child; any other person entitled to notice and the right to be heard; and any other person, in the court's discretion, directed to receive notice. W. Va. Code § 49-4-608(b). If an adoption case has been transferred or assigned to a child placing agency, that agency should be notified of the permanency hearing. W. Va. Code § 49-4-

[9] Since an adoption cannot be finalized until a child has lived in an adoptive home for six months, this situation would arise fairly frequently. See W. Va. Code § 48-22-701.

608(k). Any parent whose rights have been terminated (and their counsel) would not be given notice. Rule 39(c) (final sentence). See also Rule 3(o). If a child is age 12 or older, he or she has the right to attend a permanency hearing. This right may be waived by the child's attorney at the child's request or if the child is younger than 12 years of age and would suffer emotional harm. W. Va. Code § 49-4-608(b).

### C. Permanent Placement Review

The court, with the assistance of the MDT, must continue to monitor implementation of the permanency plan. After a permanency hearing order has been entered, a permanent placement review hearing must be held at least once every three months until permanency is achieved. Counsel for the parties (except terminated parents) and interested persons entitled to notice and the right to be heard should be given at least 15 days notice of the review. If an adoption case has been transferred or assigned to a child placing agency, that agency should receive notice of any permanency reviews. W. Va. Code § 49-4-608 (k). The review must actually be held and may not be conducted merely with the entry of an agreed order. Rule 39; W. Va. Code § 49-4-110. The best practice is to schedule the next review at the conclusion of the current review hearing.

At least ten days before each review, the MDT and the Department must provide the court and parties with a progress report describing efforts to implement permanent placement. Additionally, the court may accept progress reports or statements from other persons, including the parties, service providers, and CASA. Rule 40.

During the review, to the extent applicable to the permanency plan, the court should consider:

1. The extent to which problems that have given rise to the child abuse or neglect proceedings have been remedied;

2. Services or assistance provided to the family since the last hearing, and services and review conferences needed in the future;

3. Reasonable accommodations provided in accordance with the Americans with Disabilities Act to parents with disabilities to allow them meaningful access to reunification and family preservation services;

4. Compliance by the adult respondent and the Department with the case plan and previous court orders and recommendations;

5. Any recommended changes in court orders;

6. The extent to which the adult respondent contributes financially to the placement of the child, and his or her ability to contribute;

7. The appropriateness of the current placement of the child, including its distance from the child's home and whether it is it is the most family-like setting;

8. The appropriateness of the current educational placement and the Department's efforts to keep the child enrolled in the same school he or she was attending at the time of removal, including the Department's coordination with local education agencies about arrangements for reasonable travel or enrollment of the child in a new school;

9. A summary of visitation and any recommended changes;

10. Whether the child's special needs were or were not met while in placement, as well as whether the child has had regular opportunities to engage in age or developmentally appropriate normal childhood activities;

11. The location of siblings and the steps being taken to unite them and/or maintain regular contact with them;

12. For children aged 14 or older, the specific services aimed at transitioning the child into adulthood;

13. For children aged 17 or over, a personalized transition plan for a child that includes specific options on housing, health insurance, education, local opportunities for mentors, continuing support services, workforce support and employment services;

14. If a child is aged 17 or over and has special needs, he or she is entitled to the appointment of an adult services worker to the MDT, who, in turn, will coordinate with other transition teams, such as IEP teams; and

15. If the child's permanent placement is APPLA, the efforts that were made to place a child permanently with a parent, relative, guardianship or adoptive placement; the child's preferred permanency option, and steps taken by any foster family to allow the child the opportunity to engage in normal childhood activities. Rule 41(a); W. Va. Code § 49-4-608.

During the permanent placement review conferences, the MDT should make recommendations regarding future placement issues for the child. Some of the information that should accompany various recommendations proposed at the review conference is:

1. **If a return to the home is recommended:** (a) steps necessary to make return possible and to minimize the disruptive effects of a return; (b) the dangers that may face the child after a return; and (c) reunification services necessary to minimize danger to the child;

2. **If return to the home is not recommended:** (a) whether adoption is recommended; if so, (b) the steps needed to effectuate the termination of parental rights; and (c) the time needed to achieve such measures;

3. **If neither return nor placement for adoption is recommended:** (a) a discussion of guardianship or permanent custody with a responsible individual; and (b) if recommended, a discussion of (i) the rights and responsibilities of the biological parents and the custodial parents or guardians, and (ii) a timetable for establishing legal guardianship or permanent custody;

4. **If continued foster care with specific foster parents is recommended:** an explanation of why foster care continues to be appropriate for the child. Additional topics that should be addressed are a discussion of permanently placing the child in foster care, including, (i) a proposed timetable, (ii) terms of the foster care agreement, (iii) the continuing rights and responsibilities of the biological parents, and an explanation of why foster care continues to be appropriate for a child;

5. **If placement in a group home or institution is recommended:** (a) why treatment outside a family setting is necessary, including expert diagnoses and recommendations; (b) why less restrictive, family settings are not practical; and (c) why placement with specially trained foster parents is not practical;

6. **If emancipation or independent living is recommended for children over 16 years old:** (a) why foster care is no longer appropriate; (b) the skills needed by the child to prepare for adulthood; and (c) a description of the ongoing support and services to be provided by the department;

7. A concurrent alternative permanency plan; and

8. Any other matter relevant to implement the child's permanency plan. Rule 41(a)(14)(A)-(H).

## D. Placement and Permanency Preferences

West Virginia Code § 49-4-601a established a legislative preference for placing children with relatives or fictive kin if an out-of-home placement is necessary. Before this statute was enacted, the West Virginia Supreme Court had declined to recognize a general preference for placement with relatives. Syl. Pt. 2, *In re K. L.*, 826 S.E.2d 671 (W. Va. 2019). Similarly, West Virginia Code § 49-2-126(a) refers to a child having a right to a kinship placement, when such a placement is appropriate. However, the West Virginia Supreme Court has established that West Virginia Code § 49-2-126 does not establish an adoptive preference for relatives. *In re G.G.*, 2023 W. Va. Lexis 208.

To implement this preference, the Department is required to conduct a diligent search for such persons near in time to a child's removal ("within the first days") and to provide notice of the child's removal or placement in foster care. Within seven days of the filing of the petition, the Department is required to file a list of such persons and indicate whether or not any of them are willing to serve as a placement for the child. Any party to the case may file a list of any additional relatives or fictive kin, including their addresses within seven days of the Department's filing. Within 45 days of the filing of the initial petition,

the Department is required to file a pleading that indicates whether any relative or fictive kin is appropriate to serve as a placement. W. Va. Code § 49-4-601a

In addition to the preference for placement in the home of a relative or fictive kin, West Virginia Code § 49-4-111[10] sets forth a preference for placing a child in an adoptive home with his or her siblings. See Syl. Pt. 4, *In re Shanee Carol B.*, 550 S.E.2d 636 (W. Va. 2001). When a child becomes eligible for adoption and his or her siblings have already been placed in an adoptive home, the Department is required to notify the adoptive parents that the child is eligible for adoption. W. Va. Code § 49-4-111 (d). The purpose of providing notice is to determine whether the adoptive parents want to seek custody of the child. If the adoptive parents are willing to do so, the Department must determine whether the adoptive parents are fit and whether the placement of the child is in the best interests of the child and his or her siblings. W. Va. Code § 49-4-111 (d). To maintain the separation of siblings, the Department must show, by clear and convincing evidence, that the siblings should remain separated. Syl. Pt. 4, *Shanee Carol B.*, *supra*.

Similar to sibling placements, West Virginia Code § 49-4-114(a)(3) establishes a preference for placing a child for adoption with his or her grandparents if parental rights have been terminated. See also Syl. Pts. 4 and 5, *Napoleon S. v. Walker*, 617 S.E.2d 801 (W. Va. 2005). This code section presumptively establishes that it is in the child's best interests to be adopted by his or her grandparents. However, the preference is not absolute. If a court determines that placement with grandparents is not in a child's best interests, it is not required to choose the grandparents over another placement that serves a child's best interest. *Napoleon S. v. Walker, supra*; *In re Elizabeth F.*, 696 S.E.2d 296 (W. Va. 2010); *In re Hunter H.*, 715 S.E.2d 397 (W. Va. 2011); *In re Aaron H.*, 735 S.E.2d 274 (W. Va. 2012). A 2023 amendment to West Virginia Code § 49-4-114(a)(3) expressly authorizes circuit court judges to determine whether it is in a child's best interests to be adopted by a grandparent even though the grandparents has not completed or passed a home study.

## E. Permanent Placement Review Orders

The court shall enter an order within ten days of the review conference, stating whether permanent placement has been achieved. Rule 42(a). The court shall include findings of fact and conclusions of law supporting its determination. If the court finds that permanent placement has not been achieved, the court shall include in the order the issues discussed at the review conference, including the following:

1. Changes in the child's case plan the court deems necessary to achieve permanent placement, with accompanying findings of fact;

2. Changes in visitation and other parental involvement;

3. Changes in services to be provided to the parties and the child;

[10] West Virginia Code § 49-4-111 applies to foster care as well as adoptive placements. The discussion in this paragraph is, however, limited to adoptive placements.

4. Changes to the educational plan for the child to further the child's educational stability;

5. Steps to assist a child aged 14 or older to develop a transition plan;

6. Restraining orders controlling any conduct of parties likely to frustrate the order;

7. Additional action to be taken by parties involved in order to achieve permanent placement;

8. If the identified permanency plan is APPLA, the court should ask the child about his or her desired permanent placement. The court should then determine whether APPLA is the best permanency plan for the child and should also review the Department's efforts to place the child permanently with a parent, relative, guardian or an adoptive placement. The court must find a compelling reason why it is not in the child's best interests to place the child in one of the other types of permanency placements;

9. Findings as to whether the Department has made reasonable efforts to finalize the permanency plan in a timely manner. (See Special Procedures Chapter 4, Section X.); and

10. A date and time for the next permanent placement review conference. Rule 42(c).

If the court issues an order that permanent placement has been achieved, the case may be dismissed from the docket. Rule 42(b).

### F. Timeframe for Achievement of Permanency

Permanent placement is to be achieved within 12 months of the final disposition order unless there are extraordinary reasons to justify the delay. If permanent placement is delayed beyond 12 months post-disposition, the court should place specific findings of the extraordinary reasons justifying the delay on the record. Rule 43.

## *XIV. POST-TERMINATION VISITATION*

*Note: Rule 15 applies to visitation both prior to and subsequent to termination of parental rights. This section, however, is limited to post-termination visitation. For a discussion of pre-termination visitation during a case, see Overview Section V. F.*

Rule 15 establishes general procedures for visitation between a child and any person, including parents, with whom the child has developed a close emotional bond. When the court terminates parental rights, the effect of the ruling is to prohibit visitation between the child and the parent and between the child and grandparents. Post-termination visitation should only be allowed if the court finds that the child consents and post-termination is in the child's best interests. When considering post-termination visitation, the court must

determine whether it would interfere with the child's case plan and whether it is in the child's best interests.

The Supreme Court has held that a court may grant post-termination visitation between a parent and child based upon a child's right to continued association. Syl. Pt. 5, *In re Christina L.*, 460 S.E.2d 692 (W. Va. 1995); *In re Katie S.*, 479 S.E.2d 589 (W. Va. 1996). A request for post-termination visitation should be brought by a written motion that has been properly noticed for hearing. Syl. Pt. 5, *In re Marley M.*, 745 S.E.2d 572 (W. Va. 2013). Although a court should consider evidence and arguments of counsel with regard to the factors set forth in Syllabus Point 5 of *Christina L.*, a court may forego such a process if the circumstances make the consideration of further evidence "manifestly unnecessary." *Id.*

When determining whether to grant post-termination visitation, the trial court must consider whether there is a close emotional bond between the parent and child. The Court has recognized that it takes several years to develop a close emotional bond and, therefore, post-termination visitation would normally be granted only in cases involving older children. See *In re Alyssa W.*, 619 S.E.2d 220 (W. Va. 2005). If the child is of appropriate age and maturity, the court should also consider the child's wishes. As stated above, in all cases where it is permitted, the court must find that the visitation would be in the child's best interests and must not interfere with the child's case plan. Syl. Pt. 5, *Christina L.*, 460 S.E.2d 692; Rule 15.

If a child is not placed with his or her siblings, the court may provide for continued visitation or contact between siblings. Syl. Pt. 4, *James M. v. Maynard*, 408 S.E.2d 400 (W. Va. 1991). Rule 15 establishes a presumption for continued contact between siblings by requiring that such visitation and contact shall continue unless it is not in the best interests of the child and his or her siblings.

Questions of grandparent visitation are subject to Rule 15 and the Grandparent Visitation Act, codified at West Virginia Code §§ 48-10-101, *et seq.* As an initial matter, motions or petitions for grandparent visitation must be addressed in circuit court while an abuse and neglect case is pending. W. Va. Code § 48-10-402(d).

Once a circuit court has terminated the parental rights of the parent through whom the grandparents are related to the child, Rule 15 establishes that the termination order has the presumptive effect of prohibiting contact and visitation between the child and the grandparents. However, the circuit court may allow visitation if the child consents, and it is in the child's best interests to have continued contact. The court should consider the factors set forth in West Virginia Code § 48-10-502 when determining whether to grant grandparent visitation. See *In re Samantha S.*, 667 S.E.2d 573 (W. Va. 2008); *In re Grandparent Visitation of Cathy L.R.M. v. Mark Brent R.*, 617 S.E.2d 866 (W. Va. 2005).

Post-adoption visitation between a child and his or her grandparents is initially dependent on whether the adoptive parents are stepparents, grandparents or other relatives of the child. If a child is adopted by a non-relative, then the Grandparent Visitation Act does not allow for grandparent visitation, and a prior grandparent visitation order is automatically

vacated. Syl. Pt. 3, *In re Hunter H.*, 744 S.E.2d 228 (W. Va. 2013). Additionally, a grandparent may not file a grandparent visitation petition when a child has been adopted by a non-relative. If a relative has adopted a child, then post-adoption visitation may be granted after the court considers the factors set forth in West Virginia Code §§ 48-10-501 and -502. However, the West Virginia Supreme Court, however, has recognized that "significant weight" must be accorded to the preference of the adoptive parents. *Cathy L.R.M.*, 617 S.E.2d at 875.

The Supreme Court has also provided guidance on post-adoption visitation when persons have visitation rights that were established before an adoption. *Murrell B. v. Clarence R.*, 836 S.E.2d 9 (W. Va. 2019). If there are persons who have visitation rights with respect to a child, the entry of a final adoption order divests those persons of the visitation rights unless an agreement to visitation is included in the final adoption order or in a written agreement that is explicitly referenced in the order and is designated as an exhibit to the order. *Id.*; see W. Va. Code § 48-22-703(a).

Consistent with other types of visitation, the Supreme Court has recognized that a court may award continued visitation to foster parents if a child has developed a close relationship with them. Syl. Pt. 11, *In re Jonathan G.*, 482 S.E.2d 893 (W. Va. 1996); *In the Matter of Zachary William R.*, 509 S.E.2d 897 (W. Va. 1998). To award visitation between a child and foster parents, the circuit court must find that continued contact is in the child's best interests.

## *XV. MODIFICATION OR SUPPLEMENTATION OF COURT ORDERS*

### A. Modification of Orders

Modification or supplementation of court orders is governed by Rule 46, which addresses the modification of any abuse and neglect court order, including a disposition order, and West Virginia Code § 49-4-606 which addresses the modification of disposition orders only. The following persons may file a motion to modify or supplement a court order: a child; a child's parents (whose parental rights have not been terminated); a child's custodian; or the Department. To modify a court order, a party must show, by clear and convincing evidence, that the proposed modification is in the child's best interests. Rule 46, however, excludes child support orders from this evidentiary requirement and allows such orders to be modified upon a showing of a substantial change in circumstances as provided by the statute governing the modification of child support orders, West Virginia Code § 48-11-105.

### B. Modification of Dispositional Orders

For sound policy reasons, the modification of a dispositional order is more restrictive than other types of orders. Rule 46; W. Va. Code § 49-4-606. In a parenthetical, Rule 46 provides that only parents whose rights have **not** been terminated may move to modify or supplement an order in an abuse and neglect case. In addition to the parenthetical in Rule 46, the Supreme Court has recognized that a person whose parental rights have been terminated no longer has the status of parent to the child and lacks standing to

request modification of an order after his or her parental rights have been terminated. Syl. Pts. 4 and 5, *In re Cesar L.*, 654 S.E.2d 373 (W. Va. 2007). It is, therefore, settled that a person whose parental rights have been terminated does not have standing to move to modify a dispositional order.

Not only are there limits on who has standing to request relief, there are also limits as to when such relief may be requested. A court may not modify a dispositional order that terminated parental rights after a child has been adopted.

When a party seeks to modify a dispositional order, he or she should make a motion to the court. In turn, the court should conduct a hearing on the motion. W. Va. Code § 49-4-606(a).

### C. Dissolution or Disruption of Permanent Placement

If a case has been dismissed and a child is removed from a permanent placement or the custodians of the child relinquish their rights to the child, the matter should be brought to the attention of the circuit court of origin, the Department and the child's counsel. The Department is required to convene a multidisciplinary treatment team meeting within 30 days of notice of the disruption. In turn, the circuit court of origin is required to schedule a permanency hearing within 60 days of the report. Notice should be given to any appropriate parties and persons entitled to notice and the right to be heard. Rule 45; W. Va. Code § 49-4-606(b).

### D. Restoration of Parental Rights

West Virginia Code § 49-4-606 has established a procedure for the restoration of parental or custodial rights or the placement of a child with a person whose parental or custodial rights have been terminated, provided that a child has not been adopted. W. Va. Code § 49-4-606(c). However, the only parties that may request this relief are the Department or the child. A person whose parental or custodial rights have been terminated is not authorized to request the restoration of his or her custodial or parental rights. As a basis for awarding this relief, the court must find, by clear and convincing evidence, that there has been a material change of circumstances and that the placement of the child with such an individual and/or the restoration of the individual's custodial or parental rights is in the child's best interests.

## *XVI. APPEALS AND PETITIONS FOR EXTRAORDINARY RELIEF*

### A. Procedure for Appeals

After any adverse judgment at the adjudicatory hearing, the court shall inquire whether the parents or custodians want to appeal the decision. W. Va. Code § 49-4-601(k). The court should transcribe the response by the parents; however, a negative response will not constitute a waiver of the right to appeal if the parents later change their mind. The appeal may pertain to the court's determination of child abuse or neglect at the conclusion

of the adjudicatory hearing. W. Va. Code § 49-4-601(k). In this regard, an appeal after an adverse finding at adjudication is a permissible interlocutory appeal.

A party may also appeal a ruling after a final disposition hearing. For example, the Department may appeal an order that provides for reunification. As another example, a parent may appeal the termination of his or her parental rights. Dependent upon his or her position regarding the child's best interests, a guardian *ad litem* could appeal an order that provides for termination of parental rights or provides for reunification.

As with other appeals, a party appealing a judgment must file a notice of appeal within 30 days of the judgment. See W. Va. R.A.P. 11; W. Va. RPCANP 49. A motion to modify a judgment does not operate to toll the time for initiating an appeal.

Attorneys for respondents in abuse and neglect cases are subject to Rule 10(c), of the Rules of Appellate Procedure, a rule that governs an attorney's responsibilities when an attorney lacks a good faith belief that an appeal is warranted. In those situations, the attorney is required to discuss the relative merits of an appeal with the client and must file an appeal if the client insists. In Rule 10(c)(10)(b), it is acknowledged that an attorney may be compelled ethically to dissociate himself or herself from the contentions of a brief. In those circumstances, the attorney must preface the brief with a statement indicating that brief has been filed according to Rule 10(c)(10)(b). When an attorney is ethically compelled to disassociate himself or herself from assignments of error that the client wants to be raised, the attorney must file a motion requesting leave for the client to file a *pro se* brief that includes the errors that the client wants to address on appeal. Counsel should not, however, argue against the client's interests.

Since abuse and neglect cases are civil cases, the appellant is required to pay the $200 filing fee when the notice of appeal is presented to the Supreme Court, unless the party is entitled to a waiver of the fee. W. Va. Code § 59-1-13. In those circumstances, the party should file the appointed counsel affidavit that was approved in circuit court or present an affidavit for approval by the West Virginia Supreme Court when the notice of appeal is filed.

In addition to information that must be included in all cases on appeal, the notice of appeal requires a party in an abuse and neglect case to provide particular information to the Supreme Court. As an attachment to a notice of appeal, a petitioner must include a list of the names, ages and parents' names of all minor children, a brief description of the current status of parental rights of each parent at the time of the filing of the notice of appeal, a description of the proposed permanent placement of each child, and the name of each guardian *ad litem* appointed in the case. See W. Va. R.A.P. Appendix A.

Appeals in abuse and neglect cases are accelerated under a shorter-than-normal period for perfecting the appeal. The petitioner's brief and required appendices must be filed with the Supreme Court Clerk within 60 days of the judgment. W. Va. R.A.P. 11; W. Va. RPCANP 49. The circuit court from which the appeal is taken may, however, extend the time period for perfecting the appeal for an additional period that does not exceed two months. To extend this time period, the notice of appeal and required attachments must

have been timely filed. The party requesting such an extension should file a written motion with the circuit court and must also file a copy with the Supreme Court Clerk. Any order ruling on the motion must be provided to the Supreme Court Clerk. W. Va. R.A.P. 11(f); W. Va. RPCANP 49. Alternatively, a party may request an extension of the time period by filing a written motion with the Supreme Court Clerk. When requesting an extension from the Supreme Court, a party must follow the procedure established by Rule 29 of the Rules of Appellate Procedure. W. Va. R.A.P. 11(f); W. Va. RPCANP 49. The same 60-day timeframe applies to motions seeking to extend the appeal period filed with the Supreme Court.

Subsection (f) of Rule 11 of the Rules of Appellate Procedure allows a party to request leave to file a late appeal from the Supreme Court even if a party did not file a notice of appeal. A party, however, may only obtain this relief in extraordinary circumstances. This relief may only be obtained in the West Virginia Supreme Court, not the circuit court.

Under Rule 11(i), the parties are required to include a section in their brief that indicates the current status of the children, the permanency plan for the children, and the current status of parental rights.

According to Rule 11(j) if oral argument is scheduled, the parties are required to provide a written statement that provides any changes or updates to any circumstances set forth in the brief no less than one week before oral argument or within such other time specified in the Court's order. As explained in the Clerk's Notes, the requirement to update the Court on any change of circumstances addressed in the briefs has been placed in a separate subsection in order to highlight the importance of this requirement.

### B. Appellate Duties of Guardian *Ad Litem*

Guardians *ad litem* are extremely important to the appellate process and are required to take an active role in any appeal. Even when a guardian *ad litem* did not initiate the appeal, he or she is required to file a responsive brief. The brief may be a summary response in appropriate cases. W. Va. R.A.P. 11(h). In addition, the Supreme Court~~,~~ has, in case law, repeatedly emphasized the importance of the role of guardians *ad litem* in the appellate process. See Syl. Pt. 3, *Matter of Scottie D.*, 406 S.E.2d 214 (W. Va. 1991); Syl. Pts. 4 & 5, *In re Jeffrey R. L.*, 435 S.E.2d 162 (W. Va. 1993); *State v. Michael M.*, 504 S.E.2d 177, n. 11 (W. Va. 1998); *Kristopher O. v. Mazzone*, 706 S.E.2d 381, n. 4 (W. Va. 2011).

A guardian *ad litem* must appear at any oral argument scheduled in the case unless the Court specifically orders otherwise. W. Va. R.A.P. 11(h). When a guardian *ad litem* appears as a respondent in an appeal, the guardian ad litem will be afforded a separate five minutes to argue his or her position. W. Va. R.A.P. 19(e) & 20(e).

The West Virginia Supreme Court has squarely addressed the importance of a guardian *ad litem's* role in the appellate process. In a 2015 case, the Court entered two successive orders, each with a rule to show cause, to require a guardian *ad litem* to show why she should not be held in contempt for failing to file response briefs. *In re A.N.*, Nos. 15-0182

and 15-0208 (W. Va. September 30, 2015) (memorandum decision). Ultimately, the Court found the guardian *ad litem* in contempt for failing to comply with the scheduling orders, referred the matter to the Office of Disciplinary Counsel and directed that the attorney would not be eligible for guardian *ad litem* and other court appointments until the disciplinary action would be concluded. See Chapter 6, Section III for a complete discussion of case law addressing a guardian *ad litem's* appellate duties.

### C. Stays

The filing of an appeal does not automatically stay the proceedings or orders of the circuit court in abuse and neglect cases. Rule 50 of the Rules of Procedure for Child Abuse and Neglect Proceedings indicates that a party, upon a showing of good cause, may properly seek a stay of a judgment in an abuse and neglect case in the circuit court. Alternatively, a party may seek a stay from the West Virginia Supreme Court pursuant to Rule 28 of the Rules of Appellate Procedure. Under Rule 28, however, a stay must first be sought in the circuit court. If the stay is denied in circuit court or the applicant believes the relief afforded is insufficient, the applicant can then pursue a stay with the Supreme Court. W. Va. R.A.P. 28(b).

When a party requests a stay from the Supreme Court, he or she must file a written motion requesting relief. The motion must provide the reasons assigned by the circuit court for denying the stay or other relief sought. W. Va. R.A.P. 28(b). The motion should also explain the reasons for a stay, address the effect of a stay on the circuit court's ability to plan for a child, and address the effect of the stay on the child's best interests. W. Va. RPCANP 50. Although Rule 50 does not expressly require a party to file a written motion when seeking a stay in circuit court, it certainly is best practice to do so. Further, a party who seeks a stay in circuit court should base such a motion on the same issues that must be addressed in the Supreme Court: the reasons for the stay, the court's ability to plan for the child if a stay is entered, and the child's best interests.

### D. Transcripts

West Virginia Code § 49-4-601(k) provides that a transcript must be furnished to indigent persons without cost. (See also W. Va. Code § 51-7-8). Section IX. 5. of the Manual for Official Court Reporters of the West Virginia Judiciary (Administrative Office of the Supreme Court of Appeals), promulgated October 30, 1984, amended December 13, 2010 ("Official Court Reporter Manual"), provides: "Transcripts of child abuse and neglect proceedings will be paid only if requested under the guidelines of an indigent criminal appeal." Accordingly, the Supreme Court Administrative Director's Office will pay transcription fees for preparation of an original and one copy of a transcript requested by an indigent party in an abuse and neglect case for purposes of appeal to the Supreme Court when the requirements are met.

Petitioners in abuse and neglect cases must submit transcripts when the Court will be reviewing disputed evidentiary or testimonial issues. Before the effective date of the amendments to Rule 11 of Rules of Appellate Procedure, parties would submit briefs

without transcripts in abuse and neglect appeals. Parties to an abuse and neglect case are subject to Rule 9 which governs transcript requests.

When a petitioner is requesting transcripts, the petitioner must complete the Appellate Transcript Request Form and attach it to the notice of appeal. The petitioner must provide a copy of the Appellate Transcript Request form and required attachments to each court reporter that transcribed a hearing for which a transcript is sought. The scheduling order issued by the Supreme Court will indicate whether a transcript will be prepared, the extent of any transcript and the due date for it. W. Va. R.A.P. 11(d). To obtain a transcript without cost, a party must provide proof of indigency by submitting an affidavit of indigency or attaching the order appointing counsel to the transcript request form. See W. Va. R.A.P. 9(b) and R.A.P. Appendix A – *Appellate Transcript Request Form*.

## E. Petitions for Extraordinary Writs

In addition to seeking appellate relief, a party to an abuse and neglect case may seek relief from the West Virginia Supreme Court by filing a petition for an extraordinary writ. For example, the West Virginia Supreme Court has recognized that a writ of prohibition may be used to challenge improvement periods that are of a greater duration than allowed by statute. Syl. Pt. 2, *State ex rel. Amy M. v. Kaufman*, 470 S.E.2d 205 (W. Va. 1996); Syl. Pt. 2, *State ex rel. S.W. v. Wilson*, 845 S.E.2d 290 (W. Va. 2020). In another circumstance, the extraordinary writ process was used by the DHHR to challenge a circuit court order requiring the agency to reunify a child with his parents, although the West Virginia Supreme Court declined the relief sought in this particular case. *State ex rel. DHHR v. Fox*, 624 S.E.2d 834 (W. Va. 2005). The Supreme Court has expressly recognized that a petition for a writ of prohibition is the proper method for challenging an improvement period. *State ex rel. DHHR v. Dyer*, 836 S.E.2d 472 (W. Va. 2019). In footnote 17 of *Dyer*, the Supreme Court indicated that the DHHR and guardian ad litem had initially filed a direct appeal to challenge an improvement period. However, the Court refused to docket the appeal, but it stayed the circuit court disposition to allow the DHHR and the guardian ad litem to pursue a petition for a writ of prohibition.

As is true for any type of case, a petition for extraordinary relief should not be used as a substitute for an appeal. See Syl. Pt. 1, *Crawford v. Taylor*, 75 S.E.2d 370 (W. Va. 1953). When considering whether to file a petition for writ of prohibition, the well-recognized factors warranting such relief should be weighed. Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 483 S.E.2d 12 (W. Va. 1996).

In situations involving the possible filing of a petition for writ of mandamus, the three necessary elements should be present: 1) a clear legal right of the petitioner to the relief sought; 2) a legal duty of the respondent to do the thing sought to be compelled; and 3) the absence of another adequate remedy. *State ex rel. Chastity D. v. Hill,* 532 S.E.2d 358 (W. Va. 2000). As an example, the Supreme Court granted a writ of mandamus that required the DHHR to pay for therapy for an abused and neglected child, but limited payment to the Medicaid rate. *State ex rel. Aaron M. v. DHHR*, 571 S.E.2d 142 (W. Va. 2001).

It should also be noted that the West Virginia Supreme Court has recognized, in dicta, that a former foster parent could seek an extraordinary remedy, such as a writ of mandamus or a habeas corpus. *In re Michael Ray T.*, 525 S.E.2d 315 (W. Va. 1999). In this case, the former foster parents of three children sought to intervene in the children's case after the children had been removed from their care. Holding that intervention could be allowed for current foster parents but not for former foster parents, the Court noted that former foster parents were not devoid of a remedy. Rather, the Court noted that they could seek relief by filing a petition for an extraordinary writ.

Rule 16 of the Rules of Appellate Procedure governs the procedure for filing petitions for extraordinary writs in any case, and it contains no specialized procedures for abuse and neglect cases. As a matter of common sense, however, a party who seeks extraordinary relief with regard to an abuse and neglect case should, if appropriate, include information concerning the current status of the minor children, plans for permanent placement, and the current status of parental rights. See W. Va. R.A.P. 11(i). If the case is scheduled for oral argument, the parties should inform the Court of any change of circumstances addressed in the briefs within one week of the oral argument or at any other time established by the Court. W. Va. R.A.P. 11(j).

# CHAPTER 4:
# SPECIAL PROCEDURES AND TOPICS FOR CHILD ABUSE AND NEGLECT CASES

*Chapter Contents*

## *I. PRINCIPAL ABUSE AND NEGLECT DEFINITIONS*

West Virginia Code § 49-1-201 sets forth comprehensive definitions that pertain to all child abuse and neglect proceedings under Chapter 49 of the Code.

### A. Abuse

The definition of "abuse" or an "abused child" includes knowing and intentional injuries, as well as situations in which a parent knowingly allows another person to injure a child. The types of injuries include physical injuries, as well as emotional and mental injuries. Abuse may also include sexual abuse, sexual exploitation or the sale or attempted sale of a child. It may further include domestic violence as defined by West Virginia Code § 48-27-202 and injuries inflicted as a result of excessive corporal punishment. Human trafficking or an attempt qualifies as abuse as well. W. Va. Code § 49-1-201.

One particular definition – when a parent knowingly allows another person to inflict physical, mental or emotional injury upon the child – has been the subject of significant litigation. This type of abuse occurs when a parent does not physically abuse a child but knowingly fails to take protective action in the face of abuse by another person. Syl. Pt. 2, *In the Matter of Scottie D.*, 406 S.E.2d 214 (W. Va. 1991). This type of abuse also occurs when a parent or guardian, knowing that the abuse occurred, takes no action to identify the abuser. Syl. Pt. 8, *W. Va. DHHR v. Doris S.*, 475 S.E.2d 865 (W. Va. 1996). These cases typically involve medical evidence that contradicts the parent's or custodian's explanations about the child's injuries.

This type of abuse is commonly referred to as "failure to protect," and a parent is often referred to as a "non-protecting parent." These common terms are, however, misnomers because this type of abuse does not occur because a child was subject to abuse and a parent simply did not prevent the abuse. Rather, the parent must know of the abuse and allow it by either failing to take any protective action or by aiding or protecting the abuser.

As noted previously, the definition of an "abused child" includes acts that would constitute domestic violence under West Virginia Code § 48-27-202 in the definition of child abuse. W. Va. Code § 49-1-201. The statute also includes a definition for a "battered parent" as one who has not "condoned the abuse and neglect and has not been able to stop the abuse or neglect of the child or children due to being the victim of domestic violence . . .." W. Va. Code § 49-1-201. This provision recognizes that a victim of domestic violence

may, dependent upon the facts of the case, not be considered to have knowingly allowed an abuser to inflict a physical, mental or emotional injury upon a child. The statute, therefore, makes a distinction between the commonly misused term of "failure to protect" from the statutory definition of abuse which occurs only when a parent knowingly allows abuse against a child.

Providing guidance about this definition of child abuse, the Supreme Court has held that the termination of a "non-protecting" parent's rights for this type of abuse is "usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent." Syl. Pt. 3, in part, *In the Interest of Betty J.W.*, 371 S.E.2d 326 (W. Va. 1988). In *Betty J.W.*, the circuit court terminated a father's parental rights after he sexually abused his 17-year-old daughter and terminated the mother's rights for failure to protect. The Supreme Court, however, reversed the termination of the mother's rights because the mother, a victim of domestic violence, reported the sexual abuse as soon as she could get away from her husband. The Supreme Court also noted that the mother had interceded when the father had attempted to sexually assault his daughter. In turn, the father beat the mother and threatened her with a knife. Based upon these facts, the Supreme Court concluded that the mother did not "knowingly" allow the abuse.

## B. Neglect

A child is neglected when his or her physical or mental health is threatened by a refusal, failure or inability of the parent, guardian or custodian to supply the child with food, clothing, shelter, supervision, medical care or education. However, the failure or inability of the parent, guardian or custodian must not arise primarily from the adult's lack of financial means. A child is also subject to neglect if the child's parent or custodian has disappeared or is absent, and as a result, the child is without food, clothing, shelter, medical care, education or supervision. W. Va. Code § 49-1-201.

## C. Imminent Danger

The definition of imminent danger to the physical well-being of the child involves emergency situations that threaten the welfare or life of the child. Imminent danger is present if there is reasonable cause to believe that a child in the home has been sexually abused or exploited. It may also include non-accidental trauma. Additionally, imminent danger may involve a combination of physical signs and other signs that indicate a pattern of abuse and that may be medically diagnosed as battered child syndrome. Further, it includes circumstances involving nutritional deprivation, inadequate treatment of serious illness or disease, substantial emotional injury inflicted by a parent, guardian or custodian or the sale or attempted sale of a child by a parent, guardian or custodian. Finally, imminent danger encompasses situations in which substance abuse by a parent, guardian or custodian impairs that person's parenting skills to the extent that there is an imminent risk to the child's health or safety. W. Va. Code § 49-1-201.

## *II. RESPONSIBLE AGENCIES, OFFICERS AND PERSONS*

A brief explanation of the statutory duties of the Department of Health and Human Services (Department of Human Services effective January 1, 2024) with regard to child welfare follows. These duties provide oversight of the child welfare system in West Virginia.

### A. Cooperation with United States Department of Health and Human Services

The West Virginia DHHR is the designated state agency that is required to cooperate with the United States Department of Health and Human Services for the purposes of extending and improving child welfare services, complying with applicable federal regulations and receiving and extending federal funds for child welfare services. W. Va. Code § 49-1-106(b). Effective January 1, 2024, the Department of Human Services will be the named state agency that will be the department responsible for child welfare services.

### B. Department of Health and Human Resources (Department of Human Services): Responsibilities for Protection and Care of Children

West Virginia Code §§ 49-2-101, *et seq.* sets forth the responsibilities of the Department for the care of abused and neglected children who are committed to its care for custody or guardianship. Care may be provided through: 1) foster homes; 2) licensed child welfare agencies; and 3) state institutions. West Virginia Code § 49-2-101 specifies the Department's responsibilities for child custody and care upon voluntary parental or guardian placement, from courts exercising juvenile jurisdiction and from law-enforcement officers in emergency situations. As part of its duties related to child abuse and neglect, West Virginia Code § 49-2-813 requires the Department to maintain a statewide child abuse and neglect statistical index of all substantiated allegations of child abuse or neglect.

In addition to its responsibilities for the care of children who are placed in its custody, the Department also has the duty to provide services to children and families in order to prevent unnecessary placements. See Part II, Article 2 of Chapter 49 of the West Virginia Code. Consistent with this duty, the Department is required to provide home-based services designed to preserve the family in cases where the removal of child is considered. However, such services are not required when a child is in imminent danger of serious bodily or emotional injury. W. Va. Code § 49-2-202.

Not only does the Department have the duty to avoid the unnecessary removal of children from their home, the Department also has the duty to facilitate the placement of children in permanent homes when they cannot be reunified with their family. Consistent with this duty, the Department is required to seek the termination of parental rights in specified instances. W. Va. Code § 49-4-605. In addition, the Department is required to make reasonable efforts to achieve timely permanency for children subject to child abuse and neglect proceedings. W. Va. Code § 49-4-608; Rule 36a. As part of its duty to achieve

permanency for children, the Department is authorized to enter into contracts for subsidized adoptions and legal guardianships. W. Va. Code § 49-4-112.

## C. Duties of Department: Licensing for Child Welfare Agencies

The Legislature has specified the responsibilities of the Department for the licensing, approving and registering of child care facilities and child welfare agencies in the State. W. Va. Code §§ 49-2-101, *et seq.* Applicable State regulations include Title 78, Series 2-- "Child Placing Agencies Licensure," and Title 78, Series 3-- "Minimum Licensing Requirements for Residential Childcare and Treatment Facilities for Children and Transitioning Adults in West Virginia."

## D. Duties of Department: Standards for Transitional Living Services

The Legislature has required the Department, by legislative rule, to establish minimum standards for the provision of transitional living services, whether the services are provided in a group setting or in scattered site living arrangements. W. Va. Code § 49-2-129. This requirement is part of the policy to provide care and services to older youth who have been placed in the Department's custody.

## E. Duties of Child Protective Services

Under West Virginia Code § 49-2-802, the Department shall establish or designate a Child Protective Services Office for every county. The local office shall be responsible for: 1) investigating all reports of child abuse or neglect pursuant to the time standards and investigatory procedures specified in this statute; 2) providing, directing or coordinating appropriate and timely delivery of services to any child suspected or known to be abused or neglected (and services to the child's family); and, 3) initiating appropriate legal proceedings. (See also West Virginia Code § 49-4-303(2) relating to emergency custody by child protective service workers.)

## F. Mandatory Reporting of Suspected Abuse or Neglect

### 1. Reporting Duties

Certain types of persons are established as mandatory reporters of child abuse or neglect. West Virginia Code § 49-2-803(a) requires medical, dental and mental health professionals, school personnel, social workers, childcare workers, clergy, law-enforcement officers, humane officers, and judicial officers to report any suspected child abuse or neglect. In addition, personnel (whether volunteer or not) of an entity that provides organized activities for children are identified as mandatory reporters. Further, commercial film or photographic print processors have been designated as mandatory reporters. If a person is a mandatory reporter and he or she is also a staff member or volunteer of an organization that provides organized activities for children, he or she is also required to notify the person in charge of the entity of the suspected abuse or neglect. In turn, the person in charge of the entity may supplement the report or make an additional report. The Department has been required to implement a procedure to inform these

mandatory reporters whether an investigation of the suspected abuse or neglect has been initiated and when an investigation has been completed. W. Va. Code § 49-2-804.

Persons who are identified as mandatory reporters have the statutorily established duty to report information to the Department when they have reasonable cause to suspect child abuse or neglect or if they observe conditions that are likely to result in abuse and neglect to a child. The person should report the suspected abuse and neglect immediately, but no later than 24 hours after observing or receiving the applicable information. If the reporter believes that the child has suffered serious physical abuse or sexual abuse or sexual assault, he or she should also report the matter to the State Police and any other law-enforcement agency with jurisdiction. W. Va. Code § 49-2-803(a).

2. Reporting Procedures

The DHHR is responsible for maintaining a method through which mandatory reporters make the reports required by Article 2 of Chapter 49 of the West Virginia Code. The DHHR is authorized to allow mandatory reporters to provide reports via a web-based application. The web-based reporting method is available to judicial officers on the West Virginia Supreme Court intranet. In addition to the web-based reporting method, the DHHR must maintain a system that allows for the reporting of situations that require immediate attention, with the filing of a written report within 48 hours. Further, the DHHR is required to maintain a 24 hour, seven-day-a-week telephone number to receive telephone calls that allows persons to report suspected or known child abuse and neglect. W. Va. Code § 49-2-809(a).

If the DHHR receives a report of serious physical abuse or sexual abuse or assault, the DHHR is required to forward the report to law-enforcement, the prosecuting attorney or the coroner or medical examiner's office. If the report involves known or suspected institutional child abuse or neglect, the report shall be handled in the same manner as other mandatory reports. W. Va. Code § 49-2-809(b).

## G. Education and Training Obligations

Various statutory provisions mandate specific education or training for those persons most involved with prevention and intervention in situations of child abuse and neglect. West Virginia Code § 18-5-15c (County boards of education to provide pupils, parents and school personnel with training programs in prevention of child abuse and neglect); West Virginia Code § 48-27-1103 (Mandatory training for law-enforcement officers relating to response to calls involving family violence); West Virginia Code § 48-27-1104 (Mandatory education on family violence for circuit court judges, family court judges, and magistrates); West Virginia Code § 61-8-9a (Curriculum on parenting skills to avoid child abuse required for secondary-level grades in all State schools).

## H. Foster Care Ombudsman

### 1. Duties of Foster Care Ombudsman

The Legislature has established the position of the West Virginia Foster Care Ombudsman within the Office of the Inspector General. W. Va. Code §§ 49-9-101, et seq.; W. Va. Code § 9-5-27. Either on his or her own initiative or in response to a complaint, the duties of the foster care ombudsman include addressing situations when children are subject to a reported allegation of abuse or neglect or when a child has died or sustained a critical incident.[11] In addition, the ombudsman has the duty to advocate for the rights of foster parents and foster children and to investigate and resolve complaints that affect the rights of foster children and foster parents. W. Va. Code § 9-5-27(i).Although this particular statutory subsection refers only to "foster parents," relatives who provide a placement for foster children also fall within the ombudsman's purview because West Virginia Code § 29-2-127(a)(12) established the rights of both foster parents and kinship parents and provides both types of placements to be provided access to the ombudsman's office to make complaints concerning any alleged violation of their rights. See W. Va. Code § 49-9-102(a). The statute also refers to the investigation of complaints by foster children, kinship parents or foster parents when a court order directs such person to file a complaint with the ombudsman's office.

The ombudsman may address issues involving the inaction or decisions of the state agency, the child-placing agency, or any residential treatment facility that affect foster children and foster or kinship parents. It can be inferred that the ombudsman may act when these agencies either fail to act or take action that adversely affects children in the foster care system, and foster or kinship parents.

Additional duties of the foster care ombudsman include making policy recommendations to the DHHR and advocating for systemic reform, including legislative reform. Other duties include public education and publicizing the procedure to contact the foster care ombudsman's office. W. Va. Code § 49-9-101(b).

Further details about the powers and duties of the foster care ombudsman are included in subsections 102 through 107 of Article 9 of Chapter 49 of the West Virginia Code. These include the discretion to not investigate certain types of complaints, access to and confidential communications with foster children, and access to foster care agencies, including the ability to inspect foster homes, and residential care facilities. W. Va. Code § 49-9-103. If the ombudsman is denied entry to a facility or foster home, the ombudsman may apply for a warrant to gain entry in the magistrate court where the facility or home is located. W. Va. Code § 49-9-103(a). The information and methods for obtaining information, including the ability to apply for a subpoena in the Kanawha County Circuit Court, are established by West Virginia Code §§ 49-9-104 through -106. If the foster care ombudsman suspects abuse, neglect or exploitation of a foster child, he or she must

[11] The ombudsman also has the duty to address complaints involving children in the juvenile justice system. W. Va. Code § 49-9-102(b)(1)(A).

report the matter to the Bureau of Children and Families and/or the Office of Health Facility licensure.

It should be noted that the rights of foster children and foster and kinship parents do not create an independent cause of action. W. Va. Code §§ 49-2-126(b) and -127(b). However, the ombudsman may recommend other action, including legal action, to enforce the rights of West Virginia foster children. W. Va. Code § 49-9-101(b)(4).

2. Confidentiality of Investigations

The confidentiality of the ombudsman's investigations is governed by West Virginia Code § 49-9-107, and the content of individual complaints is generally confidential unless a person consents or disclosure is necessary to investigate abuse or neglect. Specifically, information related to complaint that identifies the complainant, the foster child, the foster parent or kinship parent is confidential. However, if imminent risk of serious harm is communicated directly to the ombudsman or staff, then this information may be disclosed. Secondly, information may be disclosed so that the bureau can determine whether an investigation abuse, neglect or emergency circumstances may be disclosed. Third, information may be disclosed so that the Office of Health Facility Licensure may determine whether to initiate an investigation. W. Va. Code § 49-9-107.

3. Prohibition on Testimony or Evidence Related to Investigations

The Legislature has established an almost complete prohibition on the ability of any party in an administrative or judicial proceeding to compel the testimony or the production of evidence that the ombudsman has obtained as part of an official investigation. Specifically, the ombudsman or staff members may not be compelled to identify an individual who has provided information or evidence to the ombudsman or staff members as part of an investigation. The information or documents (memoranda, work product, notes or case files) are confidential, and they are not subject to production as part of discovery, and they may not be disclosed in response to a subpoena. The subsection specifically indicates that the documents may not be produced subject to "other means of legal compulsion." It can be inferred that this term refers to a court order. Further, the subsection indicates the evidence is not admissible in any judicial or administrative proceedings. The purpose of the prohibitions is to ensure the confidentiality and efficacy of the ombudsman's investigations. W. Va. Code § 49-9-101(c)(1).

The ombudsman may be required to provide testimony about actions of the office that are not pertinent to substance of a specific investigation or to reports submitted to the Legislative Oversight Committee. If the ombudsman is required to testify, he or she may not be required to identify a complainant or any individual who provided information to the ombudsman or the substance of the evidence. The subsection refers to the ombudsman having the discretion to determine whether to exercise the privilege. The Legislature expressly identified the purpose of the privilege as the assurance of confidentiality as to the identity of persons who either complain or provide information or evidence to the ombudsman. W. Va. Code § 49-9-101(c)(2).

In the event that an ombudsman objects to testimony or the disclosure of evidence, the official who is presiding over a tribunal, *i.e*. judge or hearing officer, must conduct an *in camera* review. The presiding official is required to prevent the disclosure of the identity of such persons as well as the substance of information or evidence that they have provided to the ombudsman. W. Va. Code § 49-9-101(c)(3).

## *III. RESPONSIBILITIES OF PROFESSIONALS IN A CHILD WELFARE CASE*

### A. Duties of Prosecuting Attorneys

Every prosecuting attorney has the following duties with regard to the abuse and neglect of children: 1) cooperate fully and promptly with persons seeking relief in suspected instances, including co-petitioners; 2) promptly prepare applications and petitions for relief; and 3) investigate reported cases for possible criminal activity and report to the grand jury at least annually in this regard. W. Va. Code § 49-4-502. The prosecuting attorney shall provide legal services to the Department. W. Va. Code § 49-4-501. Any disputes that arise between a prosecuting attorney and the Department regarding proposed action that is believed to place a child at imminent risk are subject to the mediation provisions set forth in West Virginia Code § 49-4-501. As recognized by the West Virginia Supreme Court, the Department is the client of the prosecuting attorney in a county, and the relationship between the Department and a county prosecutor is a pure attorney-client relationship. See Syl. Pt. 4, *State ex rel. Diva P. v. Kaufman*, 490 S.E.2d 642 (W. Va. 1997); Syl. Pt. 3, *In re Ashton M.*, 723 S.E.2d 409 (W. Va. 2012). In addition, every prosecuting attorney has the duty to establish a multidisciplinary investigative team for their county, which is responsible for coordinating and cooperating in the investigation of all civil and criminal allegations of abuse and neglect. W. Va. Code § 49-4-402. See also W. Va. Code § 7-4-5.

### B. Responsibilities of Guardians *ad Litem*

In both caselaw and in procedural rules, the West Virginia Supreme Court has established significant guidance with regard to the role and duties of guardians *ad litem* in child abuse and neglect cases. See, e.g., *In re Jeffrey R.L.*, 435 S.E.2d 162 (W. Va. 1993); Appendix A, Guidelines for Children's Guardians Ad Litem in Child Abuse and Neglect Cases, RPCANP. West Virginia Code § 49-4-604(b) also requires guardians *ad litem* to comply with the Rules of Professional Conduct, as well as the Rules of Procedure for Child Abuse and Neglect Proceedings. The training and certification requirements mandate that an attorney appointed as a guardian *ad litem* must first complete training that is approved by the Supreme Court. W. Va. Code § 49-4-601(g). Any guardian *ad litem* must also complete the education required for any attorney in an abuse and neglect case -- a minimum of eight hours each reporting period. *Id.* It should be noted that this subsection provides that a guardian *ad litem* may not be paid for services unless he or she has met the certification and educational requirements established by the Supreme Court. In West Virginia Code § 49-4-604(b), the Legislature has requested that the Court provide guidance to circuit courts concerning supervision of guardians *ad litem* and that it review rule provisions that are specific to guardians *ad litem.*

### C. Duties of Counsel

Counsel appointed for any of the parties in abuse and neglect cases must complete at least eight hours of CLE training per each two-year reporting period on child abuse and neglect procedure and practice. The West Virginia Supreme Court has recognized the applicability of the Rules of Professional Conduct to attorneys who represent clients in abuse and neglect cases. See e.g., *Lawyer Disciplinary Bd. v. Sayre*, 834 S.E.2d 721 (W. Va. 2020); see also W. Va. Code § 49-4-601(g).

### D. Department of Health and Human Resources: Multidisciplinary Treatment Teams

The Department is responsible for establishing a multidisciplinary treatment team process in every county (or in contiguous counties), which shall be responsible for addressing, planning and implementing comprehensive, individualized service plans for children who are victims of abuse and neglect. W. Va. Code § 49-4-403. See Overview, Section VII. Multidisciplinary Treatment Teams for a complete explanation of multidisciplinary treatment teams in child abuse and neglect cases.

## *IV. FAMILY FIRST PREVENTION SERVICES ACT*

The Family First Prevention Services Act (hereinafter "Act") was enacted in 2018. Before the passage of this Act, states received federal funding to assist with foster care placements for eligible children, to assist with administration of the foster care system, to provide training for staff, foster parents and some private agency staff. The other areas that were funded involved adoptions and kinship guardianships. Title IV-E, therefore, only allowed for reimbursement when a child was removed from his or her home. The Act expanded the use of Title IV-E reimbursement funds for specified prevention services, and the effective date of the Act was October 1, 2019.

The Act expanded Title IV-E funding to prevention services, provided that certain conditions are met. Specifically, prevention and family services and programs may be provided to children who are candidates for foster care, but who can safely remain at home or in a kinship placement. 42 U.S.C. § 671(e). Similar services may also be provided to a child who is in foster care and who is also a pregnant or parenting foster youth. *Id.* To receive Title IV-E reimbursement, a written prevention plan must be developed for the child who is a candidate for foster care or for a child who is a pregnant or parenting youth. The prevention plan cannot last more than 12 months.

The services that may be provided must meet the definition of "trauma-informed." In addition, the services must be recognized as a "promising, supported, or well-supported practice." 42 U.S.C. § 671(e). The types of services eligible for reimbursement include in-home parent skill-based programs, mental health services, and substance abuse prevention and treatment services.

In addition to reimbursement for prevention services, a second purpose of the Act is to discourage the placement of children in congregate care, as opposed to placement in

foster families. Under a provision of the Act, the number of foster children in a family is limited to six foster children unless certain requirements are met. 42 U.S.C. § 672(c)(1).

As another method to reduce congregate care placements, the Act established specific requirements for the placement of a child in a "qualified residential treatment program" or "QRTP." To obtain Title IV-E funding for such a placement, an independent evaluator must evaluate the child and determine whether the placement "would provide the most effective and appropriate level of care for the child in the least restrictive environment. . .." 42 U.S.C. § 675a(c). Under federal law, the evaluation must be completed within 30 days of the start of the placement. *Id.* In turn, the court must consider the evaluation and approve or disapprove the placement within 60 days of the placement of the child in the QRTP. *Id.* Further, the secretary of each state's welfare agency must approve continued placement of the child in such a facility when the placement lasts more than 12 consecutive months or 18 nonconsecutive months.

Another expansion of funding involves the provisions of services to a former foster child who has not yet reached the age of 23, provided that the State had already elected to provide funds to eligible former foster children up to age 21. 42 U.S.C. § 677.

## *V. WEST VIRGINIA PROVISIONS THAT IMPLEMENT THE FAMILY FIRST PREVENTION SERVICES ACT*

Although the Family First Prevention Services Act expands federal reimbursement for prevention services, it, with a few exceptions, does not impose new requirements that change the procedure of abuse and neglect cases once a petition is filed.

The most notable effect on West Virginia court procedures involves the placement of a child in a "qualified residential treatment program" or "QRTP." To ensure compliance with federal requirements and the ability to obtain federal reimbursement for these placements, the West Virginia Supreme Court promulgated Rule 3(p)[12] of the Rules of Procedure for Child Abuse and Neglect Proceedings which defines the term, "qualified residential treatment program." A key component of the definition is that the program must utilize a trauma informed treatment model. Additionally, the child must have serious emotional and/or behavioral disorders to be placed in a QRTP.

The West Virginia Supreme Court also promulgated Rule 55 of the Rules of Procedure for Child Abuse and Neglect Proceedings, which establishes the procedure for the placement of a child in a QRTP. As the initial step after the type of placement has been proposed, an independent evaluator must determine whether a child should be subject to placement in a QRTP, and he or she must prepare a written report that is provided to the court and the multidisciplinary treatment members at least 20 days before the child is placed in a QRTP, except in situations in which good cause is shown. Within 10 days of receipt of the report from the independent evaluator, the court must review the report and either approve or disapprove the placement. The court may review the matter on the

[12] Substantially similar provisions found in Rules 3(p) and 55 of the Rules of Procedure for Child Abuse and Neglect Proceedings are included in Rule 52 of the Rules of Juvenile Procedure.

record and include the required findings in a written order, or it may conduct a hearing, either *sua sponte* or upon the request of a party. Based upon the report and any other relevant evidence, the court must determine whether the needs of the child could be met in a foster family or whether the proposed placement provides the most effective and appropriate level of care in the least restrictive environment. If the court finds that the placement is not appropriate, it must include its findings either in a written order, or it must state such findings on the record at an evidentiary hearing. Rule 55, RPCANP.

Rule 55 of the Rules of Procedure for Child Abuse and Neglect Proceedings is fairly ambitious in that it provides that a report should submitted 20 days before placement, but it also allows for the submission for the report outside of this timeline in circumstances in which good cause is shown. Another provision, subsection (d), sets the outer limit for the court's decision on the placement at 60 days after the child has been placed in the QRTP. The reason for the outer limit is to ensure compliance with 42 U.S.C. § 675a and, therefore, maintain eligibility for federal reimbursement for the placement.

## *VI. FOSTER CHILD BILL OF RIGHTS*

The Legislature enacted the Foster Child Bill of Rights, codified at West Virginia Code § 49-2-126, which became effective in 2020. By its terms, the identified rights apply both to foster children and to children in a kinship placement. The statute does not establish an independent cause of action. W. Va. Code § 49-2-126(b). It should also be noted that most of the rights identified in the statute have been the subject of earlier case law or statutes.

The first category of rights identified in the statute includes a child's right to continued association with siblings. Of primary importance, the right to placement or contact with siblings is included in West Virginia Code § 49-2-126(a)(6) and (a)(9). Placement or contact with siblings has been established in earlier cases and other provisions of law. See W. Va. Code § 49-4-111; *In re Shanee Carol B.*, 550 S.E.22d 636 (W. Va. 2001); Rule 15, RPCANP.

The statute also establishes a right to a kinship placement when it is appropriate. W. Va. Code § 49-2-126(a)(7). Similarly, West Virginia Code § 49-4-601a provides that placement with a relative or fictive kin is the least restrictive living arrangement for a child if an out-of-home-placement is necessary. Included in West Virginia Code § 49-4-601a is a procedure for notifying the court of relatives and fictive kin and also of the Department's determination of whether any of these persons could serve as a placement. These provisions establish a preference for relative placements, a preference which the West Virginia Supreme Court has earlier declined to recognize. See *In re K.L.*, 826 S.E.2d 671 (W. Va. 2019). However, the well-recognized grandparent preference found in West Virginia Code § 49-4-114(a)(3) is a statute that has afforded grandparents with a preference for placement. It should be noted that the rights contained in the statute are not absolute, and they are subject to other case-specific considerations.

Another subsection, West Virginia Code § 49-2-126(a)(11), includes a child's right to maintain contact with previous caregivers and other important adults. This right

corresponds to provisions found in Rule 15 of the Rules of Procedure for Child Abuse and Neglect Proceedings. It also correlates to the principles of law that govern post-termination visitation with adult respondents. See e.g. *In re Marley M.*, 745 S.E.2d 572 (W. Va. 2013); *In re Christina L.*, 460 S.E.2d 692 (W. Va. 1995). As set forth in the statute, any contact is subject to the child's wishes and whether the child's parents determine that the contact is not in the child's best interests. It is likely that other provisions of law, such as those found in West Virginia Code § 48-10-902[13], could affect whether visitation would be ordered in a specific case. See also, *Murrell B. v. Clarence R.*, 836 S.E.2d 9 (W. Va. 2019).

The second category of rights involve safety and well-being issues for children while they are in care. These include basic rights, such as freedom from abuse or exploitation, the right to receive adequate nutrition, adequate clothing, and appropriate medical care, including dental, vision, mental health or substance abuse treatment. Under subsection (a)(7), a child, subject to his or her age or developmental stage, should be informed of any chemical substance or medication that is given to him or her. Although these specific rights are not expressly enumerated in an earlier enacted statute, the importance of children receiving appropriate care is certainly implied and encouraged by case law and other authority governing abuse and neglect proceedings. See, e.g., *State ex rel. DHHR v. Dyer*, 836 S.E.2d 472 (W. Va. 2019); Rule 2, RPCANP.

A provision found in subsection West Virginia Code § 49-2-126(a)(4) refers to a child having an appropriate travel bag. The intent of the provision is to ensure that foster children are afforded some consideration and dignity during transitions or moves. Certainly, this intent is a noteworthy goal. However, multidisciplinary treatment team members should be even more cognizant of legal authority governing transitions or moves of foster children, than simply providing a child with a travel bag. For example, West Virginia Code § 49-4-608(g) requires the court to be informed of any case in which a child receives more than three placements in a year. As another example, when a circuit court ordered the move of a child from a foster care placement of 22 months to a relative placement, the West Virginia Supreme Court expressly stated that:

> There was no discussion concerning a sufficient adjustment period nor was there a discussion about whether or not the petitioners should be allowed continued visitation with this child who referred to them as mother and father. *A child should not be treated like a sack full of potatoes picked up from a local grocery store.* The law requires that there must be a gradual transition in cases such as the one before us. *Kristopher O. v. Mazzone*, 706 S.E.2d 381, 392 (W. Va. 2011) (emphasis added).

These general principles should be kept in mind during the transition or move of any foster child.

[13] West Virginia Code § 48-10-902 states that: "If a child who is subject to a grandparent visitation order under this article is later adopted, the order for grandparent visitation is automatically vacated when the order for adoption is entered, unless the adopting parent is a stepparent, grandparent or other relative of the child."

A third category of rights involves issues associated with education or age-appropriate activities. The statute specifically refers to the right to attend school and to participate in extracurricular activities, the right to attend religious services and the right to receive care consistent with the reasonable prudent foster parent standard. In addition, the statute refers to the right to work and to develop job skills. Further, the statute refers to the right to participate in an independent living program or activities, so long as the child is old enough. These activities are consistent with the provisions found in Rule 28(c)(4) and (c)(8), as well as Rule 41(a)(7)-(8) and (a)(12)-(13) of the Rules of Procedure for Child Abuse and Neglect Proceedings.

A fourth category of rights included in West Virginia Code § 49-2-126 involves the rights of a foster child to participate in a case. This category includes the right to receive an explanation of the bill of rights and the right to contact the foster care ombudsman. This category also includes the right of the child to communicate privately with the caseworker, guardian *ad litem*, the prosecuting attorney or his or her probation officer. The statute specifically refers to visits with the caseworker no less than every 30 days. Further, the statute refers to the right of a child to attend court and, subject to the court's discretion, the right to address the court directly. W. Va. Code § 49-2-126(a)(16). The right of a child to attend hearings has previously been established by Rule 8(d) of the Rules of Procedure of Child Abuse and Neglect Proceedings. In addition, West Virginia Code § 49-4-608(b) details the child's right to participate in a permanency hearing. It is likely that a child's right to participate in hearings would be subject to the limitations set out in Rule 8(d), which allow a court to determine whether a child's attendance at a particular hearing is appropriate.

## *VII. DUTIES AND RIGHTS OF FOSTER AND KINSHIP PARENTS*

### A. Duties of Foster and Kinship Parents

West Virginia Code § 49-2-127a generally provides that the duties and rights of foster parents, the child placing agency and the Department must be set out in a written agreement. Some specific duties of foster parents include the requirement to support reunification unless the court has determined that this is not the permanency plan for the child. W. Va. Code § 49-2-127a(a)(4). Other duties include providing information about the child to the multidisciplinary treatment team and maintaining confidentiality of the details of the case and specifying the individuals to whom a foster parent may disclose information.

### B. The Reasonable and Prudent Foster Parent Standard

West Virginia Code § 49-2-128 provides guidance on the type of care a foster child should receive and the type of activities in which he or she should be allowed to participate. Specifically, the statute allows a foster or kinship parent to allow or encourage a foster child to engage in age-appropriate extracurricular, enrichment or social activities. This statute applies to children in foster or kinship homes, as well as children in a residential treatment facility. The statute further provides that child welfare agencies and residential

treatment facilities should have policies that allow and encourage children to participate in these types of activities.

The overall intent of the statute is to allow children in care to participate in the same types of activities that any other children would have the opportunity to participate in. The statute specifically authorizes foster and kinship parents to use persons to babysit or permit overnight stays that any reasonable and prudent parent would allow. W. Va. Code § 49-2-128(e). Of course, any decision as to a particular activity should be made by the caregiver with consideration as to the individual child's age, maturity and other relevant factors. It should be noted that Rules 28 and 41 refer to the reasonable and prudent parent standard and certainly encourage caregivers to allow foster children to participate in normal childhood activities.

The statute establishes a rebuttable presumption that a caregiver has acted according to the reasonable and prudent foster parent standard. W. Va. Code § 49-2-128(g). It further insulates caregivers from liability if a child participates in such an activity and is injured, unless the foster parent's conduct would be considered an intentional tort or would be considered willful, wanton, grossly negligent, reckless or criminal.

### C. Rights of Foster and Kinship Parents

Similar to the Foster Child Bill of Rights, the Legislature has also established a bill of rights for foster or kinship parents in West Virginia Code § 49-2-127. Another statute, West Virginia Code § 49-2-127a, addresses the duties of a foster or kinship parent, as well as agreements between foster or kinship parents and any child placing agency and/or the Department. As discussed above, the Legislature enacted West Virginia Code § 49-2-128, a statute that establishes the reasonable and prudent foster parent standard. These statutes provide guidance on the role of foster and kinship parents in a child abuse and neglect case. Although West Virginia Code § 49-2-127 outlines the rights of foster and kinship parents, the statute expressly states that it does not create an independent cause of action.

Subsection (a)(10) of West Virginia Code § 49-2-127 addresses the right of a foster or kinship parent to participate in court proceedings. Specifically, the statute refers to a right to be notified in advance of any hearing that will address the case plan or permanency plan of the child. Although the statue indicates that a foster or kinship parent's ability to attend a specific hearing is subject to the court's discretion, other provisions of law allow foster parents or custodial relatives to attend hearings and to be heard. Rule 3(o); W. Va. Code § 49-4-601(h); *State ex rel. H.S. v. Beane*, 814 S.E.2d 660 (W. Va. 2018). Another subsection of the statute, (a)(14), allows foster or kinship parents to be considered as adoptive parents or legal guardians. Notably, the statute governing permanency hearings certainly implies this same right because it affords foster parents, preadoptive parents or relatives providing care for the child to attend and be heard at permanency hearings. W. Va. Code § 49-4-608(j).

Subsection (a)(15) provides that foster parents have the right to move to intervene in a pending case once parental rights have been terminated. The subsection also indicates

that foster parents should be allowed to do so without fear of retaliation. It should be noted that the West Virginia Supreme Court has provided guidance on cases in which a foster parent seeks to intervene. *State ex rel. H.S. v. Beane*, 814 S.E.2d 660 (W. Va. 2018); *State ex rel. C.H. v. Faircloth*, 815 S.E.2d 540 (W. Va. 2018). In *C.H.*, the Court held that foster parents have a right to intervene in a case when the time periods established by West Virginia Code §§ 49-4-605(b) and -610(9) are implicated (a child is in care for 15 out the most recent 22 months). The statute and relevant cases provide much needed guidance on the issue of intervention in an abuse and neglect case.

Subsection (a)(13) indicates that a foster or kinship parent may submit a letter or report to the court regarding any alleged violation of either the foster child's bill of rights or the foster or kinship parent's bill of rights. It also allows such a letter or report to address concerns over the conduct of a guardian *ad litem*, a department worker or an employee of a child placing agency. The court has the discretion to require the clerk to provide copies to all parties and to address the matter as it determines would be appropriate.

Other aspects of the statute refer to rights associated with the placement or care of the child. The statute indicates that foster or kinship parents should be notified of any issue with the child that would pose a threat to the health and safety of the family or would affect the manner in which care should be provided to the child. In terms of case-planning, the statute requires that the foster/kinship parents must receive advance notice of case-planning with regard to the child, must have the opportunity to participate in this process, and must receive a copy of the individual treatment and service plan for the child. As a multidisciplinary treatment team member, a foster or kinship parent has an established right to participate in the development of a child's case plan. Rules 28, 51, RPCANP; W. Va. Code §§ 49-4-408 and -604(a). Subsection (a)(9) of West Virginia Code § 49-2-127 also indicates that foster parents have the right to communicate with professionals who are working with a child, and it includes the examples of therapist, teachers or physicians.

Subsection (a)(7) of West Virginia Code § 49-2-127 refers to the right of foster or kinship parents to receive timely notice of the removal of a child from their home and the reasons for the removal. It should be noted, however, that West Virginia Code § 49-4-111 provides specific guidance on the Department's ability to remove children from a foster or kinship home in cases in which there are allegations of abuse or neglect in the foster or kinship home. In such a situation, the Department may remove the foster child on a temporary basis without the requirement of advance notice. Therefore, it is unlikely that the term "timely notice" would be interpreted to require advance notice. Other provisions in West Virginia Code § 49-4-111 limit the Department's ability to remove foster children from specific placements, dependent upon the placement of siblings, the best interests of the child, if parental rights have been terminated and the foster parents have not applied to adopt the child and other situations.

Other aspects of the statute address issues associated with the management of foster homes, such as training and emergency contact information. Notably, West Virginia Code § 49-2-127 provides that foster or kinship parents must be provided with information about the final outcome of a complaint about the foster home and must be provided with an explanation of any corrective plan or violation.

## *VIII. MEDICAL AND MENTAL EXAMINATIONS*

### A. Procedure for Court-Ordered Medical and Mental Examinations

West Virginia Code § 49-4-603 specifies the procedure and conditions for court-ordered mental and medical examinations of a child or other parties in abuse and neglect proceedings. The case of *In re Daniel D.*, 562 S.E.2d 147 (W. Va. 2002) provides substantial guidance on questions of immunity from criminal prosecution for statements made during the course of court-ordered examinations in child abuse and neglect case. See also Syl. Pt. 3, *State v. James R.*, 422 S.E.2d 521 (W. Va. 1992). The procedures involved with a court-ordered mental or medical examination follow.

1. At any time during the proceedings, an attorney for a child or attorney for other parties may move for, or the court may order *sua sponte*, an examination by a physician, psychologist or psychiatrist, and require testimony from such expert.

2. The court cannot terminate parental/custodial rights solely for refusal to submit to an examination, nor may the court hold such person in contempt for such failure or refusal.

3. The expert (physician, psychologist or psychiatrist) may testify as to any conclusions reached from hospital, medical, psychological or laboratory records, provided they are produced at the hearing.

4. The State will be responsible for payment if the child, parent or custodian is indigent. (With regard to the payment of expert fees, see the discussion below.)

5. No evidence acquired as the result of such examination of any parent/custodian may be used against such person in subsequent criminal proceedings.

### B. Medical Examination of a Child Before Petition Is Filed

1. Subsection (b) of West Virginia Code § 49-4-603 allows any person[14] with authority to file an abuse or neglect petition to apply to the circuit judge or juvenile referee for a medical examination before an abuse or neglect proceeding has been initiated if there is probable cause to believe that evidence of abuse or neglect may be found by such an examination.

2. Upon the presentation of sufficient evidence, the judge or referee may order law-enforcement to take the child into custody for the examination. If a referee finds that a child must be subject to an examination, he or she must obtain oral confirmation from a judge in his or her circuit or in an adjoining circuit. In turn, the judge, on the next judicial day, must enter an order confirming the referee's order.

[14] Either a reputable person or representative from the Department may file an abuse and neglect petition. W. Va. Code § 49-4-601(a).

3. A CPS worker, the child's parents, guardians or custodians may accompany the law enforcement officer to the examination.

4. At the end of the examination, the law enforcement officer may return the child to the custody of his or her parent, guardian or custodian. Alternatively, the officer may retain custody of the child or place the child in the custody of the Department until the end of the next judicial day. At that time, the child must be returned to his parent, guardian or custodian unless an abuse and neglect petition has been filed and custody has been transferred to the Department. W. Va. Code § 49-4-603(b).

## C. Court-Ordered Examination By Other Experts

In addition to the medical and mental examinations authorized by West Virginia Code § 49-4-603, the court may order parties to undergo examinations by experts who are not physicians, psychologists, or psychiatrists and may enter a protective order with regard to W. Va. Code § 57-2-3, a statute that provides use immunity for statements made "upon a legal examination." *Daniel D.*, 562 S.E.2d 147. A person is entitled to have the court establish the protections afforded by West Virginia Code § 57-2-3 in a protective order.

## D. Payment for Court-Ordered Medical and Mental Examinations

The authority for the establishment of expert witness fees is governed by a combination of statutes, rules and caselaw. In a mandamus action addressing the payment of expert witness fees, the Supreme Court concluded that a circuit court retains the ultimate authority to determine compensation for expert witnesses in abuse and neglect cases. *Hewitt v. DHHR*, 575 S.E.2d 308 (W. Va. 2002). *Hewitt* did not, however, resolve who is responsible for payment of expert witnesses in abuse and neglect cases.

In the case of *In re Chevie V.*, 700 S.E.2d 815 (W. Va. 2010), the Court reviewed relevant cases and the amalgam of statutes and rules that govern this issue. After an initial review of the applicable authority, the Court determined that the question presented was a matter of first impression.

In *Chevie V.*, the Court held that the circuit court had the discretion to require the Department to pay the expert witness pursuant to West Virginia Code § 49-7-33, the statute that, at that time, allowed the Department to establish a fee schedule according to the Medicaid rate. However, the Court also held that the Department would not be liable for payment at the rate of the expert witness fee schedule established by the Public Defender Corporation. Rather, the Department would be liable for payment pursuant to its own fee schedule.

*As part of the 2015 West Virginia Child Welfare Act, the applicable statute is codified in W. Va. Code § 49-4-108.*

It should be noted that the Supreme Court determined that Trial Court Rules 27.01 and 27.02 did not govern payment in *Chevie V.* because the circuit court did not appoint the expert. Rather, the circuit court simply approved a request by the mother's attorney to hire an expert. Under Trial Court Rules 27.01 and 27.02, the Department is liable for payment for an expert witness's report writing, consultation or other preparation, and the

Supreme Court's Administrative Office is liable for an expert's fees and expenses related to appearing and testifying. It can be concluded, however, that the payment provisions in Trial Court Rules 27.01 and 27.02 would apply when a circuit court appoints an expert in an abuse and neglect case.

It should also be noted that the Court analyzed Trial Court Rule 35.05(b) and West Virginia Code § 29-21-13a(e), provisions that require the Public Defender Corporation to pay expert witness fees in eligible proceedings. In *Chevie V.*, the Supreme Court held that the provisions were general and that the more specific provisions in West Virginia Code § 49-7-33 (now W. Va. Code § 49-4-108) were dispositive of the issue. For a complete discussion of *Chevie V.,* see Chapter 5, Section I, K. Advance Approval of Expert Fees.

## *IX. CRIMINAL OFFENSES INVOLVING ABUSE AND NEGLECT OF CHILDREN*

Beyond the protections afforded generally to all persons under the criminal statutes, various provisions are specifically designed to deter and punish offenses against children and provide special protection to child-victims of crimes.

### A. Criminal Offenses Against Children

West Virginia Code §§ 61-8D-1, *et seq.* defines the various conduct generally constituting criminal offenses of child abuse and neglect that are committed by parents, guardians, custodians or persons in a position of trust to a child. Additional specific criminal offenses involving abuse or neglect of children are principally found in West Virginia Code §§ 61-8C-1, *et seq.* (Filming of Sexually Explicit Conduct of Minors), West Virginia Code §§ 61-8A-1, *et seq.* (Preparation, Distribution or Exhibition of Obscene Matter to Minors) and West Virginia Code § 49-4-901 (Contributing to Delinquency or Neglect of a Child).

### B. Protections for Child Victims of Crime

A number of statutes provide specific protections for child-victims relating to the investigation, trial, sentencing, and release of persons charged and convicted of criminal offenses against children. West Virginia Code § 15-2-15 (Establishment of a State Police Child Abuse and Neglect Investigations Unit); West Virginia Code § 61-8-13; 61-8B-14; and 61-8C-5 (Limits on interviews of children 11 years old or less); West Virginia Code §§ 62-6B-1, *et seq.* (Closed-circuit testimony of child victims testifying in criminal matters involving charges of sexual assault/abuse); West Virginia Code § 61-11A-3(d) (Victim impact statement in a presentence report involving specified offenses against a child may include a statement from a therapist providing treatment to the child-victim as to recommendations regarding the effect that possible disposition may have on child); West Virginia Code § 61-11A-8 (Notification to child-victim's parent upon release of convicted person from correctional facility); West Virginia Code § 62-1C-17a (Bail in situations of child abuse); West Virginia Code § 62-1C-17c (Bail in cases of crimes between family or household members); West Virginia Code § 62-11A-1(g) (Protections afforded children from those convicted of child offenses who are granted work-release privileges); West Virginia Code § 62-11B-6(d) (Protections afforded victims from those who are granted

home confinement); West Virginia Code §§ 62-12-7 & 7a (Pre-sentence investigations and reports involving offenses against children); West Virginia Code § 62-12-9(a)(4) (Protections afforded children from those convicted of child offenses who are released on probation); West Virginia Code § 62-12-17(a)(4) (Protections afforded children from those convicted of child offenses who are released on parole); West Virginia Code § 62-12-26 (Protections afforded children from those convicted of sexually violent offenses against children and who are serving a period of supervised release); West Virginia Code § 15-2C-2 (Relating to Central Abuse Registry identifying persons convicted of crimes involving abuse and neglect); and West Virginia Code §§ 15-13-1, *et seq.* (Requiring persons convicted of child abuse or neglect crimes to register with the State Police).

### C. Additional Finding Upon Conviction

Various statutory provisions also mandate that upon a conviction of person for a crime against a child, when the person has any custodial, visitation or other parental rights to the child, the court shall make a finding that the convicted person is an "abusing parent" within the meaning of the abuse and neglect provisions of Chapter 49 of the Code. West Virginia Code § 61-8-12(e) (Incest); West Virginia Code § 61-8B-11a (Sexual Offenses); West Virginia Code § 61-8D-9 (Child Abuse); see also West Virginia Code § 49-4-609. The court is authorized to take further action as allowed by Part VI, Article 4 of Chapter 49.

## *X. CONTRARY-TO-WELFARE AND REASONABLE EFFORTS FINDINGS*

### A. Background

The requirement that any removal of a child be based upon a judicial finding that continuation of the child in the home is contrary of the welfare of the child was the first of the existing protections afforded to children and their families by the federal foster care program. The contrary-to-welfare requirement has been in effect since the inception of the federal program in 1961. The additional requirement that states make reasonable efforts to prevent placement and reunify families was introduced into child welfare proceedings in 1980 under the Federal Adoption Assistance and Child Welfare Act. Both the contrary-to-welfare and reasonable efforts requirements have continued as core concepts in American child welfare practices. More recently, the Federal Adoption and Safe Families Act of 1997 (and implementing regulations) refined and expanded these concepts. In addition to the reasonable efforts required to prevent removal and to reunify families, federal law also now requires states to demonstrate reasonable efforts to finalize the permanency plan in a timely manner once the child is temporarily placed in foster care.

The contrary-to-welfare and reasonable efforts requirements must be reflected in judicial findings, which must be both timely and specific. Once a child is removed from the home (temporarily or permanently), the State is eligible for 3-to-1 federal matching funds under Title IV-E of the Social Security Act for the duration of the child's stay in foster care. If a child's removal from home is not based on a judicial determination that it was contrary to the child's welfare to remain in the home, the State is ineligible for Title IV-E funding for

the entire foster care episode subsequent to that removal.[15] When findings of reasonable efforts to prevent removal are negative, insufficient, late or missing, the loss of eligibility for federal foster care matching funds will also be for the duration of the child's stay in foster care. If emergency circumstances support the conclusion that it was reasonable to make no efforts to prevent removal under the particular facts, this determination must be adequately and timely stated in the court's order. Later in the case, when findings of reasonable efforts to finalize a child's permanency plan are negative, insufficient, late or missing, the State will be ineligible for federal matching funds for the child until there are positive and sufficient findings addressing this area of critical concern.

## B. Required Judicial Findings

### 1. Contrary to Welfare

A child's removal from the home must have been the result of a judicial determination (unless the child was removed pursuant to a voluntary placement agreement) to the effect that continuation in the home would be contrary to the welfare, or that placement would be in the best interest, of the child. 45 C.F.R. § 1356.21(c). The judicial determination need not necessarily use the exact terminology of the statute or regulation, so long as the language conveys that the court has determined that it would be contrary to the welfare of the child to remain at home or that placement would be in the child's best interest.

### 2. Reasonable Efforts to Prevent Removal

Unless an exception applies, when a child is removed from the home, the court must make findings as to whether the State made reasonable efforts to maintain the family and prevent the unnecessary removal of a child, and to make it possible for the child to safely return home (after a temporary placement necessary to ensure immediate safety). 42 U.S.C. § 671(a)(15)(B) and (D); 45 C.F.R. § 1356.21(b). As stated above regarding contrary to welfare findings, exact terminology is not necessary, but the language of the order must convey that the court has determined that reasonable efforts have been made or were not required.

### 3. Reasonable Efforts to Finalize Permanency Plan

Consistent with 42 U.S.C. § 671(a)(15)(C), the State must obtain a judicial determination that it has made reasonable efforts to finalize the permanency plan in a timely manner. This finding must be made without regard to the type of permanency plan that is in effect (whether the plan is reunification, adoption, legal guardianship, placement with a relative, or placement in another planned permanent living arrangement). Federal law recognizes concurrent planning as

[15] In circumstances involving a child placed in foster care as the result of a voluntary placement agreement, within the first 180 days of the placement there must be a judicial determination to the effect that the continued placement is in the best interests of the child. Without this finding, the child's placement will no longer be eligible for federal funding once the 6-month deadline has passed.

part of reasonable efforts to finalize the permanency plan. 42 U.S.C. § 671(a)(15)(F); 45 C.F.R. § 1356.21(b)(4).

4. New Findings

If a trial home visit (e.g., improvement period) exceeds six months without court authorization, or exceeds the time period the court has deemed appropriate, and the child is subsequently returned to foster care, that must be considered a new placement and Title IV-E eligibility re-established. Accordingly, the judicial determinations regarding contrary to welfare and reasonable efforts would again be required. 45 C.F.R. § 1356.21(e).

## C. Determinations that Reasonable Efforts Not Required

The State is not required to make efforts to prevent placement or reunify the family where such efforts will endanger a child's health or safety. Federal law states that "in determining reasonable efforts to be made with respect to a child . . . and in making such efforts, the child's health and safety shall be the paramount concern." 42 U.S.C. § 671(a)(15)(A). In addition, reasonable efforts to preserve the family are not required if a court finds that the parent has: subjected the child or another child to aggravated circumstances (as defined in State law – such as abandonment, torture, chronic abuse, and sexual abuse); committed certain serious criminal acts against the child, against another child, or the other parent; the parental rights of a sibling have been terminated involuntarily; or has been required by law to register as a sex offender. W. Va. Code § 49-4-604(b)(7); see also 42 U.S.C. § 671(a)(15)(D); 45 C.F.R. § 1356.21(b)(3). Finally, even if none of the specific circumstances applies, courts may exercise discretion, in individual cases, to protect the health and safety or children. 42 U.S.C. § 678. As discussed in the federal commentary accompanying the promulgation of the final regulations:

> [T]he statute should not be construed to support unwarranted attempts to preserve families. Rather, when reasonable efforts are required, the State agency and the courts must determine the level of effort that is reasonable, based on safety considerations and the circumstances of the family. Sometimes, based on its assessment of a family, the State agency determines that it is reasonable to make no effort to maintain the child in the home or to reunify the child and family. In such circumstances, if the court determines that the agency's assessment of the family is accurate and its actions were appropriate, the court should find that the agency's efforts in such cases were reasonable, not that reasonable efforts were not required. 65 Fed. Reg. 4053 (Jan. 25, 2000).

## D. Timing of Required Findings

The timing of each of the required findings is specific to the particular events occurring in a case. The "removal" date and the different procedural stages in the case are generally the key factors in identifying the deadlines applicable to a case. There are three different

deadlines for judicial findings that strictly govern eligibility for federal foster care matching funds.

1. Contrary to Welfare

The Title IV-E regulations provide that findings to the effect that continuation of the child in the home would be contrary to the child's welfare must be made in the **first** court order sanctioning or authorizing the child's removal (even temporarily) from the home. If this determination is not made in the first order pertaining to removal, the child is not eligible for Title IV-E foster care funds for the duration of that stay in foster care. 45 C.F.R. § 1356.21(c). Although removal could occur at any stage of the proceedings, orders which most often involve the first removal include: (i) Order Ratifying Emergency Custody; (ii) Initial Order Following Petition (ten-day temporary custody); (iii) Order Following Preliminary Hearing; or (iv) Disposition Order.

2. Reasonable Efforts to Prevent Removal

The judicial findings regarding reasonable efforts by the Department to prevent placement (or that such efforts were not required under the particular circumstances) must be made within 60 days following the removal of the child from home. If this determination is not made within this time period, the child is not eligible for Title IV-E foster care payments for the duration of that stay in foster care. 45 C.F.R. § 1356.21(b)(1). In most cases, the best practice is to make this finding at the time of the initial removal (along with the contrary to welfare finding). Otherwise, this finding may be inadvertently omitted during the 60-day time frame.

3. Reasonable Efforts to Finalize Permanent Placement

Findings by the court as to whether the Department has made reasonable efforts to finalize the child's permanency plan must be made within 12 months of the date the child is considered to have entered foster care, and at least once every 12 months thereafter. If the determination is not made, the child becomes ineligible for Title VI-E payments at the end of the month in which the finding should have been made and remains ineligible until such a judicial determination is made. 45 C.F.R. § 1356.21(b)(2). A child is "considered to have entered foster care" on the date the court found that the child was abused or neglected, or 60 days following the child's actual removal from home, which ever comes first. 45 C.F.R. § 1355.20.

The permanency hearing requirement generally follows the same 12-month timeframe as the findings regarding reasonable efforts to finalize the permanency plan. 42 U.S.C. § 675(5)(C). There is an exception to this timeframe when a court determines at any stage of the proceedings that reasonable efforts to return the child home are not required; then the permanency hearing must be held within 30 days of that determination. 45 C.F.R. § 1356.21(h)(2). (See Chapter 3, Section XIII for a more detailed discussion of permanency hearing requirements.) However, the permanency hearing requirement is not a Title IV-E eligibility

criterion. If a permanency hearing is not timely conducted under the applicable (12-month or 30-day) timeframe, the child does not become ineligible for Title IV-E funding. The pertinent concern for Title IV-E purposes is the finding at least once every 12 months that the Department made reasonable efforts to finalize the child's permanency plan. The best practice to follow in this regard is to make the reasonable-efforts-to-finalize findings in every hearing (and accompanying order) after the permanency plan is established as part of the child's case plan. See W. Va. Code § 49-4-604(a). This will be more than sufficient to satisfy the 12-month timeframe for such findings.

## E. Documentation of Judicial Findings

The judicial determinations regarding contrary to welfare, reasonable efforts to prevent removal, and reasonable efforts to finalize the permanency plan in a timely manner, (and any determinations that reasonable efforts are not required), must be "explicitly documented" and "made on a case-by-case basis" in the pertinent court orders. 45 C.F.R. § 1356.21(d). Regulation commentary acknowledges the administrative burdens imposed by explicit and case-by-case findings, and suggests a number of ways to provide detailed findings, including: (i) descriptions in the court order findings; (ii) language in the court order that specifically cross-references detailed statements in an agency or other report submitted to the court; (iii) language of the court order that cross-references to facts in a sustained petition; or (iv) checking off items from a detailed checklist. 65 Fed. Reg. 4056.

If the contrary to welfare or reasonable efforts determinations are not included in the required court orders, a transcript of the court hearing in which the findings were made is the only acceptable substitute. 45 C.F.R. § 1356.21(d)(1). Neither affidavits from hearing participants nor *nunc pro tunc* orders are accepted. 45 C.F.R. § 1356.21(d)(2).

## F. West Virginia Statutes

Although receipt of Title IV-E funding in cases involving out-of-home placement is dependent upon compliance with the federal requirements, several West Virginia statutes assist with compliance by inclusion of the contrary to welfare and reasonable efforts requirements.

First, the initial order granting temporary (ten-day) custody calls for both contrary to welfare and reasonable efforts to prevent removal findings. W. Va. Code §§ 49-4-105; 49-4-602. When appropriate, the petition should provide detail about supportive services that the Department or others provided to remedy the circumstances. W. Va. Code § 49-4-601(b); Rule 18(c). This information should assist the court with its findings concerning reasonable efforts to prevent removal.

Secondly, if temporary custody is granted during a preliminary hearing, the contrary to welfare and reasonable efforts to prevent removal findings are similarly required. W. Va. Code §§ 49-4-105; 49-4-602(b). Upon consideration of temporary custody pursuant to either West Virginia Code § 49-4-602(a) or (b), the circumstances when the court may

find that the State was not required to make efforts to prevent removal are specified. W. Va. Code § 49-4-602(d); see also W. Va. Code § 49-4-105. These situations generally involve aggravated circumstances.

Third, Rule 16(d) of Rules of Procedure for Child Abuse and Neglect Proceedings requires a court to conduct a hearing within 10 days if a child is removed during a case. At the hearing, the court must determine whether the child was in imminent danger and whether there are no reasonably available alternatives to removal.

Fourth, if an order at the disposition stage involves temporary custody, the contrary to welfare and reasonable efforts to prevent removal findings are required. W. Va. Code §§ 49-4-105; 49-4-604(b)(5). Fifth, both types of findings are likewise required in any disposition involving termination of parental rights. W. Va. Code § 49-4-604(b)(6). Finally, the circumstances are set out as to when reasonable efforts to preserve the family are not required before out-of-home placement at the disposition stage. W. Va. Code § 49-4-604(b)(7).

When a court conducts permanency hearings, West Virginia Code § 49-4-608(b) requires a court to determine whether the Department has made reasonable efforts to finalize the permanency plan. See also W. Va. Code § 49-4-110(c). A permanency hearing must be conducted within 12 months of the time that the Department obtained physical custody of a child, provided that the Department was required to make reasonable efforts to preserve the family. If a court finds that the Department is not required to make reasonable efforts to preserve the family, then the permanency hearing must be conducted within 30 days of the entry of the court order that includes this finding. W. Va. Code § 49-4-608.

The Rules of Procedure for Child Abuse and Neglect Proceedings have incorporated the reasonable efforts to finalize placement determination in the court review process. See, e.g., Rules 41(a) and 42(a). Additionally, Rule 28, the rule governing the child's case plan, indicates that the permanency plan and concurrent plan should be designed to achieve timely permanency in the least restrictive setting available. Further, Rule 43 indicates that permanency should be achieved within 12 months of the final disposition order. These statutes and rules, therefore, require the court to make findings as to whether the Department has made reasonable efforts to finalize the permanency plan in a timely manner and should assist with meeting federal requirements.

## G. Common Court Order Language Problems in Abuse and Neglect Cases

The following are some common problems with Title IV-E findings in court orders in abuse and neglect cases.

1. The complete absence of "contrary to welfare of child" or "best interest of child" findings in the initial removal order.

2. The order notes that the petitioner alleges in the petition that it would be contrary to the welfare of the child to remain in the home and that the Department has made reasonable efforts to prevent the need for the removal. While noting

these allegations does not hurt, *there must be a finding by the court* as to these two issues – contrary to welfare of the child and reasonable efforts to prevent removal.

3. Finding that it is in the best interest of someone or something other than the child to remove the child from the home, i.e., that it is in the best interest of society to remove the child from the home.

4. Finding that there is "no other reasonable alternative to removal of the child" instead of whether or not the Department made reasonable efforts to prevent removal or whether or not reasonable efforts were possible.

5. Giving the Department legal custody but allowing the child to remain in the home while giving the Department permission to remove the child at their discretion. It is, of course, inconsistent to find that it is contrary to the welfare of the child to remain in the home, but at the same time allowing the child to remain in the home. Therefore, if the Department is given custody, but the child is permitted to remain in the home with the authority of the Department to remove the child, there must be another hearing (within 10 days of removal) where there are findings on the issues of "contrary to welfare of the child" and "reasonable efforts." See Rule 16(d) and (e).

6. Any reference to reasonable efforts being left out of the initial removal order. Reasonable efforts findings should be in the initial order; it is often very hard to get a follow-up order with a reasonable efforts statement within the required 60-day limit.

7. A general reference to the State code requirements to substantiate findings. The findings as to contrary to the welfare of the child and reasonable efforts must be case specific.

## *XI. CHILD SUPPORT*

### A. Establishment of Support

It is generally established that the court should address child support when a child is placed in the custody of Department or the custodial or decision-making responsibility for the child is altered. Rule 16a; W. Va. Code § 49-4-801. It is within the sole jurisdiction of the circuit court to establish a child support obligation. Syl. Pt. 3, *DHHR v. Smith*, 624 S.E.2d 917 (W. Va. 2005). The case may not be transferred or remanded to the family court for assessment of the child support obligation. Rules 16a and 17(c)(5). In general, the provisions of Part VIII, Article 4 of Chapter 49 should be construed as consistent with the relevant articles of Chapter 48 of the West Virginia Code. The primary authority governing child support is found in Article 13 of Chapter 48.

When a child is removed from his or her home, the circuit court is required to issue a support order payable by the child's mother. W. Va. Code § 49-4-801(c). If a child's legal

father has been determined, then the court shall enter a support order payable by the child's legal father. If the child's legal father has not been determined, the court should address paternity. Upon the establishment of the paternity of the child, the court should enter a support order payable by the legal father. When the court enters an order addressing child support, copies of the order should be provided to the Bureau for Child Support Enforcement.

Although the statute indicates that a court "shall" enter a support order if a child is removed from the home, the court has the discretion, as allowed by the statute, to vary the amount established by the child support guidelines. See W. Va. Code § 48-13-702. In addition to the allowances established in Chapter 48, the court may enter a support order that departs from the guidelines in the following instances: 1) deviation from the guidelines may assist the parent to successfully complete an improvement period; 2) it is in the child's best interests to issue a zero child support order; and/or 3) the parent has no gross income. W. Va. Code § 49-4-801(e).

If there is a pre-existing child support order in effect, for example a prior family court order, the support obligation will automatically continue until the abuse and neglect court issues a superseding order. W. Va. Code § 49-4-802(a). If a child is returned to the physical custody of a parent, the support obligation automatically ceases. Even if an order terminating the obligation is not entered, a parent cannot be held responsible for the payment of child support for a time period in which the parent has physical custody of the child. W. Va. Code § 49-4-802(b). If a child abuse and neglect case is dismissed for failure to prove the allegations, any support provision is considered void ab initio. W. Va. Code § 49-4-802(c).

## B. Calculation of Support

At the initial hearing in a child abuse or neglect proceeding, the circuit court must require the parents to complete financial statements forms to determine the amount of any child support obligation. Rule 17(c)(5). When establishing a support order, the circuit court must apply the Guidelines for Child Support found in West Virginia Code §§ 48-13-101, *et seq.*, unless the court makes specific findings that the use of the Guidelines is inappropriate. Rule 16a(b); W. Va. Code § 48-13-702. West Virginia Code § 49-4-801(e) establishes additional reasons for deviating from the Child Support Guidelines. These reasons include the following: 1) deviation from the guidelines may assist the parent to successfully complete an improvement period; 2) it is in the child's best interests to issue a zero child support order; and/or 3) the parent has no gross income.

The child support award should be based on the combined gross monthly income of both parents using the table found in West Virginia Code § 48-13-301. West Virginia Code § 48-1-205 provides that, under some circumstances, the court may attribute income to a responsible party who is unemployed or underemployed. If necessary, the court may order the withholding of support from the wages of the person liable for support.

The lowest combined monthly gross income on the table in West Virginia Code § 48-13-301 is $550 per month. When the income of the respondent(s) is below this amount, the

court may set the child support obligation at $50 per month or other discretionary amount based upon the resources, living expenses and other child support obligations of the respondent(s).

If a court determines that it should not impose a support obligation, it should impose a zero support obligation. Imposing a zero support obligation assists the BCSE with its statutorily mandated obligation to collect child support.

## C. Modification

Once a circuit court has established a child support obligation, either by establishing an initial support obligation or modifying an existing support obligation, the circuit court may not remand the case to family court for future modification or enforcement proceedings. Syl. Pt. 5, *In the Interest of J.L.*, 763 S.E.2d 654 (W. Va. 2014). Modifications of a support order may be made by the court on the motion of any party if there is a substantial change in circumstances. Rule 16a; W. Va. Code § 48-11-105. A substantial change in circumstances includes situations in which there would be a child support obligation that is more than 15% different than the current obligation. An order modifying a support obligation must also follow the Guidelines for Child Support, unless the court specifically finds that the guidelines should not apply. *J.L.*, 763 S.E.2d at 661. Rules 16a and 46; W. Va. Code §§ 48-11-105; 49-4-801(e). The standard of proof for modifying a support order is the preponderance of evidence. Rule 46.

It should be noted that a circuit court may not cancel or alter child support that has already accrued. *In re K.S.*, 874 S.E.2d 738 (W. Va. 2022); W. Va. Code § 48-1-204.

## D. Enforcement of Support Orders

Once a circuit court establishes a child support obligation, it retains jurisdiction over the enforcement of the support order pursuant to Rule 6.[16] Syl. Pt. 4, *J.L.*, 763 S.E.2d 654. Under Rule 16a(d), the circuit court cannot transfer or remand the case to the family court for subsequent enforcement proceedings. Support orders may be enforced through any of the methods established by Chapters 38 and 48 of the West Virginia Code.

If a parent fails to pay child support, the BCSE may bring a contempt action. In addition, the DHHR's Bureau for Children and Families may initiate contempt proceedings. Further, the child's physical custodian, the child's guardian *ad litem* or the prosecuting attorney may pursue contempt proceedings for the parents' failure to pay child support. W. Va. Code § 49-4-803(b).

[16] Since Rule 6 was the basis for the Court's holding in *J.L.*, the exception established by Rule 6, when a circuit court returns a child to his or her cohabitating parents without entering a visitation or support order that alters the relationship of the parents, would serve as the one situation in which a circuit court would not retain jurisdiction over a future child support matter between the parents.

### E. Post-Termination Child Support

Once a circuit court enters a support order, the support obligation will automatically continue beyond the termination of parental rights unless the court expressly terminates the support obligation in an order. W. Va. Code § 49-4-802(d). See also Syl. Pt. 2, *In re Ryan B.*, 686 S.E.2d 601 (W. Va. 2009); Syl. Pt. 7, *In re Stephen Tyler R.*, 584 S.E.2d 581 (W. Va. 2003). This requirement applies to terminations that occur as a result of a voluntary relinquishment or an adverse judicial determination. *Ryan B.* The circuit court, however, retains jurisdiction to prospectively modify a post-termination child support order. Syl. Pt. 8, *Stephen Tyler R.*

### F. Other Support Matters

The court may also consider addressing medical support for the child pursuant to West Virginia Code § 48-12-102, and the inclusion of the language required by West Virginia Code § 48-11-102 in the order establishing child support.

## *XII. ACCESS TO RECORDED INTERVIEWS OF CHILDREN*

Given the ease of publication of electronic or written material, it is necessary to guard against the unauthorized disclosure or publication of recorded interviews of children. As a general principle, recordings of forensic interviews of children are subject to the confidentiality provisions found in West Virginia Code § 62-6B-6 and Trial Court Rule 18, and access to and disclosure of recorded interviews is prohibited unless expressly allowed by the confidentiality provisions.

### A. Definition of "Interviewed Child"

The confidentiality provisions govern disclosure of interviews of children that are electronically recorded when the topic of the interview involves alleged criminal behavior or abuse or neglect of *any* child who is under 18. Therefore, the protections apply whether or not the interviewed child is the direct victim of the alleged criminal behavior or abuse or neglect. T.C.R. 18.02(a). For example, an older sibling of a victim could be interviewed, and his or her recorded interview would be confidential even though he or she was not the identified victim of the alleged criminal behavior or abuse or neglect.

### B. Definition of "Recorded Interview"

The term "recorded interview" includes the electronic recording itself, any transcript of an electronic recording, and any written documentation of the recorded interview. T.C.R. 18.02(b). For instance, a written summary of a recorded interview would be subject to the confidentiality provisions found in West Virginia Code § 62-6B-6 and Trial Court Rule 18. However, documents such as criminal complaints, police reports or other routine law enforcement documentation are **not** subject to these requirements. T.C.R. 18.02(b).

The confidentiality provisions are broad and apply to almost any type of professional whose interview with a child is recorded electronically, so long as the topic of the interview

involves alleged criminal behavior or abuse or neglect of a child. Of course, the provisions apply to a recorded interview conducted by an employee or representative of a child advocacy center. They also apply when a psychologist, psychiatrist, physician, nurse, or social worker interviews a child. They further apply to a recorded interview if a psychiatrist or licensed psychologist records an interview of a child to determine whether a child should be allowed to testify in a criminal case through live, closed-circuit television. W. Va. Code § 62-6B-3(d). Finally, the provisions apply to a recorded interview conducted by a child protective services worker, a law enforcement officer, a prosecuting attorney, or his or her representative. T.C.R. 18.02(b).

Although Trial Court Rule 18.02(b) applies to broad categories of professionals, such as prosecuting attorneys, not all interviews of a child will necessarily be recorded. See W. Va. Code § 62-6B-5.[17] For example, a nurse may perform a physical examination of a child for alleged sexual abuse, but the nurse is not subject to the memorialization requirement set forth in West Virginia Code § 62-6B-5. Similarly, a prosecuting attorney is not required to record an interview when he or she prepares a child to testify in court. W. Va. Code § 62-6B-5.

## C. Access During Investigation

Access to or disclosure of a recorded interview is dependent upon whether a court case has been initiated or whether a case is in the investigative phase. During an investigation, only specified professionals may obtain copies or observe a recorded interview. These professionals include the same professionals who may conduct such an interview, and they are listed in Section B., above. Treating professionals, such as psychiatrists, psychologists, nurses, or social workers, should be afforded reasonable access to an interview, but should not be provided with copies of the interview. W. Va. Code § 62-6B-6(b).

Whether a parent, guardian, or custodian may review a recording depends upon whether he or she is considered a perpetrator of criminal behavior or abuse or neglect. During an investigation, a parent, guardian or custodian can only be allowed to observe a recorded interview if he or she is *not* an alleged perpetrator of the criminal behavior or the abuse or neglect. The prohibition on review applies if the allegations *may* give rise to a judicial or administrative proceeding. Although the term “administrative” proceeding is not defined, the intent of the phrase is to prevent review of an interview during an investigation if the DHHR may open a case for services to address the allegations of abuse or neglect. W. Va. Code § 62-6B-6(b).

Another limit on access by a parent, guardian or custodian also pertains to recorded interviews. A parent, guardian, or custodian should not be allowed to watch a recorded interview if it would frustrate or undermine an investigation. W. Va. Code § 62-6B-6(b).

[17] West Virginia Code § 62-6B-5 establishes circumstances when an interview of a child must be memorialized by audio, video, or note-taking. This code section applies only to criminal investigations involving sexual assault of a child when the alleged victim is under 13 years of age. The requirements to memorialize an interview of a child by this code section do not correspond to the confidentiality provisions of Trial Court Rule 18 and West Virginia Code § 62-6B-6.

As an example, it may be beneficial for a "protective" parent to watch a child's recorded interview. Conversely, a parent who might attempt to influence a child's statement should not be allowed to view a recording.

## D. Access During Court Proceeding

Once a court case has been initiated, Trial Court Rule 18 governs access to and disclosure of recorded interviews of children. Trial Court Rule 18 covers all West Virginia court cases, whether the proceeding is in circuit court, family court, or magistrate court. T.C.R. 18.01. For example, Trial Court Rule 18 would govern disclosure if the evidence in a personal safety order case included a recorded interview of a child. Similarly, Trial Court Rule 18 would apply in a final protective order proceeding in family court if the evidence included this type of interview.

The Supreme Court has addressed the ability of an indigent defendant to access a "recorded interview" of a child in preparation for a post-conviction habeas corpus proceeding. *State ex rel. Tackett v. Poling*, 843 S.E.2d 518 (W. Va. 2020). This case arose when an indigent inmate, convicted of sexual offenses against a child, sought a writ of mandamus to obtain transcripts and other material contained in his criminal case file in preparation for filing a post-conviction habeas corpus petition. In an attempt to challenge his conviction, he sought specified documents from the underlying criminal file. The circuit court, however, denied the request because it found that an inmate may only obtain discovery for the purposes of a habeas corpus proceeding under Rule 7 of the Post-Conviction Habeas Rules. See *State ex rel. Wyant v. Brotherton*, 589 S.E.2d 812 (W. Va. 2003). Resolving the issue, the Court held that while an inmate is entitled to one free copy of his or her transcript under *Call v. Mckenzie*, 220 S.E.2d 665 (1975), an inmate may not engage in discovery before a habeas corpus petition is filed. Syl. Pt. 3, *Tackett*, 843 S.E.2d 518.

Because this case involved the sexual abuse of a child, the Court also held that an inmate's entitlement to a copy of free copy of his or her transcript would not include any document that is protected from disclosure. Syl. Pt. 2, *Tackett*, 843 S.E.2d 518. In the same syllabus point, the Court specifically noted that an inmate would not be entitled to a recorded interview of a child, any transcript of such an interview or any related documentation that Trial Court Rule 18.03 protects from disclosure.

## E. Required Protective Order Provisions

Before a recorded interview may be disclosed, a protective order must be established that controls access to, publication of, duplication of, or use of any recorded interview of a child. As explained above, "recorded interview" includes an electronic recording, a transcript or written documentation of an interview, such as a summary. T.C.R. 18.03(b). Any protective order must include the terms and conditions set forth in Trial Court Rule 18.03(b). A discussion of the required terms follows.

First, all copies of a recorded interview must be marked as follows: "CONFIDENTIAL - PENALTIES FOR UNAUTHORIZED DISCLOSURE OR DUPLICATION." T.C.R. 18.03(b)(1).

Secondly, access to and use of a recorded interview by counsel for the parties, any guardian *ad litem*, and their employees is limited to the use in the case and only as allowed by the protective order. T.C.R. 18.03(b)(2). For example, an attorney who represents a parent in an abuse and neglect case in which a recorded interview was disclosed would not be allowed to use the recorded interview in a subsequent family court case, such as a divorce, without authorization by the court.

A third provision in a protective order involves review by parties. Only parties may review an interview, and their observation must be under the supervision of their counsel, the guardian *ad litem*, or their staff. This requirement expressly prohibits an attorney from providing copies of a recorded interview, transcript or written documentation of an interview to a party, as might be done routinely with other types of discovery. If a party appears *pro se* in a case, he or she may watch a recording in the presence of court staff, but he or she may not obtain a copy of a recorded interview. T.C.R. 18.03(b)(3).

A fourth provision in a protective order requires a protective order to prohibit review by non-party family members of a defendant, respondent, petitioner, or victim unless the presiding judicial officer finds that the disclosure is necessary to protect a party's rights or is in the best interests of the interviewed child. T.C.R. 18.03(b)(3). This finding should be included in the protective order.

One example in which a family member could be allowed to watch a recorded interview would involve a juvenile case when a juvenile is charged with a sexual offense against a child. The juvenile, as a party, would be allowed to review a recording of an interview. Under a strict interpretation of Trial Court Rule 18, a juvenile's parent would not be able to watch a recording. However, in most cases, it would be helpful for a juvenile's parent to review a recorded interview in order to evaluate the allegations against his or her child. In such a case, the presiding judge should determine whether or not a parent of a juvenile would be allowed to observe a recorded interview and should indicate the finding in the protective order.

As another example, it would be helpful, in most cases, for a parent (a non-perpetrator) whose child is a victim of a sexual offense to be allowed to watch a recording. In that instance, the protective order should simply specify that the parent would be allowed to do so because it is in the child's best interests.

Another required provision in a protective order addresses access to a recorded interview by a party's consultant, investigator, or expert. T.C.R. 18.03(b)(4). A professional of this type may be allowed to receive a duplicate or watch a recorded interview, so long as the professional has signed a written agreement to be bound by the protective order. In most cases, it would be helpful to identify the consultant, investigator, or expert and any limitations on his or her review in the protective order or an amendment to it.

Further, a protective order should include a clause that requires counsel or a guardian *ad litem* to take reasonable and appropriate measures to prevent unauthorized access to a recorded interview. T.C.R. 18.03(b)(5). Again, this provision applies to recordings, transcripts and related documentation, such as a summary of a recorded interview.

The protective order should include specific confidentiality provisions that a party should follow if the recorded interview is filed as an exhibit to a pleading or is discussed in a pleading. T.C.R. 18.03(b)(6). For example, the protective order should require counsel to comply with the procedures found in Trial Court Rule 10.03 to obtain an order sealing a recorded interview if counsel files it as an exhibit or discusses it in detail in a pleading.

A protective order should include a provision governing the use of a recorded interview at a deposition. T.C.R. 18.03(b)(7). If parties or attorneys use a recorded interview at a deposition, they shall have both the right and obligation to designate a recorded interview as confidential and subject to the terms of a protective order.

A protective order should include a provision that requires counsel to notify the court before a recorded interview is used at a hearing or trial in a case. T.C.R. 18.03(b)(8). The type of notice is not specifically identified, but, in most cases, a written notice should be filed.

Any protective order should include the statutory criminal penalties for the knowing and willful duplication or publication of a recorded interview established by West Virginia Code § 62-6B-6(d). T.C.R. 18.03(b)(9). The misdemeanor penalty includes a jail term of not less than 10 days nor more than one year or a fine of not less than $2,000.00 nor more than $10,000.00. W. Va. Code § 62-6B-6(d).

A court is further authorized to include any other appropriate measures in a protective order. T.C.R. 18.03(b)(10). The judicial officer is, therefore, authorized to tailor any protective order to the circumstances of a particular case.

## F. Expedited Access

Although distribution of a recorded interview must be subject to a protective order, a judicial officer may allow a guardian *ad litem* or counsel to have expedited access to a recorded interview. T.C.R. 18.03(c). In these circumstances, counsel or a guardian *ad litem* may review a recorded interview while it is in the custody or possession of an authorized individual. An example of an authorized individual is specified as a prosecuting attorney, but the rule does not limit the term to a prosecuting attorney. Therefore, counsel or a guardian *ad litem*, as allowed by a provisional court order, could review a recorded interview at a child advocacy center.

## G. Production by Non-Parties

Trial Court Rule 18.04 governs the production of an interview by a person or entity who is not a party to a proceeding. A typical example would involve the production of a recorded interview by a child advocacy center. A third party, such as a child advocacy

center, is not authorized or obligated to produce a recorded interview unless a party obtains a court order as described below. A subpoena, standing alone, does not authorize or obligate a third party to disclose this type of recorded interview.

A party to a proceeding who seeks production of a recorded interview must file a motion with the court that specifies the basis or grounds for the production. A copy of the subpoena to be served on the non-party must be filed with the motion.

The motion, subpoena, and a notice of hearing must be served on counsel and any unrepresented party. It must also be served on the prosecuting attorney in the county where the proceeding is pending and the prosecuting attorney where the recorded interview was conducted or used as part of an investigation. For example, a person might be seeking a divorce or other relief such as establishment of a parenting plan in a county other than the county where the interview was conducted. In those circumstances, the party must serve both the prosecutor where the family court case is pending and the county where the interview was conducted.

The presiding court is required to conduct a hearing on the motion. As part of its analysis, the court may conduct an *in camera* inspection of the records. Upon a finding of good cause, the court may order the disclosure of specified parts of the recorded interview or other records. If the court orders the disclosure of the records, the court is required to enter a protective order that includes the provisions found in Trial Court Rule 18.03(b). Absent a court order established through the above-referenced procedure, the third party is not authorized or obligated to disclose the recorded interview.

## *XIII. PARTICIPATION OF THE CHILD IN HEARINGS AND MULTIDISCIPLINARY TREATMENT TEAM MEETINGS*

*Note: A child's attendance at hearings or multidisciplinary treatment team meetings is distinct from testimony which is governed by subsections (a) through (c) of Rule 8 and Rule 9.*

Rule 8(d) provides that a child may attend hearings or parts of hearings unless the court determines that such attendance is inappropriate. West Virginia Code § 49-2-126(a)(16) also provides that a child has a right to attend hearings and may address the court directly, subject to the court's discretion. Similarly, a child may participate in multidisciplinary treatment team meetings unless the team finds it is inappropriate. See also W. Va. Code § 49-4-405(b) (providing that a child may attend a multidisciplinary treatment team meeting if the team determines that the child's attendance is appropriate). Factors that should be considered are the child's preferences and developmental maturity. Certainly, the guardian *ad litem's* recommendation should be given weight in making this decision. See generally Appendix A, RPCANP.

If a child is 14 years of age or older or is otherwise of an age of discretion, the court is required to consider the child's wishes concerning the termination of parental rights. W. Va. Code § 49-4-604(c)(6)(C). Noting this statutory requirement, the Supreme Court has held that a child's preferences about the termination of parental rights should be

considered when the child is of an age of discretion. *In the Interest of Jessica G.*, 697 S.E.2d 53 (W. Va. 2010); *In re Ashton M.*, 723 S.E.2d 409 (W. Va. 2012). However, a child's wishes are not dispositive as to termination of parental rights. Syl. Pt. 4, *In re J.A.*, 833 S.E.2d 487 (W. Va. 2019). Rather, a child's preference is one factor for the court's consideration.

The permanency hearing is another juncture at which a child's input or attendance is crucial. As established by West Virginia Code § 49-4-608(b), a child who is 12 years of age or older is entitled to notice of the permanency hearing. Also, a child who is 12 years of age or older has the right to be present at the permanency hearing. This right may, however, be waived by the child's attorney at the child's request. The child's attorney may waive the child's right to be present if the child is younger than 12 years old and would suffer emotional harm.

With regard to the implementation of a permanency plan, a child who is 12 years of age or older must consent to an adoption. W. Va. Code § 48-22-301(f). Further, the West Virginia Supreme Court has recognized that a child's preferences regarding placement with a particular parent should be considered. *In re Frances J.A.S.*, 584 S.E.2d 492 (W. Va. 2003); *In the Matter of Bryanna H.*, 695 S.E.2d 889 (W. Va. 2010).

## *XIV. INDIAN CHILD WELFARE ACT*

The Indian Child Welfare Act ("ICWA") was enacted by Congress in 1978. (codified at 25 U.S.C. §§ 1901, *et seq*.) ICWA was enacted to address the congressional findings that there is an "alarmingly high percentage" of Indian families broken up by the "often unwarranted" removal of children by non-tribal agencies; and that an alarmingly high percentage of the children are placed in non-Indian foster and adoptive homes.

Accordingly, Congress has stated its intention to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families. ICWA establishes minimum federal standards for the removal of Indian children from their families. Additionally, the Act imposes several criteria to better assure the placement of any removed child in foster-adoptive homes which will reflect the unique values of Indian culture. 25 U.S.C. §§ 1901 and 1902.

The Bureau of Indian Affairs has published "Guidelines for Implementing the Indian Child Welfare Act." The most recent version was published in 2016.

### A. When ICWA Applies

The Indian Child Welfare Act applies in abuse and neglect proceedings when an "Indian child" is removed from his or her parent or Indian custodian for placement in a home or institution (including foster care) in circumstances when the parent or custodian cannot have the child returned upon demand. 25 U.S.C. § 1903(1).

An "Indian child" is defined as:

- An unmarried person under the age of 18 who is:
- a member of a federally-recognized Indian tribe; **OR**
- the biological child of a member of a federally-recognized Indian tribe; **and**
- The child is eligible for membership in any federally-recognized Indian tribe. 25 U.S.C. § 1903(4).

## B. Jurisdiction

Upon finding that ICWA applies to an abuse and neglect proceeding, a determination should be made as to whether there is exclusive tribal jurisdiction or whether the circuit court may retain jurisdiction over the case subject to the other ICWA provisions.

*Exclusive Tribal Jurisdiction*

The child's Indian tribe has exclusive jurisdiction over the proceeding if the child resides in or is domiciled in the reservation of the tribe **or** when the child is a ward of the tribal court. 25 U.S.C. § 1911(a).

However, the circuit court may order the temporary removal of an Indian child who resides in or is domiciled on a reservation but temporarily located elsewhere if such removal is necessary to prevent imminent physical harm to a child. 25 U.S.C. § 1922.

In cases where there is no exclusive tribal jurisdiction, the circuit court must transfer the case to the tribal court if requested to do so by one of the child's parents, the tribe, or the child's Indian custodian (as defined by 25 U.S.C. § 1903(6)). The circuit court may refuse to transfer the case to the tribal court if:

- The circuit court finds good cause not to transfer the case; **or**
- One of the child's parents objects to the transfer; **or**
- The tribal court declines to accept jurisdiction.

## C. Notice Requirements

In cases where there is no exclusive tribal jurisdiction, the petitioner in the circuit court proceeding must provide written notice to the Indian child's parent or Indian custodian, and the child's tribe. The notice must be served by certified mail, return receipt requested and must include a statement that the notified party has a right to intervene in the proceedings. If the identity or location of the parent or custodian and the tribe cannot be determined, notice must be given to the Secretary of the Interior. The proceeding cannot proceed until at least ten days have passed after receipt of notice. Even after such ten days has passed, the parent, custodian, or tribe, must be granted an additional 20 days to prepare for the proceeding if a request is made for such additional time. 25 U.S.C. § 1912.

In an abuse and neglect case, the adult respondents claimed error because the DHHR had not provided notice by registered mail to the applicable tribe in accordance with 25 U.S.C. § 1912(a). *In re N.R.*, 836 S.E.2d 799 (W. Va. 2019). However, it was undisputed that a tribal representative had called the DHHR after the father had notified the tribe of the case. After this actual notification, the DHHR kept the tribe informed about the case and provided documentation from the case to it. Therefore, the circuit court found that any deficiency with notice had been resolved and that the case should not have been dismissed. The Supreme Court affirmed the ruling and found that there was no basis to invalidate the proceeding.

## D. Transfer to a Tribal Court

The ICWA provides for the transfer of child welfare proceedings involving an Indian child to a tribal court unless there is good cause not to do so. 25 U.S.C. § 1911. In addition, a federal regulation establishes a procedure for the determination as to whether there is good cause to deny a motion to transfer. 25 C.F.R. § 23118. The 2016 Guidelines for Implementing the Indian Child Welfare Act also provides significant guidance on transferring a case from a West Virginia court to a tribal court. See *State ex rel. Del. Tribe of Indians v. Norwicki-Eldridge*, 888 S.E.2d 866 (W. Va. 2023).

## E. Other ICWA Provisions

### 1. Placement

#### a. *Foster Care*

No foster care placement may be ordered in an ICWA case without a finding that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical harm to the child. The finding must be supported by:

- Clear and convincing evidence; including
- Testimony of a qualified expert witness.

25 U.S.C. § 1912(e).

The Supreme Court has recognized that the ICWA does not specify the hearing at which the expert testimony must be presented. *In re N.R.*, 836 S.E.2d 799 (W. Va. 2019). As noted by the Court, most courts have concluded that the adjudicatory hearing is the best procedural phase to present this type of evidence. The Court held that the circuit court did not err by finding that there was no violation of the ICWA when it accepted the parents' stipulations and did not require expert testimony at adjudication. It further concluded that any error would be harmless because expert testimony was presented at disposition and, therefore, the requirements of the Act were satisfied. *N.R.*, 836 S.E.2d at 811.

If a parent or Indian custodian consents to foster care placement, the consent can be revoked at any time and the child must be returned to the parent or Indian custodian. 25 U.S.C. § 1913(b).

Furthermore, any consent by a parent or Indian custodian to a foster care placement or to termination of parental rights must be made in writing and placed on the court's record, and the court must certify that the terms and consequences of the consent were fully explained in detail and were understood by the parent or custodian. 25 U.S.C. § 1913.

b. *Termination*

As with any out-of-home placement, prior to terminating a parent's rights, the court must find that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical harm to the child. The finding must be supported by:

- Evidence beyond a reasonable doubt; including
- Testimony of a qualified expert witness.

25 U.S.C. § 1912(f).

To determine the type of expert testimony required, the relevant federal regulation states that:

> A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. A person may be designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe. 25 C.F.R. § 23.122(a).

In *N.R.*, the Supreme Court recognized that an expert *must* be able to testify as whether the child's continued custody with the parent or Indian custodian would result in damage to the child. However, the Court noted that it is in the court's discretion as to whether the expert *should* be able to testify as to the social and cultural standards of a tribe. The Court further commented that the Bureau of Indian Affairs has recognized this same principle--that an expert must be able to testify as to harm to a child, but may not, in all cases, be required to testify as to social and cultural standards. It is dependent

upon whether, under the particular facts and circumstances of the case, this type of evidence is relevant. *N.R.*, 836 S.E.2d at 812.

2. Remedial Services

Prior to the removal of an Indian child from his or her home, and prior to termination of a parent's rights, the court must be satisfied that "active" efforts have been made to prevent breakup of the Indian family and that the efforts have been unsuccessful. 25 U.S.C. § 1912(d).

The applicable federal regulation provides that: "Active efforts means affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family." 25 C.F.R. § 23.2. The regulation establishes guidelines on the type of efforts that must be provided to a family that include a preference for safe reunification as a goal, comprehensive assessments, the use of family preservation strategies, the provision of services, visitation, a diligent search for relatives, placement of children with their siblings, and post-reunification services if appropriate. The Supreme Court has noted that other courts have recognized that the active efforts standard involves an active, not passive approach, in attempt to reunify an Indian child with his or her family of origin. *In re N.R.*, 836 S.E.2d 799, 809 (W. Va. 2019).

3. Placement Criteria

An Indian child placed in foster care must be placed in the least restrictive setting which most closely approximates a family and in which his or her special needs must be met. The child must also be placed with reasonable proximity to his or her home, and placement preferences must be given, in the absence of good cause, with:

- A member of the child's extended family;
- A licensed foster home approved or specified by the Indian child's tribe;
- An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
- An institution for children approved by the tribe or operated by an Indian organization.

Presumably, the above-stated preferences must be applied in the order in which they are listed unless the tribe specifies otherwise. ICWA further requires that the standards to be applied in meeting the preference requirements must be the "prevailing social and cultural standards of the Indian community." 25 U.S.C. § 1915(b), (c) and (d).

Although the ICWA establishes certain placement preferences, the Supreme Court has recognized that a failure to follow the preferences does not provide grounds to

invalidate an abuse and neglect proceeding. *In re N.R.*, 836 S.E.2d 799, 813 (W. Va. 2019).

### F. Remedy for Violations

A parent, Indian custodian, and the tribe may petition the court to invalidate any removal or termination of an Indian child upon a showing that such action violated provisions of ICWA. 25 U.S.C. § 1914.

### G. Additional Information

Further information, including ICWA checklists, may be obtained from:

National Council of Juvenile & Family Court Judges
P. O. Box 8970
Reno, NV 89507
(775) 507-4777
www.ncjfcj.org

## *XV. PRE-PETITION PROCEEDINGS RELATING TO CHILD ABUSE AND NEGLECT*

Although only circuit courts have jurisdiction to handle child abuse and neglect cases, allegations and information regarding child maltreatment sometimes arise in other types of cases properly before the family courts. In limited circumstances, explained below, a family court judge may order the Department to take emergency custody of a child. In addition, a referral and investigative process has been established by the following rules: Rules 48 and 48a, Rules of Practice and Procedure for Family Court (RFC); Rules 16a and 25a, Rules of Practice and Procedure for Domestic Violence Civil Proceedings (RDVCP); Rule 13, Rules for Minor Guardianship Proceedings; and Rule 3a, Rules of Procedure for Child Abuse and Neglect Proceedings (RPCANP). All of these rules are commonly referred to as the "overlap" rules. They outline specialized procedures that may be invoked when abuse and neglect allegations arise in certain types of family court cases.

### A. Family Court: Temporary Emergency Custody Orders

In addition to the referral and investigative process explained below, a family court judge is authorized to order the Department to take temporary emergency custody of a child in specific circumstances. W. Va. Code § 49-4-302. For a child to be subject to this type of limited emergency custody order, he or she must be in the physical custody of a party to an action or proceeding before family court. By clear and convincing evidence, the family court judge must find that there is imminent danger to the physical well-being of a child; that the child is not subject to a case pending in circuit court that involves allegations of abuse and neglect and that there are no reasonably available alternatives to emergency custody. W. Va. Code § 49-4-302(a). Unless an abuse and neglect petition is later filed, the period of emergency custody may not exceed 96 hours. W. Va. Code § 49-4-302(f)(1).

As contemplated by the statute, the family court should enter a written order, and it must include case-specific findings that explain the basis for emergency custody. Once the order is issued, it must be transmitted to the Department, the circuit court and prosecuting attorney. When the Department receives this type of emergency custody order, it is required to assist the family court judge with placement of the child.

The statute establishes a preference for placing a child with an appropriate relative. W. Va. Code § 49-4-302(g)(1). A worker who assumes custody of a child as a result of a family court order is required to notify the following persons: any parents, grandparents, guardians or custodians of the child, provided that they are known or can be reasonably located. The worker is authorized to disclose the basis for the temporary custody order to these relatives. If none of these persons can be located or contacted, the worker should notify the child's closest relative, if possible, and explain the reasons for the emergency custody order. If an appropriate relative or neighbor of the child is willing to care for the child, the worker should place the child in that person's care or custody. Although foster care is not specifically mentioned in the statute, it certainly would be an option if no relative or neighbor could assume custody. If there are no other reasonably available alternatives, the Department may place the child in an emergency shelter.

When a circuit court receives an emergency custody order from family court, it is required to enter an administrative order that directs the Department to submit an investigative report to both the family and circuit courts within 96 hours from the time the child is placed in the Department's custody. The report must indicate whether the Department will file a child abuse and neglect petition based upon its investigation. W. Va. Code § 49-4-302(e).

An order of temporary emergency custody issued by a family court can only last 96 hours, if no further action is taken. Otherwise, it will expire by operation of law at the end of this 96-hour time period. If the Department files a child abuse and neglect petition, the temporary custody order will automatically be extended until a preliminary hearing is conducted in the circuit court, unless the circuit court orders otherwise. W. Va. Code § 49-4-302(f).

## B. Administrative Proceedings Arising from Domestic Relations or Domestic Violence Cases

During the course of a domestic relations case involving issues of custody or visitation of minor children, a family court may obtain information giving reasonable cause to suspect that a child (or children) has been abused or neglected. Similarly, allegations in a domestic violence proceeding may give rise to such reasonable suspicions of child maltreatment. In these circumstances, the family court, in writing, must immediately report the suspected abuse or neglect to the Child Protective Services (CPS) Office in the county where the family court case is pending.[18] When the written referral is sent to CPS, a copy is also transmitted by the family court to the circuit court in the county where the family court case is pending. See Rule 48(b), RFC; Rules 16a and 25a(a), RDVCP. In

[18] This written referral procedure is in addition to any oral communication made by the family court to the state child protective services agency pursuant to its duty as a mandatory reporter. Rule 48(b), RFC; Rule 16a, RDVCP.

each circuit, the chief circuit judge should determine if the copies of the CPS referral letters should all be directed to the chief judge, to another designated circuit judge, or handled on a rotational basis. A copy of the referral letter is also to be placed, under seal, in the family court case file by the circuit clerk.

Upon receiving a written referral from a family court, the circuit court is required to promptly issue and have served an administrative order in the name of and regarding the affected child or children. The administrative order will direct CPS to investigate the suspected child maltreatment and submit a report to the circuit court; or appear at a scheduled hearing to show cause why the investigative report has not been submitted. The circuit court's administrative order should schedule the hearing for a date not to exceed 45 days. The time interval may be substantially shortened if the court determines that the information in the family court's written referral presents reason to believe a child may be in imminent danger. Rule 3a(a), RPCANP; Rule 25a(a), RDVCP.

When CPS believes the circuit court of another county is a more appropriate venue for the administrative proceedings, it may file a motion to transfer the administrative proceedings to another county. Rule 3a(e), RPCANP; Rule 25a(f), RDVCP. Such a motion must be filed within ten days following the service of an administrative order directing CPS to conduct an investigation. The court should grant the motion unless it finds that the basis for the motion is clearly unreasonable under the circumstances. Any transfer of the administrative proceedings to another circuit court will not affect the forty-five-day time period required by Rule 3a(e) of the Rules of Procedure for Child Abuse and Neglect Proceedings.

Once the circuit court provides the circuit clerk the *Administrative Order Directing Investigation and Report*, a "JAA" number will be assigned and placed on the order (along with the family court case number from the case from which the written referral originated). The clerk should then fax or mail copies of the order to the prosecuting attorney, the county supervisor of the local CPS office, and the family court that made the written referral. Rule 3a(c). Because these administrative proceedings involve child abuse and neglect matters, the court file should be handled as confidential records similar to Chapter 49 cases. Likewise, hearings on these administrative orders are to be closed to the general public; except that any person whom the court determines to have a legitimate interest in the matter may attend. If the family court case that gave rise to the referral and order requiring investigation was a domestic violence case, involved staff from a domestic violence agency is entitled to attend administrative order hearings to the same extent of access to domestic violence hearings. Rule 3a(d).

These administrative proceedings will typically be short-lived cases. In most of these administrative cases, CPS will investigate and either file its investigative report with the circuit court or will file an abuse and neglect petition, thereby starting a new "JA" case. The filing of the investigative report or abuse and neglect petition will usually occur before the scheduled hearing date but could occur at the hearing. If an abuse and neglect petition has been filed, or upon review of the investigative report the circuit court concludes that CPS is not under any obligation to file a petition, the court should file an *Administrative Order of Closure* to conclude the case.

## C. Mandamus Proceedings Following the Filing of an Investigative Report

Another possible outcome for an administrative case could occur when CPS files an investigative report finding no necessity to file an abuse and neglect petition. Upon review of the Department's report and the written referral from family court, the circuit court may believe that the information reasonably suggests that CPS has a statutory obligation to file an abuse and neglect petition. Rule 3a(b), RPCANP; see also Rule 25a(b), RDVCP. In this instance, the court should issue a *Mandamus Show Cause Order* which treats the written referral from family court as a mandamus petition in the name of the child or children. By its terms, the mandamus show cause order closes the "JAA" case and opens a new mandamus proceeding, setting a prompt hearing on the question of whether the Department has a clear legal duty to file an abuse and neglect petition.

The Department's mandatory duty to file an abuse and neglect petition can arise in one of two ways. First, under the particular circumstances the Department may have a nondiscretionary duty to file a petition pursuant to the provisions of West Virginia Code § 49-4-605. Secondly, in other situations where the decision to file is within the Department's discretion, a duty to file can arise if the court finds "aggravated circumstances" and that the Department acted arbitrarily and capriciously in deciding not to file an abuse and neglect petition. Rule 3a(b). The term "aggravated circumstances" includes, but is not limited to, child abandonment or when a parent subjects a child to torture, chronic abuse or sexual abuse. W. Va. Code § 49-4-602(d)(1).

## D. Contempt Proceedings Relating to Pre-Petition Investigations

The third (and least likely) path for an administrative case would be when CPS does not file an investigative report or abuse/neglect petition within the timeframe set in the administrative order. The circuit court should then issue a *Contempt Show Cause Order Regarding Prior Order Directing Investigation and Report*. The contempt matter would be addressed as part of the administrative case, with the same "JAA" case number. The administrative case would not be closed until the contempt issue is fully resolved.

Contempt proceedings could also arise in the course of a pre-petition mandamus case. If a circuit court issues an order determining that CPS has a mandatory duty to file an abuse/neglect petition and CPS does not do so, the court may issue a *Contempt Show Cause Order for Failure to File an Abuse and Neglect Petition*. These contempt proceedings would remain part of the mandamus case, and all orders and other filings should bear the same "JAM" number. The mandamus case would remain open until the contempt matter is fully resolved.

## E. Removal of Family Court Minor Guardianship Cases to Circuit Court

Under West Virginia Code § 44-10-3, a petition seeking appointment of a guardian for a minor may be filed and heard in either family court or circuit court. If a minor guardianship petition is filed in family court and the judge learns that the basis of the petition, in whole or in part, is child abuse or neglect allegations, the family court must remove the case to circuit court. Rule 48a(a), Rules of Practice and Procedure for Family Court; Rule 13(a),

Rules of Minor Guardianship Proceedings. If the allegations of abuse or neglect are apparent from the petition seeking guardianship, the family court may issue the removal order prior to any hearing. If the family court first becomes aware of allegations or information regarding possible abuse or neglect during a hearing, the family court may appoint a temporary guardian, if necessary, but otherwise must continue the hearing and remove the case to circuit court for further hearing to be conducted within ten days.

Upon receiving the removal order from family court, the circuit clerk should immediately provide a copy to the circuit court. Rule 48a(a), Rules of Practice and Procedure for Family Court; Rule 13(a), Rules of Minor Guardianship Proceedings. Upon receiving the removal order, the circuit court must schedule a hearing to be conducted within ten days of the removal from family court, and see that CPS is given a notice of hearing and a copy of the petition. The petitioner and other parties must also be provided written notice of the circuit court hearing. Depending upon local practices or rules, the circuit clerk may be responsible for sending the notices to CPS and the parties. Once a case is removed to circuit court, the case or any portion of it may not be remanded to family court.

At the circuit court hearing on the guardianship petition, allegations of abuse and neglect must be sustained by clear and convincing evidence. If the court deems it necessary or appropriate, the administrative and mandamus proceedings under Rule 3a of the Rules of Procedure for Child Abuse and Neglect Proceedings relating to child maltreatment investigations may be utilized when addressing the matters raised by the guardianship petition. See Rule 48a(b), Rules of Practice and Procedure for Family Court; Rule 13(b), Rules of Minor Guardianship Proceedings. If Rule 3a proceedings are initiated by the court, the hearing on the guardianship petition would necessarily be continued. During the pendency of these matters, however, a temporary guardianship order may be needed in some cases to protect the child's safety and welfare.

If the Department files a child abuse and neglect petition as the result of the Rule 3a proceedings, the petitioner may be named as a co-petitioner, provided that the parties agree. Rule 3(b), Rules of Minor Guardianship Proceedings. However, Rule 3(b) expressly indicates that it should not be interpreted so as to require the guardianship petitioner to appear as a co-petitioner. In addition, Rule 3(b) indicates that a minor guardianship petitioner should not be foreclosed from filing an abuse and neglect petition even though the Department shows cause that it should not be required to file an abuse and neglect petition during the course of the Rule 3a proceedings.

If an abuse and neglect petition is filed, the circuit court in which such petition is pending may order the transfer of any other proceeding, except for a criminal or delinquency case, that arises from the same facts as the petition or addresses whether abuse or neglect occurred. The transfer provision applies to other cases pending in another circuit court, family court or magistrate court.

## *XVI. INTERSTATE PLACEMENT PROCEEDINGS*

The interstate placement of children is often fraught with delays that are difficult to address because cooperation between two states typically raises a number of

jurisdictional and bureaucratic issues. However, through judicial leadership and the use of existing statutes and rules, the court can eliminate or diminish most of these delays. The court should also consider seeking the informal assistance of the courts in other states to ensure timely placement of children.

## A. The Interstate Compact on the Placement of Children

West Virginia enacted the Interstate Compact on the Placement of Children (ICPC) in 1975 (W. Va. Code §§ 49-7-101, *et seq.*). The ICPC is designed to facilitate cooperation among states in the placement of children into homes and facilities across state boundaries. The stated purpose of the ICPC is to maximize opportunities to place children in appropriate settings, to facilitate clear communication between agencies in the sending and receiving states, and to ensure that appropriate arrangements for the care of children are made.

The compact is comprised of ten articles and ten regulations. The compact sets forth cooperative terms designed to facilitate the placement of a child across state borders. Article 1 emphasizes that each child requiring placement "shall receive the maximum opportunity to be placed in a suitable environment," and that the receiving states should have appropriate authority to assess the adequacy of potential placements within their borders. Article 2 defines terms, while Article 3 sets the conditions for placement and Article 4 prescribes penalties for illegal placements. Article 5 settles questions of jurisdiction, while Article 6 provides ground rules for placing delinquent children into out-of-state institutions. Article 7 defines the responsibilities of the state compact administrator, specifically to coordinate all activities under this compact. Articles 8, 9 and 10 focus on the limitations of the compact, mechanisms for adjusting the terms, and the means for enacting or terminating participation in the compact.

When a child is in the custody of the state, state officials may seek to place that child in the physical custody of a person or facility in another state. In order to make this request, the sending state needs to provide sufficient documentation for the receiving state to assess the appropriateness of the potential placement. Should the receiving state determine that the placement is inappropriate, the sending state may not place the child in that proposed placement. When the receiving state does deem the placement appropriate, the sending state retains legal jurisdiction over the case and the receiving state agrees to provide any necessary supervisory services. The compact indicates that there may be penalties for failing to abide by these terms, but these sanctions are vague and practically unenforceable.

The ICPC process initiates with a written request by a local sending agency (such as CPS) to make a placement of the child in a different state. The written request is part of an ICPC Packet that includes: (1) a standardized Interstate Compact Placement Request Form (ICPA 100A); (2) a cover letter delineating the details and circumstances of this case; (3) a medical/financial plan that addresses the child's material and health needs; and (4) all pertinent legal documents necessary to document custody and circumstances. The local agency sends the packet to the state office where it is reviewed for completeness and then forwarded to the corresponding state office in the receiving state.

The receiving state office reviews the packet for completeness before forwarding it on to the appropriate local personnel where the placement has been requested. The ICPC procedure, as applied in child abuse and neglect cases, contains roughly eight processes:

1. The ICPC packet is prepared by the local agency in the sending state and forwards it to the state compact administrator;

2. Sending state compact administrator forwards the packet to receiving state administrator;

3. Receiving state administrator forwards the packet to appropriate local agency for action (typically a home study);

4. The local agency completes the request and prepares a report with a recommendation on the placement;

5. Receiving state administrator reviews the report and makes a determination to approve or deny the placement request;

6. The placement decision along with the report from the local agency is sent to the sending state administrator;

7. If the placement is denied, the process ends, and other (concurrent) permanency plans need to be completed. If the placement is approved, the sending state must decide whether to utilize the placement within six months; and

8. Receiving state automatically closes the case if an approved placement is not made within six months of approval.

Delays can be encountered at the onset, for instance, in gathering the necessary documents (court orders, immunization records, Social Security cards, etc.). Then, the process may encounter delays in the second stage as the packet must be funneled through the sending state's centralized office. Third, the sending state forwards the referral to the receiving state's centralized office where it is processed. Only then is the referral sent on to the local child welfare agency where the sending state would like to make a placement.

Because there are numerous stages in which delays may occur in the interstate placement process, it should be kept in mind that the court is entitled to inquire, and should inquire, about the status of a case delayed in other state. The court's inquiry could include: informal communication with a presiding judge in the jurisdiction in which the placement is to occur (perhaps the local judge would assist in removing barriers to placement, such as a delayed home study); order the Department to make direct inquiry of their counterparts in the receiving state to ascertain the cause for delay and potential remedies; invoke the Uniform Child Custody Jurisdiction and Enforcement Act (see below) and request the that a judge in the other jurisdiction conduct proceedings there to enforce compliance with ASFA timeframes and ICPC provisions and regulations. Judicial

leadership by the court in the sending state to promote the expeditious completion of interstate placement of children is key to avoiding delays commonly encountered in the two-state process.

## B. The Uniform Child Custody Jurisdiction and Enforcement Act

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (W. Va. Code §§ 48-20-101, *et seq.*) is designed to aid in the resolution of interstate jurisdictional disputes and to ensure cooperation between states in the handling of child custody cases. The UCCJEA has provisions that permit the taking of testimony in other states and, among other measures, authorizes West Virginia courts to request that courts of other states hold evidentiary hearings for West Virginia cases. West Virginia Code § 48-20-111(a) provides that "a party to a child custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowable in this state for testimony taken in another state." Subsection (b) of this statute specifies that testimony may be by telephone, audiovisual means, or other electronic means. Additionally, West Virginia Code § 48-20-112(a) allows West Virginia courts to request courts in another state to:

> (1) Hold an evidentiary hearing;
>
> (2) Order a person to produce or give evidence pursuant to procedures of that state;
>
> (3) Order that an evaluation be made with respect to the custody of a child involved in a pending proceeding;
>
> (4) Forward to the court of this state a certified copy of the transcript of the record of the hearing, the evidence otherwise presented, and any evaluation prepared in compliance with the request; and
>
> (5) Order a party to a child custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.

This provision could be used creatively by the court to compel the appearance of a non-cooperating agency representative in the receiving state to explain his or her actions, or lack thereof. For example, if the home study process is being delayed in the receiving state, a court of this state could ask the local court in the receiving state to conduct a proceeding to determine the cause for delay, and to compel the appearance of non-cooperating individuals. Likewise, a court of this state could request the court in the receiving state to compel witnesses in the receiving state to appear in the West Virginia proceeding via videoconferencing. The UCCJEA even permits a court to assess costs relating to out-of-state hearings (e.g., travel, videoconferencing expenses, etc.) against a party. (See W. Va. Code § 48-20-112(c)). Although the UCCJEA does not seem to be frequently used to ensure the timely interstate placement of children, the provisions of the act certainly authorize the court to reach across state lines to break through placement barriers.

### C. Rules that Facilitate Interstate Participation in Abuse and Neglect Proceedings

Video conferencing (West Virginia Trial Court Rule 14.02).

Use of telephonic practices (R. Pro. Child Abuse and Neglect Proceedings – Rule 14).

## *XVII. TRANSITION PLANNING FOR OLDER YOUTH*

In 2008, Congress passed the Fostering Connections to Success and Increasing Adoptions Act ("Fostering Connections Act"). One of its significant purposes was to address problems faced by older youth in foster care as they transition into adulthood. May Shin, *A Saving Grace? The Impact of the Fostering Connections to Success and Increasing Adoptions Act on America's Older Foster Youth*, 9 Hastings Race & Poverty L.J. 133 (2012). Specific issues faced by youth who turn 18 while in foster care include problems finding steady employment, obtaining education and life skills, managing finances, obtaining and keeping stable housing, avoiding incarceration, and supporting their physical and mental health. 9 Hastings Race & Poverty L.J. at 136. In an attempt to remedy these problems, the Fostering Connections Act amended various provisions of Title IV-E of the Social Security Act.

As an initial matter, 42 U.S.C. § 675(8)(B) was amended to allow states to provide financial support to youth who have reached the age of 18 but who have not reached age 21, so long as they are engaged in approved educational or employment activities or are incapable of doing so because of a medical condition. 42 U.S.C. § 675(8)(B). Also, youth who receive financial support are subject to the same case review requirements as other foster children. 42 U.S.C. § 675(5). Another provision requires states to assist youth with the development of a personalized transition plan 90 days before they turn 18. 42 U.S.C. § 675(5)(H). These provisions are designed to improve educational and employment outcomes for youth who turn 18 while they are in foster care. As part of the Family First Prevention Services Act, a state that has extended eligibility for foster care to youth who have not reached age 21, may allow financial assistance to youth who have not reached age 23 but have aged out of foster care. 42 U.S.C. § 677.

West Virginia has adopted statutes and rules in order to implement these important provisions of the Fostering Connections Act. The Legislature has adopted the term "transitioning adult" for youth who have reached age 18 but who are under 21 years of age. W. Va. Code § 49-1-202. To meet the requirements of this provision, the youth must also have been adjudicated as an abused or neglected child or must have been in the Department's custody when he or she turned 18.[19] Further, the youth must need assistance with an educational, training or treatment program that was initiated before the

[19] In addition to children who are in the Department's custody because of an abuse and neglect case, the term, "transitioning adult," applies to youth who are in the Department's custody as a result of juvenile proceedings, including status offender cases. A youth meets the definition of the term so long as he or she was in the Department's custody when turning 18 -- the term is not limited to youth who were adjudicated as abused or neglected children. In subparagraph (A), the term expressly includes youths who committed a delinquent act before turning 18 and who require supervision and care to complete an education or treatment program initiated before turning 18. W. Va. Code § 49-1-202.

youth's eighteenth birthday. Transitioning adults are subject to the same requirements for both permanency and review hearings as other foster children who are under 18. W. Va. Code § 49-4-110.

In order to promote a successful transition, a case plan is required to specify services that a child, aged 14 or older, should receive to assist with the transition to adulthood. Rule 28(c)(8). Once a child has turned 17 while in the Department's custody or as soon as a child who has reached age 17 is joined as a party to an abuse and neglect case, the Department must provide the child with support and assistance to develop a personalized transition plan. The time at which a transition plan must be established under Rule 28 is more stringent than the 90-day period before a youth's eighteenth birthday required by the Fostering Connections Act. Under Rule 28, the plan must include specific options for housing, health insurance, education, local opportunities for mentors, continuing support services, work force support and employment services. If a child has turned 17 and has special needs, the child is entitled to the appointment of an adult services worker to coordinate the activities of the MDT with other transition planning teams, such as an IEP team.

To assist with the transition to adulthood, the Department has implemented the Youth Transitioning Policy that requires caseworkers to complete certain steps once a child in foster care turns 14. The Casey Life Skills Assessment is a tool that is used to engage teenagers with the process of developing adult life skills. As a method to meet the requirements of the Fostering Connections Act, the Department has developed a "WV Older Youth Transition Plan." In addition to developing transition plans, caseworkers should make referrals to the MODIFY Program (formerly "Chafee Program"). Some additional steps in the Department's Youth Transitioning Policy include assisting youth with obtaining a credit report, assisting youth with applying for Social Security Disability when appropriate, addressing educational and career plans in an MDT, and scheduling medical, dental, optometric and mental health appointments before a child turns 18. These steps and others are more fully explained in the Youth Transitioning Policy.

*The Youth Transitioning Policy and Plan can be found in the BCF section of the DHHR website under the Foster Adoptive Care Home Page.*

## *XVIII. CHALLENGES TO DEPARTMENT'S SUBSTANTIATION OF ABUSE OR NEGLECT*

West Virginia Code § 49-4-601b outlines a procedure through which a person may challenge a substantiation of abuse and/or neglect by the Department when there is no judicial finding of abuse or neglect. Since the statute addresses situations in which a judicial finding has not been made, it applies to situations when an abuse and neglect petition is not filed, and the matter is resolved without court action. It also addresses situation when a petition is filed, but a petition is dismissed before adjudication or when a finding is not made after an adjudicatory hearing.

According to the statute, the Department must provide written notice of the substantiation to the person by certified mail, return receipt requested. The person against whom the Department has substantiated abuse and neglect has the right to challenge the

substantiation first by filing a grievance with the Department's board of review. It should be noted that the statute does not establish a time limit in which a grievance must be filed. If a person is unsuccessful before the Board of Review, the person may file an administrative appeal pursuant to West Virginia Code §§ 29A-5A-1, *et seq.* in the applicable circuit court. W. Va. Code § 49-4-601b(b).

The statute also requires the Department to establish legislative rules that detail the procedure for challenging a substantiation of abuse and/or neglect. At a minimum, the legislative rules must include provisions about the contents of the written notice, the rights under the statute including applicable time limits, the right to file an appeal in circuit court and a description of any registry on which a person's name will be included that may prevent future employment or prevent a person from serving as a foster or kinship care provider. Finally, the legislative rules must include a provision about the Department's duty to remove a person's name from a registry if the finding of abuse or neglect is successfully challenged either before the board of review or before a circuit court. W. Va. Code § 49-4-601b(c).

In addition to the circumstances discussed above, the statute also provides that if an allegation of abuse and/or neglect is substantiated and the department does not file a petition, all records must be sealed one year after the substantiation, except when a person has another substantiation within the one-year period. W. Va. Code § 49-4-601b(d)(1). The provision in the statute indicates that this subsection will not apply when an allegation is substantiated, but the circumstances do not allow for the filing of an abuse and/or neglect petition. Although the statute does not provide any examples, a situation would most likely involve an allegation of abuse or neglect that is substantiated, but that the maltreating person is not a parent, guardian or custodian to the child. For example, a neighbor or babysitter could have abused or neglected a child, but an abuse and neglect petition would not be filed because the neighbor or babysitter would not be a proper party to an abuse and neglect petition. W. Va. Code § 49-4-601b(d)(1).

The statute further addresses situations when an allegation is substantiated, a petition is filed, but the person is not adjudicated. W. Va. Code § 49-4-601b(d)(2). In those instances, the allegation is considered to have been unsubstantiated. The statute does not establish a procedure that would have the effect of removing a person's name from a registry. The department is, however, required to adopt legislative rules that establish a procedure for this relief. W. Va. Code § 49-4-601b(f).

Finally, the statute allows a person to petition a circuit court if a person has a substantiation and was also adjudicated. In these instances, the person may petition the circuit court which adjudicated the person to have his or her record sealed no sooner than five years after the judicial finding of abuse or neglect. However, if a person has an additional substantiation during the five-year period, his or her records may not be sealed. When a court is reviewing a petition to seal records, it may consider efforts at rehabilitation, family reunification, and any other relevant factors. If a record is sealed, any inquiry by an employer shall indicate that the person does not have a substantiation that precludes his or her employment. W. Va. Code § 49-4-601b(d)(3).

# CHAPTER 5:
# CASELAW DIGEST FOR ABUSE AND NEGLECT PROCEDURES

*Chapter Contents*

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## I. ROLE OF CIRCUIT COURT – GENERALLY

### A. Jurisdiction

Syl. Pt. 3, *State ex rel. Paul B. v. Hill*, 201 W. Va. 248, 496 S.E.2d 198, (1997); Syl. Pt. 2, *State ex rel. Rose L. v. Pancake*, 209 W. Va. 188, 544 S.E.2d 403 (2001)

A circuit court has jurisdiction to entertain an abuse and neglect petition and to conduct proceedings in accordance therewith as provided by W. Va. Code §§ 49-6-1, *et seq*.

*W. Va. Code §§ 49-4-601, et seq.*

*In re C.S.*, 247 W. Va. 212, 875 S.E.2d 350 (2022)

Syl. Pt. 8: For a circuit court to have jurisdiction over a child in an abuse and neglect case, the child must be an "abused child" or a "neglected child" as those terms are defined in West Virginia Code § 49-1-201. Pursuant to West Virginia Code § 49-4-601 (i), a circuit court's finding that a child is an "abused child" or a "neglected child" must be based upon the conditions existing at the time of the filing of the abuse and neglect petition.

The respondent mother had two biological children: one who was a subject to a legal guardianship established approximately five years earlier and one who was placed in foster care when the petition was filed. The record indicated that the mother's problems with substance abuse and lack of participation continued throughout the case. Later in the case, the mother showed progress in that she had passed her drug screens, had moved to a new apartment, and was participating in outpatient counseling. At the

disposition hearing, the DHHR presented a minimal amount of evidence and relied primarily on the length of time that the younger child had been in foster care to request termination. After deciding to terminate the mother's parental rights, the circuit court noted that the mother's progress was not sufficient, but it did not include the required findings of fact or conclusions of law.

The focus at the disposition hearing was on the length of time that the younger child had been in foster care, 17 months, and the DHHR's responsibility to request termination pursuant to West Virginia Code § 49-4-605(a). The initial error addressed by the Supreme Court related to the lack of evidence presented by the DHHR and the circuit court's failure to make the required findings necessary to terminate of parental rights. W. Va. Code § 49-4-604(c)(6). For this reason, the Court reversed the termination of the mother's parental rights.

The jurisdictional issue addressed in the opinion involved the older child, B.S., who had been placed in a guardianship five years before the initiation of the abuse and neglect case. The Court found that West Virginia Code § 49-4-601 (a) is unambiguous in that it only allows the filing of a petition when the petitioner is alleging that the child is abused or neglected as defined by West Virginia Code § 49-1-201. The Court also explained that the conditions constituting abuse and neglect must exist at the time of the filing of the petition. In the syllabus point quoted above, the Court set forth the requirements for assuming jurisdiction over a child.[20] The Court held that to be subject to an abuse and neglect petition, the child must be found to be an abused or neglected child under West Virginia Code § 49-1-201, and the conditions of abuse or neglect, pursuant to West Virginia Code § 49-4-601(i), must have existed at the time of the filing of the petition.

Applying this standard, the Supreme Court found that the older child, B.S., did not meet the definition of an abused or neglected child because the child was not subject to the mother's substance abuse and because the mother could have only regained custody of B.S. by filing a petition to terminate the guardianship. In footnote 15, the Court noted that *In re G.S.*, 855 S.E.2d 922 (W. Va. 2021) did not control the question of jurisdiction because the facts of G.S. involved a legal guardianship that had *not* been established at the time that the abuse and neglect petition was filed. Since the evidence failed to show that the mother should have been adjudicated with respect to B.S., the Supreme Court

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[20] Although the Supreme Court did not discuss the statute that governs petitions, it should be noted that the applicable subpart states as follows:

> In a case *where there is more than one child in the home, or in the temporary care, custody or control of the alleged offending parent*, the petition shall so state. Notwithstanding the fact that the allegations of abuse or neglect may pertain to less than all of those children, *each child in the home for whom relief is sought shall be made a party to the proceeding*. Even though the acts of abuse or neglect alleged in the petition were not directed against a specific child who is named in the petition, the court shall order the removal of the child, pending final disposition, if it finds that there exists imminent danger to the physical well-being of the child and a lack of reasonable available alternatives to removal. W. Va. Code § 49-4-602(a)(3) (emphasis added).

held that the circuit court should not have proceeded to disposition with respect to the older child, who had been subject to a previously established guardianship.

Syl. Pt. 3, *In re B.V.*, --- W. Va. ---, 886 S.E.2d 364 (2023)

The mere fact that a child is in a legal guardianship at the time an abuse and neglect petition is filed does not preclude a circuit court from exercising subject matter jurisdiction in adjudicating whatever rights a respondent to that petition may still have to that child, provided that the child meets the definition of an "abused child" or "neglected child" as defined in West Virginia Code § 49-1-201 so as to confer that jurisdiction. To exercise subject matter jurisdiction, the court must make specific factual findings explaining how each child's health and welfare are being harmed or threatened by the allegedly abusive or neglectful conduct of the parties named in the petition. Due to the jurisdictional nature of this question, generalized findings applicable to all children named in the petition will not suffice; the circuit court must make specific findings with regard to each child so named.

When the petition was filed, three of the parents' children lived in the home, but four children had been placed in guardianships with different relatives in prior abuse and neglect cases. The guardians had been afforded discretion as to visitation with the parents, and the two oldest children had some contact with the parents. The allegations of the petition included the father's physical abuse of a child, domestic violence, and substance abuse and the mother's failure to protect the children from the abuse. At disposition, the parents' rights were terminated to all of the children, including those in the guardianships.

On appeal, the Supreme Court raised the question of subject matter jurisdiction and requested supplemental briefs because of the opinion, *In re C.S.*, 875 S.E.2d 350 (W. Va. 2020), which had been decided after disposition had occurred in the circuit court. In her brief, the mother argued that *In re C.S.* indicated that the circuit court lacked subject matter jurisdiction to terminate the parental rights for the children who had been previously placed in guardianships. Addressing the argument, the Supreme Court expressly stated that a parent who does not have legal custody of a child may still be subject to a Chapter 49 case involving that child. The Court also distinguished the facts from *In re C.S.* because it involved a child in a guardianship who had been out of the parent's home for five years and the petition did not include allegations pertaining to that particular child. In contrast, in this case, the oldest child may have been exposed to the domestic violence and the allegations, in part, were based upon the child's disclosures. The Supreme Court reversed the termination of the four children subject to guardianships and remanded the case for an adjudicatory hearing with instructions that the circuit court must determine the whether the children in the guardianships met the definition of abused or neglected children pursuant to West Virginia Code § 49-1-201.

With regard to the disposition of the children who were in the parent's custody at removal, the Supreme Court affirmed the termination of parental rights for both of the

parents. A more complete discussion of these issues are found in Sections V.B., IX.H., and XII.C.

## B. Jurisdiction -- Interstate Custody Issues

### 1. Uniform Child Custody and Enforcement Act

*W. Va. DHHR ex rel. Hisman v. Angela D.*, 203 W. Va. 335, 507 S.E.2d 698 (1998)

Based upon express language in the UCCJA, the Court recognized that the UCCJA (now titled UCCJEA and codified at W. Va. Code §§ 48-20-101, *et seq.*) applies to abuse and neglect proceedings.

*In re Tyler D.*, 213 W. Va. 149, 578 S.E.2d 343 (2003) (per curiam)

After the circuit court reunified the respondent mother and children and dismissed the petition, the respondent mother moved to Maryland where the Allegheny County Department of Social Services obtained legal custody of the children based on alleged abuse and neglect. Although proceedings were ongoing in Maryland, the West Virginia DHHR and the guardian *ad litem* appealed the dismissal of the petition to the West Virginia Supreme Court.

On appeal, the Supreme Court recognized that the UCCJEA and the Parental Kidnapping Prevention Act applied to abuse and neglect cases. Finding that Maryland was the proper forum to assume jurisdiction, the Supreme Court instructed the circuit court to inform the Maryland court of the West Virginia proceedings. Additionally, the Supreme Court reversed the dismissal of the West Virginia petition and addressed the remaining issues, so that the circuit court would have guidance for future proceedings if Maryland deferred jurisdiction to West Virginia.

### 2. Home State Jurisdiction

Syl. Pt. 3, *In re K.R.*, 229 W. Va. 733, 735 S.E.2d 882 (2012)

To determine whether a state qualifies as a child's "home state" for purposes of determining initial jurisdiction under W. Va. Code § 48-20-201(a), a court must analyze whether any state qualified as the child's "home state" at any time within the six months immediately preceding commencement of the action.

A summary of this case is not included because it involves a minor guardianship case. However, it, in addition to the above-cited syllabus point, contains a helpful discussion of the bases for jurisdiction under the UCCJEA.

*In re Z.H.*, 245 W. Va. 456, 859 S.E.2d 399 (2021)

Syl. Pt. 7: When determining whether a court has home state subject matter jurisdiction over the custody of a child who is less than six months old, West Virginia Code §§ 48-20-102(g) and 48-20-201(a)(1) direct the court to consider where the child lived

from the child's birth to the commencement of the proceeding in which custody is at issue. Events prior to birth, and the child's living arrangements after the commencement of the proceeding, are not relevant to the determination of whether the court has home state subject matter jurisdiction.

Syl. Pt. 8: A newborn child's hospital stay incident to birth is insufficient to confer home state subject matter jurisdiction pursuant to West Virginia Code §§ 48-20-102(g) and 48-20-201(a)(1).

Syl. Pt. 9: One of the requirements under West Virginia Code § 48-20-201(a)(3) for a court to obtain subject matter jurisdiction over an initial child custody determination where another state has either home state jurisdiction or significant connection jurisdiction, is that a court of the other state must decline to exercise jurisdiction. This requirement is not satisfied by evidence that some other person or entity in the other state has declined jurisdiction.

This case began when a mother gave birth to a drug-exposed child in a West Virginia hospital, but the child's parents were both residents of Virginia. Shortly after birth, the mother cut off the child's bracelet and was planning to take the child from the hospital. After security staff intervened, the West Virginia DHHR sought and was granted custody of the child, and the child was placed in foster care. There was evidence in the record that the mother had given birth in West Virginia because her parental rights to a child had been terminated in Virginia. The West Virginia proceedings continued, and the circuit court, at disposition, terminated the mother's rights. None of the parties raised the issue of subject matter jurisdiction at the trial court level. On appeal, the mother raised the jurisdictional argument for the first time.

At the beginning of its discussion of the UCCJEA, the Court indicated that the jurisdictional issue should have been addressed at the beginning of the proceedings and that courts must be watchful for this issue. The Court also noted that subject matter jurisdiction "cannot be conferred by consent, waiver or estoppel." Syl. Pt. 5, in part, *Rosen v. Rosen*, 664 S.E.2d 743 (W. Va. 2008).

When determining home state jurisdiction for a minor child who is under six months old, the Court instructed that where the child lived from birth to the beginning of the case is the relevant determination. See W. Va. Code § 48-20-201(a)(1). In Syllabus Point 7, the Court clarified that events before the child's birth and after a case begins are not relevant to this analysis. Reviewing cases from other states, the Court, in Syllabus Point 8 concluded that a child's hospital stay at birth is not sufficient to establish home state jurisdiction under the UCCJEA. Under the facts of this case, the Court concluded that the child did not have a "home state" for jurisdictional purposes. The Court did point out that the circuit court had acted within its authority and jurisdiction to prevent imminent harm to the child when it ratified emergency custody of the child by the West Virginia DHHR.

Since the child did not have a "home state," the Court next considered which state had "significant connection" jurisdiction under West Virginia Code § 48-20-201(a)(2). After reviewing the facts about where the mother lived and her intentions, the Supreme

Court concluded that West Virginia did not have "significant connection" jurisdiction because both subsections of West Virginia Code § 48-20-201(a)(2)(A) & (B) were not met. The Court then noted that Virginia had "significant connection" jurisdiction.

The Court then discussed "declination jurisdiction" which is defined by West Virginia Code § 48-2-201(a)(3). This type of jurisdiction arises when all courts who would have jurisdiction under the "home state" or "significant connection" tests decline jurisdiction. The Court found that under the language of the statute and a prior case, *In re J. C.*, 832 S.E.2d 91 (W. Va. 2019), that a court, not a state agency or other person, would have to decline jurisdiction.

Finally, the Court discussed "default" jurisdiction, which is established by West Virginia Code § 48-20-201(a)(4), and it occurs when no other court would have jurisdiction. Since the Court concluded that Virginia had "significant connection" jurisdiction, this basis for jurisdiction was not applicable.

Applying these principles, the Court found that the order terminating the mother's rights was void and unenforceable. The Court further instructed the circuit court to contact the applicable Virginia court to determine whether it would decline jurisdiction. Finally, the Court found that the child should not be returned to his parents' custody in the interim, but that the child should remain with his foster parents, who had provided care for him since birth and that he should remain there until the jurisdictional issue had been resolved.

3. Significant Connection Jurisdiction

*In re A.A.*, 246 W. Va. 596, 874 S.E.2d 708 (2022)

In 2019, the DHHR took custody of A.A. after her father was arrested during a high-speed chase and she was found in a hotel room with an unrelated individual. There were drugs and drug paraphernalia in the hotel room. Apparently, the father had brought the child to West Virginia three days earlier. During the removal, the CPS worker contacted the paternal grandmother in South Carolina about placement of the child, but she declined because one of her adult sons who had a felony record was living with her and she would not pass a home study. The DHHR placed A.A. with the foster parents who had cared for A.A. for two weeks in 2018 during an earlier abuse and neglect case.

Approximately ten months into the case, it appeared that the father's rights would be terminated. In response, the grandmother moved to intervene in the case and also sought placement of A.A. The foster parents also intervened in the case. While the placement motion was pending, the grandmother moved to Moundsville and obtained an approved home study. A.A.'s father lived close to the grandmother's Moundsville home.

Another issue in the case involved A.A.'s developmental delays. Apparently, she was autistic, but she had greatly improved while she was in the care of the foster parents. After hearing the evidence, the circuit court found that it was in the child's best interests to remain with the foster parents and denied the grandmother's placement motion.

As for the jurisdictional issue, summary of pre-petition facts involving the child's residences follows because the grandmother challenged jurisdiction on appeal. A.A. was born in Pennsylvania in 2015, and she moved with her parents to Wetzel County shortly after her birth. In April of 2018, the DHHR filed an abuse and neglect petition in Wetzel County, but it was dismissed before adjudication approximately a month later. Next, her father took her to live in Pennsylvania in May 2018, and she remained there until her father took her to South Carolina at the beginning of February 2019, and she remained there until her father brought her to Pleasants County, West Virginia in June 2019. Thus, her residency in South Carolina lasted approximately four months. The instant abuse and neglect case was initiated shortly after her father brought her to West Virginia.

On appeal, the grandmother argued that the circuit court did not have jurisdiction under the UCCJEA, West Virginia Code §§ 48-20-101, *et seq.*, to address the abuse and neglect petition. She asserted that South Carolina was the child's home state under the UCCJEA because the child had lived there for six months.

Addressing the jurisdictional issue, the Supreme Court cited to a prior case in which it held that UCCJEA applies to abuse and neglect proceedings, in addition to other types of custody cases. *In re Z.H.,* 859 S.E.2d 399 (W. Va. 2021). It also recognized that subject matter jurisdiction may be addressed for the first time on appeal. It, however, reminded courts to resolve jurisdictional issues early in a case.

The Supreme Court first considered whether South Carolina was, in fact, A.A.'s home state. W. Va. Code § 48-20-201(a)(1). Reviewing the facts concerning A.A.'s residences, the Court concluded that A.A. had only lived in South Carolina for four months, not the six months claimed by the grandmother. Therefore, the Supreme Court held that South Carolina failed to meet the requirements to be designated as A.A.'s home state.

Next, the Supreme Court examined whether West Virginia could exercise "significant connection" jurisdiction under the UCCJEA. To do so, a court must find that no state can exercise jurisdiction as the "home state" or that the "home state" declined to exercise jurisdiction over the child. In addition, the court must find that one of the parents has a significant connection with the state, and it must involve more than the parent's physical presence. There must also be substantial evidence about the child in the state, that includes the child's care, his or her protection, training, and personal relationships. W. Va. Code § 48-20-201(a)(2).

Applying this standard, the Supreme Court recognized that the child's parents had connections to West Virginia and that her father had brought her to West Virginia at different points in her life. Additionally, A.A. lived in West Virginia on several occasions before the abuse and neglect case was initiated. The Court noted that there was some evidence concerning A.A.'s care in West Virginia and that there was little evidence available on this issue in any other state. Further, the Court noted that all of the evidence that formed the basis for the petition was primarily available in West Virginia. The Court,

therefore, concluded that the circuit court had properly exercised jurisdiction under the significant connection test found in West Virginia Code § 48-20-201(a)(2).

After it resolved the jurisdictional issue, the Supreme Court addressed the merits of the case. It affirmed the circuit court decision that found that A.A. should remain with her foster parents.

4. Declination Jurisdiction

Syl. Pt. 4, *In re J.C.*, 242 W. Va. 165, 832 S.E.2d 91 (2019)

One of the requirements under West Virginia Code § 48-20-201(a)(2), for a circuit court to obtain subject matter jurisdiction of a child whose home state is not West Virginia, is that a "court" of the home state of the child must decline to exercise jurisdiction. This requirement is not satisfied by evidence that some other person or entity in the child's home state declined jurisdiction.

This case arose when a mother was hitchhiking through West Virginia with an infant, J.C., who was under six months of age, and police officers contacted the DHHR because of their concerns. During an initial investigation, the DHHR contacted the mother's husband who informed the West Virginia DHHR that the mother had mental health issues. The West Virginia DHHR also learned that the child had been born in Virginia and that child protective services has been provided to the family. Upon learning this information, the DHHR contacted Virginia child protective services which told the West Virginia caseworkers that West Virginia DHHR had to address any incident occurring in West Virginia.

Given this information, the West Virginia DHHR initiated a case against the parents based upon the mother's mental health, child protective services involvement in Virginia, and the father's alleged alcohol use and failure to protect the child. As the West Virginia case proceeded, the West Virginia DHHR was informed that the mother had given birth to a second child who was placed in child protective services custody in North Carolina. Apparently, North Carolina officials thought that West Virginia should maintain custody of J.C. and that North Carolina should address the case involving the second baby. The West Virginia judge attempted to contact the North Carolina judge, but according to the mother's counsel, the North Carolina judge believed that J.C.'s custody should be transferred to North Carolina and that there should be an order allowing communication between the judges. Because another court did not assume jurisdiction, the West Virginia case proceeded, and the mother's parental rights were terminated.

On appeal, the mother argued that West Virginia lacked subject matter jurisdiction because it could not be considered the home state for the child. W. Va. Code § 48-20-102(g).[21] The Supreme Court agreed and found that Virginia was the home state when

[21] West Virginia Code § 48-20-102(g) provides that: "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the

the West Virginia case was initiated. The Court further explained that West Virginia could have only exercised jurisdiction if a Virginia court had declined to do so.

In this case, it was Virginia child protective services that declined to assume jurisdiction over a child, not a Virginia court, which is what the Court concluded is required by the statute. W. Va. Code § 48-20-201(a)(2).[22] Therefore, the Court held that the circuit court did not have subject matter jurisdiction over the child. Consequently, the Court found that the order terminating parental rights was void.

The Court gave further instructions for proceedings on remand that the appropriate Virginia court should be contacted to determine whether it would assume jurisdiction over the child. If the Virginia court declined jurisdiction, the Court further instructed that the appropriate North Carolina court should be contacted to determine if it would take custody of the child and reunite the child with his sibling who was born in North Carolina. Finally, if North Carolina declined to assume jurisdiction, the Court instructed that *de novo* adjudicatory and dispositional hearings must be conducted in West Virginia.

5. Default Jurisdiction

*In re K.R.*, 229 W. Va. 733, 735 S.E.2d 882 (2012)

This case involved a minor guardianship case, not an abuse and neglect case. However, It contains a succinct discussion of the different jurisdictional bases under the UCCJEA. Default jurisdiction, as specified in West Virginia Code § 48-20-201(a)(4) can only be established "[I]f there is no state which would have jurisdiction under any of the other sections." 735 S.E.2d at 892.

6. Temporary Emergency Jurisdiction

*In re A.T.-1*, --- W. Va. ---, 889 S.E.2d 57 (2023)

This case involved a family who resided in Pennsylvania, but the precipitating incident for the petition occurred at a grandmother's West Virginia home. The oldest child was the parents' biological child, and the two younger children had been adopted. Apparently, a maternal aunt and grandmother who lived in West Virginia had served as temporary caretakers of the older boy until about two weeks before the basis for the petition arose.

child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

[22] In relevant part, West Virginia Code § 48-20-201(a) states that a West Virginia court may assume jurisdiction over a child if: "A court of another state does not have jurisdiction under subdivision (1) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under section 20-207 or 20-208 . . .."

A petition was filed in West Virginia because it was alleged that the mother threatened to kill the older child, that she threw him on the ground, and that the older child's two siblings were present. These alleged actions all occurred in West Virginia at the grandmother's home. In turn, the aunt called law enforcement, and the three children were placed in DHHR custody until a preliminary hearing could be conducted. In the petition, the DHHR alleged that the mother perpetrated acts of emotional and physical abuse against the older child in the presence of the younger children and that the father also committed abusive acts and failed to protect the children from the mother.

At the preliminary hearing, the parents waived the right to have evidence presented. At the adjudicatory hearing, the parents presented stipulations, and the circuit court made a finding of aggravated circumstances. W. Va. Code §§ 49-4-602(d), and -604(c)(7). At this hearing, the court also addressed jurisdiction and made a finding that its jurisdiction was emergency jurisdiction. After the hearing but before the entry of an adjudicatory order, the circuit court contacted a Pennsylvania court which declined jurisdiction because the children had significant connections to West Virginia and because the West Virginia circuit court had conducted an adjudicatory hearing. In turn, the circuit court found it had jurisdiction, and it entered an adjudicatory hearing order approximately one month later.

At disposition, the parents presented evidence that the mother had spanked the older child but had not choked him, as alleged. They also asserted that the conduct towards the older child was the result of his behavioral problems. The older child had also told the guardian *ad litem* that he did not want his parents' rights terminated. At the end of the hearing, the court terminated the parents' right over the older child's express wishes, but it allowed post-termination visitation with him in a therapeutic setting. No visitation was allowed with the younger children.

On appeal, the parents raised the issue of subject matter jurisdiction, as well as errors relating to the merits. In its opinion, the Supreme Court, discussed, in detail, the different types of jurisdictions under the UCCJEA and the order of priority for them. W. Va. Code § 48-20-201. These types are: home state jurisdiction; significant connection jurisdiction; declination jurisdiction and default jurisdiction. The Supreme Court additionally explained the limits of emergency jurisdiction. W. Va. Code § 48-20-204; *In re Z.H.*, 859 S.E.2d 399 (W. Va. 2021). At the outset of the discussion, the Supreme Court noted that emergency jurisdiction cannot serve as a basis for continuing subject-matter jurisdiction. A court acting under temporary emergency jurisdiction can only exercise jurisdiction until the court contacts a court in the home state and the home state either assumes jurisdiction or declines to exercise jurisdiction.

Applying its reasoning, the Court found that a Pennsylvania court was the only jurisdiction where a court could have had presided over an abuse and neglect case until Pennsylvania either relinquished or declined jurisdiction. The Supreme Court, therefore, concluded that the circuit court erred by conducting an adjudicatory hearing before it had subject matter jurisdiction. Explaining its conclusion, the Supreme Court noted that the circuit court made rulings that were permanent in nature and because the Pennsylvania

court had declined jurisdiction, in part, because the circuit court had conducted an adjudicatory hearing. The Supreme Court further explained that this type of jurisdictional defect cannot be cured by a subsequent declination of jurisdiction by the court of another state. The Supreme Court remanded the case with the instruction that the circuit court contact the Pennsylvania court to determine if it would continue to decline jurisdiction.

### C. Jurisdiction -- Custody Determination After Dismissal of Petition

*In re T.M.*, 242 W. Va. 268, 835 S.E.2d 132 (2019)

Syl. Pt. 3: Pursuant to Rule 6 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, the circuit court retains jurisdiction to oversee the custodial placement of children subject to abuse and neglect proceedings at the close of those proceedings, irrespective of the disposition of the petition under West Virginia Code § 49-4-604(b), as well as any future custody, visitation, or support proceedings. Only where a petition has been dismissed for failure to state a claim or children are returned to cohabitating parents may the family court regain jurisdiction for any future proceedings involving the children.

Syl Pt. 4: The mandatory deferral of jurisdiction over the children involved in abuse and neglect proceedings to the circuit court necessarily requires the circuit court to make any custodial and decision-making allocations the family court was foreclosed from making if the children are reunified with parents, guardians, or custodians who are no longer cohabitating at the close of the proceedings.

An abuse and neglect petition was filed against a father after an incident in which he overdosed on pills and also threated to shoot anyone who came near his house. His two children, then ages 10 and 13, wrestled him to get a rifle away from him, and one of the children jumped on his back to prevent him from going to the house to get a pistol. Apparently, the father was distraught because the mother had started a relationship with another man.

When the petition was filed, primary physical custody of the children was placed with the children's mother, and she was named as a non-offending parent in the case. Initially, she moved in with her mother and later moved in with her sister. During the abuse and neglect case, the parents divorced in family court. In the property settlement agreement, the mother gave up her right to the marital home in exchange for certain items of personal property. After living with her sister, the mother moved in with a boyfriend who was charged with soliciting a minor through the internet. She separated from her boyfriend and began living with another boyfriend. Ultimately, the father successfully completed his improvement period.

At the end of the father's improvement period, both parents sought primary custody of the children. The circuit court retained jurisdiction of the custody matter pursuant to Rule 6 of the Rules of Procedure for Child Abuse and Neglect Proceedings. At the conclusion of the hearing on the children's permanent placement, the circuit court awarded primary custody of the children to the father and provided parenting time to the

mother. In turn, the mother appealed based upon the assertion that the children's express preferences were not "firm and reasonable" as required by West Virginia Code § 48-9-206(a)(2).

Before the Supreme Court addressed the merits of the mother's argument, it explained that Rule 6 of the Rules of Procedure for Child Abuse and Neglect Proceedings requires a circuit court to establish permanent placement for children and any subsequent modifications unless the case falls into two narrow types. Those types include cases when a petition is dismissed for failure to state a claim or when a child is returned to cohabitating parents. Only in these two situations may parents seek future relief in family court to establish a parenting plan or child support. The Court noted that: "the obligation to allocate custodial responsibility falls to the circuit court given the divestment of jurisdiction in the family court to do so." 835 S.E.2d at 140. The Court adopted two syllabus points that explain the continued jurisdiction of a circuit court to make future custody decisions unless the two exceptions set forth in Rule 6 apply.

For a discussion of the factors that a circuit court should apply when making these types of custody decisions, see Section X.D.

## D. Jurisdiction -- Child Support

*Note: For a more complete discussion of these cases, see Detailed Procedures Section VIII. Child Support in Abuse and Neglect Cases. See also Special Procedures Section XI. See W. Va. Code §§ 49-4-801, et seq. for provisions governing child support.*
Syl. Pt. 3, *DHHR v. Smith*, 218 W. Va. 480, 624 S.E.2d 917 (2005)

When a child is the subject of an abuse or neglect or other proceeding in a circuit court pursuant to Chapter 49 of the West Virginia Code, the circuit court, and not the family court, has jurisdiction to establish a child support obligation for that child.

*In the Interest of J.L.*, 234 W. Va. 116, 763 S.E.2d 654 (2014)

Syl. Pt. 4: Pursuant to Rule 6 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, when a circuit court enters an order awarding or modifying child support in an abuse and neglect case, the circuit court retains jurisdiction over such child support order.

Syl. Pt. 5: Pursuant to Rule 16a(d) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, a circuit court cannot transfer or remand a child support order that it has entered in an abuse and neglect case to the family court for enforcement or modification.

## E. High Priority for Court's Attention

Syl. Pt. 1, in part, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991); Syl. Pt. 6, *W. Va. DHHR v. Scott C.*, 200 W. Va. 304, 489 S.E.2d 281 (1997); Syl. Pt. 3, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996); Syl. Pt. 5, *In the Matter of*

*Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995); Syl. Pt. 3, *Boarman v. Boarman*, 190 W. Va. 533, 438 S.E.2d 876 (1993); Syl. Pt. 2, *State ex rel. West Virginia Dept. of Health and Human Resources v. Pancake*, 224 W. Va. 39, 680 S.E.2d 54 (2009); Syl. Pt. 4, *In re Isaiah A.*, 228 W. Va. 176, 718 S.E.2d 775 (2010)

Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security.

Syl. Pt. 5, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991); Syl. Pt. 6, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996); Syl. Pt. 5, *Boarman v. Boarman*, 190 W. Va. 533, 438 S.E.2d 876 (1993); Syl. Pt. 3, *State ex rel. West Virginia Dept. of Health and Human Resources v. Pancake*, 224 W. Va. 39, 680 S.E.2d 54 (2009)

The clear import of the statute [W. Va. Code § 49-6-2(d)] is that matters involving the abuse and neglect of children shall take precedence over almost every other matter with which a court deals on a daily basis, and it clearly reflects the goal that such proceedings must be resolved as expeditiously as possible.

*W. Va. Code § 49-4-601(j)*

## F. Time Standards for Processing Abuse and Neglect Cases

*In re J.G.*, 240 W. Va. 194, 809 S.E.2d 453 (2018)

In this case, the circuit court had allowed the respondent parents to continue in improvement periods for 22 months after the adjudicatory hearing. At disposition, the circuit court ordered that the children should be reunified. The foster parents, who had intervened, appealed the circuit court decision and alleged that the circuit court had failed to follow the mandatory timelines for abuse and neglect cases. Reversing the circuit court disposition, the Supreme Court expressly stated that:

> To whatever extent our expansive body of caselaw regarding the circuit court's paramount duties in cases of abuse and neglect is unclear, let us now lay the matter squarely to rest. The procedural and substantive requirements of West Virginia Code § 49-4-601 et seq., the Rules of Procedure for Child Abuse and Neglect, and our extensive body of caselaw are not mere guidelines. The requirements contained therein are not simply window dressing for orders which substantively fail to reach the issues and detail the findings and conclusions necessary to substantiate a court's actions. The time limitations and standards contained therein are mandatory and may not be casually disregarded or enlarged without detailed findings demonstrating exercise of clear-cut statutory authority. Discretion granted to the circuit court within this framework is intended to allow the court to fashion appropriate measures and remedies to highly complex familial and inter-personal issues—it does not serve as a blanket of immunity for the circuit court to manage abuse and neglect cases as its whim, personal desire, or docket may fancy.

*State ex rel. P.G.-1 v. Wilson*, 247 W. Va. 235, 878 S.E.2d 730 (2021)

The guardian *ad litem* filed a petition for a writ of prohibition when a circuit court had granted multiple extensions to the respondent parents' post-adjudicatory improvement periods, such that the children had been placed in foster care for 25 months. The record below indicated that the circuit court had lamented about the unrealistic time frames that do not take into account the feelings of young children as to the termination of parental rights. In addition to quoting *In re J.G.*, 809 S.E.2d 453 (W. Va. 2018), the Supreme Court stated that: "A circuit court may disagree the statute and rules, but it is not at liberty to ignore them." 878 S.E.2d at 742.

*In re D.P.*, 245 W. Va. 791, 865 S.E.2d 812 (2021)

In this case, the circuit court had allowed repeated extensions to the respondent parents' improvement periods, and, as a result, the improvement periods as to the two older children had lasted for 34 months. Although no party had alleged error with regard to the length of the improvement periods, the Supreme Court stated that:

> [W]e are compelled to highlight this disregard to once again reiterate to the circuit courts of this State that these time limits are mandatory and may only be enlarged pursuant to the enumerated procedures for doing so in our statutes. Those procedures were not followed in this case, and the delay resulting therefrom worked only to the detriment of these children insofar as it delayed achieving permanency for them. 865 S.E.2d at 819.

*In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996)

Although the specific rules cited in this opinion have been abrogated, the admonition to follow lawful directives of the Legislature and Supreme Court is still applicable to the time standards presently in force. In this regard, the Supreme Court noted that:

> It is vital to the rule of law that legislative and appellate commands be honored. A judge is free, of course, to manage his or her own docket but, when such managerial decisions transgress appellate commands, it is incumbent upon the trial judge to avoid the further (and quite different) impression that he or she has crossed the line into disregard . . . A circuit court is not at liberty to disregard lawful directives of the Legislature and this Court simply because those directives conflict with the judge's individual notions of efficiency or docket control. In the last analysis, it is crucial to public confidence in the courts that judges be seen as enforcing the law and as obeying it themselves. Exactly so. This is the short of it--and there is no long of it. 470 S.E.2d at 185.

## G. Continuances

*In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996)

"The sacred rights of the affected children" must be considered in deciding whether to grant a continuance.

*In re Kyiah P.*, 213 W. Va. 424, 582 S.E.2d 871 (2003)

This case involved serious allegations of abuse and neglect, as well as the respondent's prior termination of parental rights in Virginia. Although the circuit court granted one continuance on DHHR's motion, it denied a second motion and dismissed the petition when DHHR failed to produce Virginia CPS witnesses who could testify concerning the Virginia proceedings. Reversing the dismissal, the Supreme Court reasoned that the best interests of the children required the court to conduct an adjudicatory hearing and that DHHR had established good cause for a continuance.

## H. Appointment of Counsel

*Note: For a complete discussion of the appointment of counsel for parents and custodians, including when a parent is a co-petitioner with the Department, see Overview Section V.F.*

Syl. Pt. 8, *In the Matter of Lindsey C.*, 196 W. Va. 395, 473 S.E.2d 110 (1995); Syl. Pt. 2, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996)

Circuit courts should appoint counsel for parents and custodians required to be named as respondents in abuse and neglect proceedings incident to the filing of each abuse and neglect petition. Upon the appearance of such persons before the court, evidence should be promptly taken, by affidavit and otherwise, to ascertain whether the parties for whom counsel has been appointed are or are not able to pay for counsel. In those cases in which the evidence rebuts the presumption of inability to pay as to one or more of the parents or custodians, the appointment of counsel for any such party should be promptly terminated upon the substitution of other counsel or the knowing, intelligent waiver of the right to counsel. Counsel appointed in these circumstances are entitled to compensation as permitted by law.

## I. Mandatory Procedure for Child Abuse and Neglect Cases

Syl. Pt. 5, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001); Syl. Pt. 6, *In re Elizabeth A.*, 217 W. Va. 197, 617 S.E.2d 547 (2005); Syl. Pt. 5, *In re T.W.*, 230 W. Va. 172, 737 S.E.2d 69 (2012); Syl. Pt. 3, *In re Darrien B.*, 231 W. Va. 25, 743 S.E.2d 333 (2013); Syl. Pt. 3, *In re M.M.*, 236 W. Va. 108, 778 S.E.2d 338 (2015)

Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated

and the case remanded for compliance with that process and entry of an appropriate dispositional order.

*In re Darrien B.*, 231 W. Va. 25, 743 S.E.2d 333 (2013)

An abuse and neglect case was initiated after a child was diagnosed with a spiral fracture. When the CPS worker went to the home to remove a second child, she observed extremely poor conditions. During the removal, the CPS worker also discovered that the father had voluntarily relinquished his rights to a daughter in an earlier abuse and neglect case that involved substantiated allegations of sexual abuse.

After an adjudicatory hearing, an improvement period was granted, and the primary issue of concern was the condition of the home. At the conclusion of the improvement period, the circuit court conducted a disposition hearing, but did not issue a decision as to whether parental rights would be terminated. Rather, it directed the DHHR to continue providing services. At a review hearing conducted three months later, the court stated that it was terminating parental rights, even though the caseworker was not requesting termination. In response, counsel for the respondent mother requested the opportunity to present the testimony of a service provider and the caseworker, but the court did not allow counsel to do so. One month later, the circuit court issued a written order terminating parental rights.

On appeal, the Supreme Court found that the lower court should have allowed the mother's counsel to present the testimony of the two witnesses and remanded the case. Additionally, the Court directed that the substantiated allegations of sexual abuse against the father must be explored and addressed upon remand.

*In re M.M.*, 236 W. Va. 108, 778 S.E.2d 338 (2015)

In preparation for disposition, the DHHR filed a case plan in which it recommended an improvement period for the adult respondents. The guardian *ad litem*, however, objected to an improvement period. After counsel for the adult respondents indicated their willingness to proceed, the trial court conducted two evidentiary hearings. After the hearings, the court denied the adult respondents' motions for improvement periods and terminated their parental rights.

On appeal, the adult respondents argued that the required procedures for abuse and neglect cases had been substantially frustrated and relied upon *In re Ashton M.*, 723 S.E.2d 409 (W. Va. 2012) and *In re Edward B.*, 558 S.E.2d 620 (W. Va. 2001). The Court, however, distinguished the case from *Ashton M.* and *Edward B.* because counsel for the adult respondents were aware that the guardian *ad litem* might not agree to an improvement period and they had prepared for the evidentiary hearings. Secondly, the Court noted that the parties had full notice of the issues and the opportunity to present evidence. Third, the Court observed that counsel did not object to proceeding with the hearing. Further, the Court pointed out that the adult respondents did not contend that they had additional witnesses or evidence to present. Therefore, the Court held that disposition process had not been substantially frustrated.

*In re J.G.*, 240 W. Va. 194, 809 S.E.2d 453 (2018)

In this case, the circuit court had allowed the adult respondents an excessive combination of improvement periods that had allowed the case to remain pending for three years. Emphasizing the mandatory nature of procedures and timelines in these cases, the Court emphatically stated that:

> The procedural and substantive requirements of West Virginia Code § 49-4-601 *et seq*., the Rules of Procedure for Child Abuse and Neglect, and our extensive body of caselaw are not mere guidelines. The requirements contained therein are not simply window dressing for orders which substantively fail to reach the issues and detail the findings and conclusions necessary to substantiate a court's actions. The time limitations and standards contained therein are mandatory and may not be casually disregarded or enlarged without detailed findings demonstrating exercise of clear-cut statutory authority. 809 S.E.2d at 463-64.

Explaining the role of discretion within the guidelines, the Court stated that:

> *Discretion granted to the circuit court within this framework is intended to allow the court to fashion appropriate measures and remedies to highly complex familial and inter-personal issues—it does not serve as a blanket of immunity for the circuit court to manage abuse and neglect cases as its whim, personal desire, or docket may fancy.* "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security." Syl. Pt. 1, in part, *Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365. The circuit court's inexplicable penchant for "kicking the can" down the proverbial road in this matter flies directly in the face of every directive enacted by the Legislature and articulated by this Court as pertains to the timely disposition of abuse and neglect matters. 809 S.E.2d at 463-64 (emphasis added).

*In re J.A.*, 242 W. Va. 226, 833 S.E.2d 487 (2019)

In this case, five children, two of whom were teenagers, were removed from their parents' home because the house was extremely unsanitary and because all of the children had excessive absences from school. At disposition, the circuit court terminated the parental rights of the three youngest children, but it did not include any disposition with regard to the two teenagers. Apparently, the two teenagers had expressed the desire that parental rights not be terminated, but the reasons for their wishes were not explained. During the course of the appeal, one of the teenagers turned 18.

In its opinion, the Court primarily addressed that a child's wishes about the termination of parental rights is only one factor in an overall analysis of the children's best interests. In addition, the Court noted that the procedures for an abuse and neglect case were disregarded because a dispositional order was not entered with regard to the

younger teenager. Consequently, a permanent placement for the teenager, guardianship with his paternal grandmother, had been delayed. The Court further noted that the DHHR should contact the older of the two teenagers to determine whether he would be amenable to receiving further services.

For a complete discussion of this case see Section IX.Q.

*In re K.B.-R.*, 246 W. Va. 682, 874 S.E.2d 794 (2022)

The unmarried parents of K.B.-R. and L.R., shared custody of the two children, then aged six and seven. Allegations of sexual abuse against the father arose after the mother had given L.R. a deactivated cell phone. L.R. took the cell phone on a visit with her father, and the mother discovered sexually explicit photos of the children when they returned home.

After finding the videos, the mother took the children to the police department, and the children disclosed to the officer that the father would touch them and himself. The police report also included the mother's statement -- that the children had told her that the father had touched both children inappropriately and had digitally penetrated L.R. Separate CAC interviews of the children were conducted, and both children disclosed sexual abuse that was consistent with the allegations in the police report. The mother engaged a therapist for the children, and the children's disclosures in therapy were consistent with their prior disclosures. Based upon this evidence, the DHHR filed an abuse and neglect petition against the father.

At adjudication, the court conducted a two-day hearing, and it heard evidence from multiple individuals concerning the allegations. The CAC interviews were also introduced into evidence. Further, the circuit court conducted *in camera* interviews of the two children, even though the children's statements about the sexual abuse were included in the testimony of other individuals. The Supreme Court included excerpts of the transcripts from the *in camera* interviews.

Only the circuit court judge, the guardian *ad litem*, and the court reporter were present during each of the children's interviews. When L.R. was interviewed, she initially hid under the table and was distracted. She also stated that she did not want to discuss what had happened to her. However, when the judge questioned her, she repeated the disclosures that she had previously made, including the disclosure about digital penetration. In response to questions from the judge, L.R. began to cry, but she also reiterated that the father had told her to take the videos and that no one had told her how to testify. During the interview, the court plainly implied that L.R. was lying about the allegations. Despite L.R.'s distress, the guardian *ad litem* did not object to the court's methods of conducting the interview, and he asked further questions of L.R. at the end of the interview.

The child, K.B.-R., age six, also showed signs of discomfort during her interview. After she had recounted the allegations of sexual abuse, she hid under the table. During

the questioning, the circuit court used leading questions and implied that there had been a plan to put the father in jail.

At the conclusion of the hearing, the circuit court found that the DHHR had not met its burden, and it dismissed the case. In response, the mother appealed the dismissal of the petition.

As a starting point, the Supreme Court expressly stated that it was not ruling on the merits of the sexual abuse allegations. Rather, it was addressing the egregious manner in which the *in camera* interviews were conducted. Next, the Supreme Court discussed the presumption found in Rule 8(a) of the Rules of Procedure for Child Abuse and Neglect Proceedings, that is, that there is a rebuttable presumption that that the potential psychological harm to the child outweighs the need for the child's testimony. On this issue, the Supreme Court observed that the children's testimony was not necessary because the record included consistent disclosures from the children, *i.e.*, the CAC interviews, and statements to therapists. The Supreme Court, however, concluded that the circuit court acted within its discretion when to conduct the interviews.

The second error that the Supreme Court discussed was the method of questioning the children. It found that the circuit court violated Rule 611 of the West Virginia Rules of Evidence in that a court is required to exercise reasonable control to prevent the harassment of witnesses and undue embarrassment. The Supreme Court found that the circuit court actually perpetrated the harassment when it implied that L.R. was lying. The Supreme Court stated that: "[W]e cannot conceive of any reasonable method or purpose of questioning a child which involves openly and directly accusing the child of lying." 874 S.E.2d at 802. The Supreme Court also found that circuit court improperly led K.B.-R. when it questioned her.

Further, the Supreme Court found that the court violated Rule 8 in the manner in which it conducted the *in-camera* interviews. The Supreme Court referred to the apparent emotional distress that both of the children displayed.

Although the Supreme Court discussed the significant flaws in the methods used in the interviews, the Supreme Court stated that it had not and would not establish specific guidelines for *in camera* interviews. Specifically, it stated that: "The learned judges of this state are well-suited to interview children in a manner which comports with their professional, ethical, and legal obligations." *K.B.-R.*, 874 S.E.2d 794, fn. 7.

Based upon detailed review of the record, the Supreme Court, concluded that the Rules of Procedure for Child Abuse and Neglect Proceedings were substantially frustrated, and that reversal of the circuit court was warranted. Further, in a significantly unusual directive, it found that the case must be assigned to another circuit court judge, upon remand, to conduct an independent review of the allegations in the petition.

In addition to discussing the circuit court's errors, the Supreme Court also addressed the guardian *ad litem's* deficiencies in the representation of the children. Specifically, the Supreme Court indicated that the guardian *ad litem* had not visited or

met with the children enough to provide adequate representation. Also, the Supreme Court took issue with the guardian *ad litem's* failure to object to the circuit court's method of questioning the children during the interviews. It further pointed out that the guardian *ad litem* had, during oral argument, stated that he believed that the circuit court interviews had been properly conducted. The Supreme Court determined that the guardian *ad litem's* errors were egregious, and it directed that another guardian *ad litem* must be appointed upon remand. For a more thorough discussion of these issues, see Chapter 6, Section III.

## J. Required Findings of Fact and Conclusions of Law

*In the Interest of S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981)

*W. Va. Code § 49-4-601(i)*

Findings of fact and conclusions of law required by W. Va. Code § 49-6-2(c) must be more than a bare statement couched in the language of the statute.

Syl. Pt. 4, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001)

*W. Va. Code § 49-4-604(b)(6)*

*W. Va. Code § 49-4-604(b)(5)*

Where a trial court order terminating parental rights merely declares that there is no reasonable likelihood that a parent can eliminate the conditions of neglect, without explicitly stating factual findings in the order or on the record supporting such conclusion and fails to state statutory findings required by West Virginia Code § 49-6-5(a)(6) on the record or in the order, the order is inadequate. Likewise, where a trial court removes a child from the custody of an alleged neglectful parent and places exclusive custody in another individual, the court must adhere to the mandates of West Virginia Code § 49-6-5(a)(5), and failure to include statutorily required findings in the order or on the record renders the order inadequate.

*In re E.H.*, 247 W. Va. 456, 880 S.E.2d 992 (2022)

The DHHR filed a petition against a father for domestic violence against his wife and alleged sexual abuse of his step-child. He had two children with two separate women, and he was the stepfather for his wife's children. After an adjudicatory hearing, the circuit court adjudicated the respondent for domestic violence and for sexual abuse of his step-child. He also was charged criminally for the offense against his step-daughter.

At disposition, the father relinquished his rights to his step-children, but he opposed termination of his parental rights. The circuit court, however, terminated his parental rights to his biological children, but did not make specific findings as to the reasons for the termination of parental rights. In the written order, the reason for termination of parental rights was denoted as "aggravated circumstances."

On appeal, the father argued that the termination order failed to include requisite findings of fact and conclusions of law. He also raised other assignments of error.

After it reviewed the record, the Supreme Court found that the termination order did not include the findings of fact and conclusions of law required by both Rule 36(a) and the relevant statute. Specifically, the Court explained that the statute allows for termination based upon two findings: there is no reasonable likelihood that conditions of abuse and neglect can be corrected in the near future and that termination is necessary for the best interests of the child. W. Va. Code § 49-4-604(c)(6). The Supreme Court found that neither the order, nor the record contained any evidence that termination was in the best interests of the father's biological children. Accordingly, it reversed the circuit court order and remanded the case for further proceedings.

In his dissenting opinion, Justice Armstead noted that the order was "scant," but he pointed to evidence in the record that supported the termination of parental rights. He concluded that the evidence, although minimal, was sufficient to support the termination of the father's parental rights to his biological children.

## K. Advance Approval of Expert Fees

*Note: For a discussion of the authority of the circuit court to set expert fees, see Special Procedures Section VIII. D.*

*In re Chevie V.*, 226 W. Va. 363, 700 S.E.2d 815 (2010)

The question in this case, the responsibility for the payment of expert witness fees, arose when a respondent mother sought approval from the circuit court to hire an expert witness concerning marks on a child which were alleged to be caused by a lit cigarette. The mother requested approval for an expert because the DHHR planned to present expert testimony regarding the child's injuries. After the circuit court approved the request, the respondent mother hired an expert and the circuit court ordered that the expert would be paid by the Public Defender Corporation. After the expert provided services, the respondent mother's attorney sought reimbursement for the expert's fees. The circuit court ordered the DHHR to pay the fee and upheld its ruling when the DHHR later sought to modify the ruling. The DHHR then sought appellate relief from the order pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure.

As a starting point for its analysis, the Supreme Court reviewed an earlier opinion, *Hewitt v. DHHR*, 575 S.E.2d 308 (W. Va. 2002), that concluded that a circuit court has the ultimate authority to direct payment of expert witness fees in abuse and neglect cases. The Supreme Court did not accept the DHHR's position in *Hewitt* that it has exclusive authority for the payment of expert witness fees pursuant to West Virginia Code § 49-7-33, a statute that allows the DHHR to pay for health care services at the Medicaid rate when such rates are available.

*W. Va. Code § 49-4-108*

As a basis for assigning payment responsibility to the DHHR, the circuit court had relied on West Virginia Code § 49-6-4 and Trial Court Rules 27.01 and 27.02, provisions that govern payment when a court appoints an expert. The Supreme Court, however, concluded that these rules and statute were not

*W. Va. Code § 49-4-603*

dispositive of the issue because the circuit court had not appointed the expert. Rather, it had simply approved the respondent mother's request to hire an expert witness who would present testimony on her behalf.

As a basis to oppose responsibility for payment, the DHHR argued that the Public Defender Corporation was the responsible entity based upon West Virginia Code § 29-21-13a(e) and Trial Court Rule 35.05(b), provisions that require the Public Defender Corporation to pay expert witness fees in eligible proceedings. However, the Supreme Court held that these provisions were general and the more specific provisions of West Virginia Code § 49-7-33 were dispositive of the issue.

With regard to the provisions of West Virginia Code § 49-7-33, the Court concluded that the statute allows the circuit court the discretion to require the DHHR to pay fees for an expert witness in an abuse and neglect or juvenile case. The Court noted that the statute states that the court "may" require the DHHR to pay for "professional services" that include "'evaluation, report preparation, consultation and preparation of expert testimony' by an expert witness." 700 S.E.2d at 824. Based upon this reasoning, the Court affirmed the circuit court's order that required the DHHR to pay the fees for the expert witness.

The Court, however, reversed the circuit court insofar as it required the DHHR to pay the expert witness fee according to the schedule established by the Public Defender Corporation. The Court concluded that the relevant statute (then codified at West Virginia Code § 49-7-33) established that the DHHR has the sole authority to set the fee schedule for professional services provided in abuse and neglect and juvenile cases. The Court remanded the case to the circuit court to allow the DHHR to establish the fee schedule for the payment of the expert. In two new syllabus points, the Court held that:

*W. Va. Code § 49-4-108*

Syl. Pt. 5: Pursuant to the plain language of W. Va. Code § 49-7-33, a circuit court "may ... order the West Virginia Department of Health and Human Resources to pay for professional services" incurred in a child abuse and neglect proceeding. Such "professional services" include, but are not limited to, "evaluation, report preparation, consultation and preparation of expert testimony" by an expert witness. W. Va. Code § 49-7-33.

Syl. Pt. 6: When a circuit court orders the West Virginia Department of Health and Human Resources to pay for professional services, including those provided by an expert witness, pursuant to the provisions of W. Va. Code § 49-7-33, the Department of Health and Human Resources shall be permitted to establish the fee schedule by which the professional will be paid "in accordance with the Medicaid rate, if any, or the customary rate [with] adjust[ments to] the schedule as appropriate." W. Va. Code § 49-7-33.

*Hewitt v. DHHR*, 212 W. Va. 698, 575 S.E.2d 308 (2002)

Although West Virginia Code § 49-7-33 allows the DHHR to pay for health services and expert witnesses in juvenile and abuse and neglect cases at the Medicaid rate, if available, the Court has not held that the DHHR has the "exclusive authority" to set expert

witness fees. Rather, the Court has found that "a circuit court still remains the ultimate authority for entry of all orders directing payment of expert witness fees in abuse and neglect cases." 575 S.E.2d at 313.

## II. PARTIES TO AN ABUSE AND NEGLECT PETITION

### A. Who May File an Abuse and Neglect Petition

*Note: Chapter 49 of the West Virginia Code and Rule 17(a) indicate that an individual, upon the mutual consent of the parties, may serve as a co-petitioner with the DHHR. See Overview, Section V.*

*State ex rel. Paul B. v. Hill*, 201 W. Va. 248, 496 S.E.2d 198 (1997)

*W. Va. Code § 49-4-601(a)*

Not only the DHHR has "standing" to file an abuse/neglect petition, any "reputable person" with knowledge of the facts may. W. Va. Code § 49-6-1(a).

*In re Emily G.*, 224 W. Va. 390, 686 S.E.2d 41 (2009)

*W. Va. Code § 49-4-601*

When an abuse and neglect petition was brought by a child's grandparents and was dismissed without a hearing, the Supreme Court held that West Virginia Code § 49-6-1 requires the DHHR to participate in abuse and neglect proceedings and to provide supportive services to remedy the circumstances of abuse and neglect. Upon remand, the DHHR was to be joined as an intervenor.

Syl. Pt. 2, in part, *In re George Glen B., Jr.*, 207 W. Va. 346, 532 S.E.2d 64 (2000); Syl. Pt. 4, *In re Emily G.*, 224 W. Va. 390, 686 S.E.2d 41 (2009)

"[T]he Department of Health and Human Resources has a duty to join or participate in proceedings to terminate parental rights . . .."

Syl. Pt. 5, *In re B.C.*, 233 W. Va. 130, 755 S.E.2d 664 (2014)

While a civil abuse and neglect action pursuant to *W.Va. Code* § 49-6-1 may be initiated by either the West Virginia Department of Health and Human Resources or "a reputable person," the action is pursued solely on behalf of the State of West Virginia in its role as *parens patriae*.

This case involved a situation in which a mother initially filed a domestic violence petition against the child's father on the child's behalf that was ultimately denied by the family court. After the circuit court affirmed the dismissal, the mother filed an abuse and neglect petition against the father. While the abuse and neglect case was pending, the father grabbed the child and fractured the child's wrist at an exchange required by the parenting plan. In response, the mother filed a second domestic violence petition which was granted by the family court.

Discussing West Virginia Code § 49-6-1, the Court found that, although an abuse and neglect petition may be filed by a reputable person, "An abuse and neglect petition is prosecuted on behalf of one party, and only one party: the State of West Virginia, in its role as *parens patriae*." 755 S.E.2d at 671. The Court explained that the Legislature has designated the DHHR as the State's representative to prosecute child abuse and neglect petitions. The Court also observed that the ability to file an abuse and neglect does not indicate that the "reputable person" would necessarily have an interest in the proceeding or that the case was pursued on behalf of the reputable person. This reasoning, in turn, was the Court's basis for holding that *res judicata* or collateral estoppel would not bar abuse and neglect cases and domestic violence petitions based upon the same set of facts.

*W. Va. Code § 49-4-601*

## B. Custodian or Parent

Syl. Pt. 4, *W. Va. DHHR v. Doris S.*, 197 W. Va. 489, 475 S.E.2d 865 (1996)

Child abuse encompasses a parent, guardian or custodian who knowingly allows another person to inflict physical injury upon another child residing in the same home as the parent and his/her children, even though that child is not parent's natural or adopted child.

*In re K.S.*, 246 W. Va. 517, 874 S.E.2d 319 (2022), n. 14

In footnote 14, the Supreme Court observed that the father had been designated as an interested party. However, the Court pointed out that he should have been named as a respondent because the applicable statute defines respondents as "all parents, guardians, and custodians identified in the child abuse and neglect petition who are not petitioners or co-petitioners." W. Va. Code § 49-1-201.

*In re A.A.*, 246 W. Va. 596, 874 S.E.2d 708 (2022)

*Note: The primary issues addressed in the case were jurisdiction under the "significant connection" test of the UCJEA and the grandparent preference. See Sections I.B. Jurisdiction – Interstate Custody Issues and XV. Placement with Grandparents.*

In 2019, the DHHR took custody of A.A. after the father was arrested in West Virginia for a high-speed chase. The father had brought the child to West Virginia with him, and the DHHR found A.A. in a hotel room with drugs and drug paraphernalia. The DHHR contacted the grandmother in South Carolina about taking custody of the child, but she declined because she would not pass a home study as one of her other sons was living with her and was a felon. When it became apparent that the father's rights would be terminated, the grandmother intervened in the case and sought placement of A.A. The circuit court, however, found that it was in the child's best interests to remain in her foster home.

As one basis for her appeal, the grandmother argued that she was the child's custodian and should have been named as a party to the case when it was filed. Reviewing the evidentiary record, the Supreme Court noted that the child had lived with her father, as well as the grandmother, and that the father would leave grandmother's home with the child, instead of leaving the child solely in her care. Therefore, the Supreme Court found that the grandmother met the definition of a "caregiver," not a "custodian," and it was not required to name her as a party to the case under the relevant statutes. See W. Va. Code §§ 49-1-204 and 49-4-601.

*In re H.W.*, 247 W. Va. 109, 875 S.E.2d 247 (2022)

Relying on prior cases, the Court explained that for a person to be considered a "custodian," for the purposes of an abuse and neglect case, the relationship between the person and the child must have been established before, not incident to, the abuse and neglect case. See e.g., *State ex rel. H.S. v. Beane*, 814 SE.2d 660 (W. Va. 2018).

### C. Non-Custodial Parents Can Be Found Abusive and/or Neglectful

Syl. Pt. 1, in part, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996); Syl. Pt. 1, *In re Christine Tiara W.*, 198 W. Va. 266, 479 S.E.2d 927 (1996)

When the Department of Health and Human Services finds a situation in which apparently one parent has abused or neglected the children and the other has abandoned the children, both allegations should be included in the abuse and neglect petition filed under W. Va. Code § 49-6-1(a). Every effort should be made to comply with the notice requirements for both parents. To the extent that *State ex rel. McCartney v. Nuzum*, 161 W. Va. 740, 248 S.E.2d 318 (1978), holds that a non-custodial parent can be found not to have abused and neglected his or her child it is expressly overruled.

*See W. Va. Code § 49-4-608(b)*

Syl. Pt. 6, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995); Syl. Pt. 8, *In the Matter of Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995)

When the DHHR seeks to terminate parental rights where an absent parent has abandoned the child, allegations of such abandonment should be included in the petition and every effort made to comply with the notice requirements of W. Va. Code § 49-6-1.

*W. Va. Code § 49-4-601*

### D. Foster Parents in Abuse and Neglect Cases

#### 1. Persons Entitled to Notice and the Right to be Heard

*State ex rel. H.S. v. Beane*, 240 W. Va. 643, 814 S.E.2d 660 (2018)

In this case, the child T.C. had been placed with long-term foster parents, H.S. and J.S., who are also the child's maternal aunt and uncle. In addition, the MDT had designated them as the preadoptive parents of the child. The paternal grandmother

sought custody of the child, and a paternal aunt sought visitation with the child by filing a motion. After conducting a hearing, the circuit court granted these two paternal relatives supervised visitations with the child. The motion was not served upon the preadoptive parents, and they were not notified of the hearing when the visitation motion was granted. In response to the order establishing visitation, the preadoptive parents sought and were granted intervenor status, but the court did not alter the visitation order. To challenge the visitation order, the preadoptive parents filed a petition for a writ of prohibition and argued that they had not been afforded a meaningful opportunity to be heard on the scheduled visitation with the paternal relatives.

To address, this issue, the Court first discussed its earlier memorandum decision of *State ex rel. R.H. v. Bloom*, No. 17-0002, 2017 WL 1788946 (W. Va. May 5, 2017) (memorandum decision) in which it had decided that there is a two-tiered framework established by West Virginia Code § 49-4-601(h) in that persons with parental rights or persons who had a pre-petition custodial relationship have a "meaningful opportunity to be heard" and "the opportunity to testify and to present and to cross-examine witnesses." However, foster parents and preadoptive parents have only the right to the "meaningful opportunity to be heard." Therefore, the Court observed that while a parent or pre-petition custodian is a party to the case and has the full right to participate, a foster parent or other person who is entitled to a meaningful opportunity to be heard does not have the same right to present evidence and cross-examine witnesses.

After the Court discussed the two-tiered framework, it went on to address circumstances in which a person entitled to notice and the right to be heard, defined under Rule 3(o), would have a right to be heard. The Court cited Rule 46 which requires a person who is entitled to notice and the right to be heard to be provided notice of any motion for modification of a court order. The Court further noted that Rules 36a, 39, and 41 all require that such persons be provided notice when the Court is addressing permanency planning.

Applying this guidance to the instant case, the Court found that the circuit court exceeded its authority when it ruled on the visitation issue without providing notice to the petitioners. The Court further found that the second follow-up hearing did not rectify the fact that they had been deprived of a meaningful opportunity to be heard when visitation was ordered. The Court noted that either the guardian *ad litem* or the DHHR could have presented the petitioners' testimony at the first hearing on visitation and that would have met the requirement that the petitioners must have the opportunity to be heard. Finally, the Court noted that *In re Jonathan G.*, 482 S.E.2d 893 (W. Va. 1996) provided support for the petitioners' position -- that they should be afforded a meaningful opportunity to be heard on the issue of visitation.

Syl. Pt. 1, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996)

*Note: The Court modified the holding of this case when it adopted Syllabus Point 4 of State ex rel. C.H. v. Faircloth, discussed below.*

The foster parents' involvement in abuse and neglect proceedings should be separate and distinct from the fact finding portion of the termination proceeding and should be structured for the purpose of providing the circuit court with all pertinent information regarding the child. The level and type of participation in such cases is left to the sound discretion of the circuit court with due consideration of the length of time the child has been cared for by the foster parents and the relationship that has developed. To the extent that this holding is inconsistent with *Bowens v. Maynard*, 174 W. Va. 184, 324 S.E.2d 145 (1984), that decision is hereby modified.

n. 6, *In re B.A.*, 243 W. Va. 650, 849 S.E.2d 650 (2020)

In this footnote, the Supreme Court observed that the foster parents were limited to the opportunity or right to be heard, but that they did not have the right to present and cross-examine witnesses.

*State ex rel. D.B. v. Bedell*, 246 W. Va. 570, 874 S.E.2d 682 (2022)

*Note: For a complete discussion of the merits of this case, see Section XIV.G.*

The issue concerning the foster parents' participation in the case arose when the maternal grandparents of the child, R.L., moved to intervene, moved for an expedited home study and later moved for placement of the child, but did not serve the motions on the foster parents who had placement of the child, R.L. After a hearing for which the foster parents did not have notice, the circuit court granted the grandparents' motion to intervene and for an expedited home study. The foster parents learned of the grandparents' efforts from a second set of foster parents who had placement of one of R.L.'s sibling. In turn, the foster parents contacted the guardian *ad litem* who informed them of the upcoming hearing on placement of the child.

The material facts regarding placement with the grandparents involved the grandfather's prior convictions for sexual battery when he was 19 years old. According to the record, both the grandfather and the victim were intoxicated when the offense occurred. The DHHR did not approve the home study for the grandparents because of the sexual battery convictions. According to testimony of the DHHR home finding specialist, DHHR policy would not allow the approval of the home study because the grandfather's offense is, by policy, a non-waivable offense.

Although the foster parents attended the placement hearing, they were not represented by counsel. The guardian *ad litem* presented the testimony of foster parent D.B. at the placement hearing, and one of the foster parents was allowed to make a brief proffer during the hearing. However, the foster parents were unable to obtain the transcript when they sought relief in prohibition because they were not parties. Based upon the record before it, the Court concluded that the focus of the placement hearing was the grandfather's conviction and whether the conviction would prevent the placement of R.L. with them. Two months after the placement hearing, the circuit court found that the grandfather was remorseful and that he had not committed any other criminal offenses

since the time of the disqualifying offenses. The circuit court also found that the grandparents would be suitable adoptive parents despite the failed home study.

As an initial basis for their petition, the foster parents asserted that they had been denied adequate notice and a meaningful opportunity to be heard. In response, the grandparents argued that the foster parents should have filed a motion to intervene and should have requested reconsideration of the placement order before seeking relief in prohibition. The Supreme Court, however, found that, given the procedural history below, that the foster parents would not be required to first seek relief in the circuit court.

The Supreme Court found that the foster parents had very little information about the motions filed by the grandparents, the motion to intervene and the expedited home study. The Supreme Court also observed that they did not have the opportunity to obtain counsel before the placement hearing. Therefore, the Supreme Court held that the foster parents' attendance at the placement hearing and their limited participation did not afford them with a meaningful right to be heard, as is required by West Virginia Code § 49-4-601 (h). *State ex rel. H.S. v. Beane*, 814 S.E.2d 660 (W. Va. 2018).

In addition to the due process issue, the Supreme Court also found that the circuit court did not have the authority to apply the grandparent preference because the DHHR did not approve the grandparents' home study. Further, the Supreme Court found that the circuit court had not sufficiently considered the effect that the move to the grandparents' home would have on R.L. Therefore, the Supreme Court granted the foster parents' petition for a writ of prohibition.

In his separate opinion, Justice Armstead, joined by Justice Walker, concurred in the majority's holding, that the foster parents had not been granted a meaningful opportunity to be heard. However, he dissented with regard to the part of the majority opinion that indicated that the grandfather should have been informed of his right to grieve the DHHR decision. He first discussed the DHHR grievance procedure which is found in the "Common Chapters Manual." Next, he summarized the provisions of the DHHR Homefinding Policy[23] that establish certain convictions as non-waivable, including convictions for sexual offenses. He pointed out that circuit court review of a grievance such as the grandfather's would be limited to whether the grandfather had been convicted of a non-waivable offense. Since the grandfather had admitted to his conviction, Justice Armstead pointed out that the grandfather would never be able to obtain a favorable home study and any error arising from lack of notice of the grievance procedure was moot.

2. Permissive Intervention

*State ex rel. L.D. v. Cohee*, 247 W. Va. 695, 885 S.E.2d 633 (2022)

*Note: For a complete discussion of this case, see Section X.A.*

[23] As set forth in Justice Armstead's separate opinion, the DHHR Homefinding Policy and West Virginia Code § 49-2-114 provide that an individual may not have a criminal conviction that involves a non-waivable offense or abuse and neglect history to receive an approved homestudy.

A petition was filed against respondent parents because of a child's excessive bruising, and the child was placed with the father's cousin. During the case, the parents participated exceptionally well in their post-adjudicatory improvement period. At the disposition hearing, the parties all recommended reunification. However, the relative caregivers opposed reunification because the child had developed a bond with them. Because the disposition appeared that it would be contested, the judge recused himself, and a new judge was appointed.

At the next hearing before the new judge, the parties again requested that the child should be reunified with her parents. However, the circuit court questioned whether reunification was in the child's best interests because of the time that the child had been in foster care and whether DHHR could recommend reunification given the length of the child's foster care stay. W. Va. Code § 49-4-605. The court, without a pending motion to intervene, granted party status to the caregivers and appointed counsel for them. The court also ordered that respondent parents and relative caregivers participate in a bonding assessment. In response to the court's decision, the guardian *ad litem* filed a petition for a writ of mandamus to require the child to be reunified and to remove the relative caregivers from their status as parties to the case.

As one basis to grant the writ of mandamus, the Supreme Court found that there was no evidence to deny reunification. Additionally, the Supreme Court addressed the circuit court's decision to grant party status to the relative caregivers when they had not filed a motion to intervene. The Supreme Court noted that a person must file a motion to intervene, as is required by Rule 24 of the West Virginia Rules of Civil Procedure. The Supreme Court identified the persons who are required to be made parties to a case under West Virginia Code § 49-4-601(h) and noted that the relative caregivers did not fall into this category. Therefore, the Court found that the intervention of the caregivers would be permissive, rather than a matter of right. Based upon the record, the Court granted the writ of mandamus and required that the caregivers be removed from party status in the case.

3. Right to Intervention

*Note: West Virginia Code § 49-2-127 provides that foster parents or custodial relatives have a right to move to intervene in a case after parental rights have been terminated.*

*State ex rel. C.H. v. Faircloth*, 240 W. Va. 729, 815 S.E.2d 540 (2018)

In this case, the child was born prematurely and hospitalized for approximately eight weeks, after which he was placed with his foster parents. The petition was filed because of domestic violence and the parents' contentious actions while the child was hospitalized. At the time of the appeal, the child was approximately 21 months old and continued to have feeding and developmental issues.

During this case, both biological parents were granted post-adjudicatory improvement periods and extensions, at which time the biological mother had been given

approximately an 11-month improvement period and the biological father a one-year, three-month improvement period. At this time, the guardian *ad litem* sought to revoke the parents' improvement periods. The foster parents also retained counsel and moved to intervene. The circuit court conducted a hearing on the foster parents' motion to intervene. Concluding that there was nothing more the foster parents could offer as parties than they could in their capacity as participants, the circuit court denied the motion, finding it premature as the case was still in the "fact finding," pre-termination stage. However, the court stated that the foster parents would be permitted to fully participate in the MDT meetings and attend hearings.

Next, a hearing was scheduled to determine whether to revoke the biological parents' improvement period. When the hearing was conducted, neither the foster parents, nor their counsel was in attendance. Apparently, their counsel had a scheduling conflict, and the court had originally decided to wait on counsel's arrival. However, the court proceeded with the hearing and ultimately granted the biological parents six-month post-dispositional improvement periods. In turn, the foster parents filed a petition for a writ of prohibition.

To address this case, the Court first discussed a case decided earlier in the term, *State ex rel. H.S. v. Beane*, 814 S.E.2d 660 (W. Va. 2018), and its guidance on the role of foster parents. Specifically, the Court noted that *Beane* indicates that a foster parent has a right to be heard independent of whether he or she has been granted intervenor status. The Court expressly noted that: "*Beane* establishes by implication that party-intervenors have greater rights of participation than do parties merely given a statutory 'right to be heard.'" 815 S.E.2d at 548. Those rights include: the ability to present testimony, notice of court proceedings, and the ability to access the court file.

Secondly, the Court discussed the case of *In re Jonathan G.*, 482 S.E.2d 893 (W. Va. 1996) and determined that its holding and application to abuse and neglect cases needed to be clarified because it predated the current statutory right to be heard that is afforded to foster parents. Adopting a new syllabus point, the Court held that:

> Foster parents, pre-adoptive parents, or relative caregivers who occupy only their statutory role as individuals entitled to a meaningful opportunity to be heard pursuant to West Virginia Code § 49-4-601(h) are subject to discretionary limitations on the level and type of participation as determined by the circuit court. Foster parents who have been granted the right to intervene are entitled to all the rights and responsibilities of any other party to the action. To the extent that this holding is inconsistent with *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996), our holding in *In re Jonathan G.* is hereby modified. Syl. Pt. 4, *C.H.*, 815 S.E.2d 540.

Addressing the facts of the instant case, the Court found that the foster parents had been denied a meaningful opportunity to be heard when the court conducted a hearing in their absence and granted the respondent parents post-dispositional improvement periods. The Court found that the foster parents were entitled to participate in the hearing based upon West Virginia Code § 49-4-601(h).

Next, the Court addressed the denial of the foster parents' motion to intervene. The respondent parents relied on *In re Jonathan G.*, 482 S.E.2d 893 to oppose the foster parents' intervention and argued that intervention before termination should not be permitted. However, the Court reviewed other West Virginia cases and concluded that there was no temporal limit on intervention. *See e.g., In re J.G.*, 809 S.E.2d 453 (W. Va. 2018); *In re Harley C.*, 509 S.E.2d 875 (W. Va. 1998). The Court observed that statutes that allow foster parents to participate in MDTs and that afford them with the right to notice and the opportunity to be heard have provided foster parents with a significant stake in the proceedings. The Court further noted that concurrent planning "naturally heightens the vested interest foster parents have in the proceeding." 815 S.E.2d at 552.

Finally, the Court reviewed statutes that limit the total length of combined improvement periods, West Virginia Code § 49-4-610(9), and that require the DHHR to seek termination of parental rights, West Virginia Code § 49-4-605(b), after a child has been in foster care for 15 of the most recent 22 months. Based upon its analysis, the Court, in a new syllabus point, held that:

> Foster parents are entitled to intervention as a matter of right when the time limitations contained in West Virginia Code § 49-4-605(b) and/or West Virginia Code § 49-4-610(9) are implicated, suggesting that termination of parental rights is imminent and/or statutorily required. Syl. Pt. 7, *C.H.*, 815 S.E.2d 540.

Applying this guidance to the instant case, the Court granted the writ of prohibition to require the lower court to vacate the order that granted post-dispositional improvement periods. Further, the Court instructed that the foster parents' motion to intervene must be granted.

4. Foster Parents' Participation in Permanency Hearing

*Kristopher O. v. Mazzone*, 227 W. Va. 184, 706 S.E.2d 381 (2011)

After a young child had been continuously placed in a foster home for 22 months and all parental rights had been terminated, the DHHR sought and obtained an order to move the child to the home of a paternal aunt. The DHHR based this custody change upon its adoption policy that mandated placement with a blood relative over persons unrelated to a child. The foster parents attempted to attend the permanency hearing and present a motion to intervene but were instructed to leave.

Finding that the circuit court exceeded its legitimate powers and issuing a writ of prohibition, the Supreme Court pointed out that the statute governing permanency hearings grants the right to notice and an opportunity to be heard to foster parents, pre-adoptive parents and relatives who are providing care to a child. Additionally, the Supreme Court noted that the circuit court erred because the foster parents had not even been considered as a permanent placement even though the child had lived with them for 22 months and they were not even allowed to present evidence concerning the child's best interests. Further, the Supreme Court pointed out that the DHHR should have

developed a concurrent permanency plan for the child and could have considered the aunt as a possible placement at the beginning of the case.

5. Former Foster Parents

*In re Michael Ray T.*, 206 W. Va. 434, 525 S.E.2d 315 (1999)

Syl. Pt. 4: Former foster parents do not have standing to intervene in abuse and neglect proceedings involving their former foster children.

Syl. Pt. 5: A circuit court may, in its sound discretion, permit former foster parents to present evidence regarding their former foster children to assist the court in assessing the best interests of such children subject to an abuse and neglect proceeding.

In any event, we do want to emphasize that, while the [former foster parents] do not have a right of intervention in the underlying abuse and neglect proceedings, they may not be completely devoid of remedies should they desire to pursue this matter further. Such alternative remedies at their disposal may include the extraordinary remedies of mandamus, as alluded to in the circuit court's order, and habeas corpus. . .. As both of these proceedings would be external to the underlying abuse and neglect proceedings, there exists a lesser likelihood of unnecessary and disruptive procedural delay. 525 S.E.2d at 324.

6. Right to Appeal

Syl. Pt. 1, *In re Harley C.*, 203 W. Va. 594, 509 S.E.2d 875 (1998)

Foster parents who are granted standing to intervene in abuse and neglect proceedings by the circuit court are parties to the action who have the right to appeal adverse circuit court decisions.

*In re H.W.*, 247 W. Va. 109, 875 S.E.2d 247 (2022)

The primary issue on appeal was whether the circuit court erred in denying the foster parents' motion to intervene, which the Supreme Court affirmed. However, the foster parents also appealed the disposition order that found that the child should be reunified with her biological mother. On this issue, the Court expressly stated that: "Because the [f]oster [p]arents were not granted intervenor status, their ability to bring the instant appeal is limited to their role in the proceedings below as foster parents who requested, but were denied, intervenor status." 874 S.E.2d at 258.

## E. Custody Transferred to Third Party Before Case Initiation

*In re G.S.*, 244 W. Va. 614, 855 S.E.2d 922 (2021)

Syl. Pt. 2: When a writing signed by both parents purports to transfer custody of a child to a third person, and that child later becomes the subject of an abuse and neglect petition against the child's parents, the person with purported custody of the child has a

right to be heard at the preliminary phase of the proceedings to determine: (a) whether the writing is authentic, (b) whether he or she is a responsible person for purposes of West Virginia Code § 49-4-602, and (c) whether temporary placement with such person is in the child's best interest.

A child was born prematurely, had been exposed to addictive drugs, and remained hospitalized for a lengthy period. A day after the child's birth, both parents signed a written agreement transferring custody of the child to the paternal grandparents, and the paternal grandparents filed a guardianship petition the following day. On the same day that the guardianship petition was filed, the DHHR applied for emergency custody, and the magistrate ratified the emergency custody order. Once the DHHR obtained custody of the child, the circuit court dismissed the guardianship petition without a hearing and without providing any rationale in the order. After the abuse and neglect petition was filed, the grandparents moved to intervene in the abuse and neglect case, requested placement, and sought to be named as co-petitioners.

At the preliminary hearing, the circuit court heard argument on the motion to intervene. It denied the motion to intervene, but it indicated that the paternal grandparents should be considered for placement. The circuit court did not, however, address whether the child should be placed with the grandparents and whether placement with them was in the child's best interests. Opposing the grandparents' placement motion, the DHHR indicated its intent to place the infant with half-siblings who had been previously adopted. The paternal grandparents filed an appeal of the denial of their motion to intervene. Later in the abuse and neglect case, the circuit court granted the motion to intervene, but it did not address whether the child should be placed temporarily with the grandparents.

On appeal, the grandparents relied on upon the grandparents' preference found in West Virginia Code § 49-4-114(a)(3), and they argued that placement of the child with her half-siblings was an abuse of discretion. Reviewing the record, the Supreme Court noted that the circuit court had not made any findings about whether the grandparents should serve as a temporary placement for the child. The Court went on to note that a child may be placed with a "responsible relative" or "responsible person" on a temporary basis pursuant West Virginia Code § 49-4-602(a) & (b). Based upon this reasoning, the Court, in Syllabus Point 2, held that a court, when faced with facts involving a transfer of custody to a third person and the child becomes subject to an abuse and neglect case, the third person has a right to be heard at the preliminary phase of the case. When addressing such a situation, the court must determine whether the writing is authentic and whether the third person is a "responsible person." Finally, the court must determine whether temporary placement is in the child's best interests.

The Supreme Court remanded the instant case for an expedited hearing to determine whether the grandparents should serve as a temporary placement. The Court further noted that, if ordered by the circuit court, any transition from the foster parents to the paternal grandparents should take place gradually.

## III. CHILD ABUSE AND NEGLECT PETITION

### A. Emergency Custody

Syl. Pt. 1, *In the Matter of Jonathan P.*, 182 W. Va. 302, 387 S.E.2d 537 (1989)

W. Va. Code § 49-6-3, authorizes, upon the filing of a petition, the immediate, temporary taking of custody of a child by the Department of Human Services when there exists an imminent danger to the physical well-being of the child and there are no reasonably available alternatives to the removal of the child.

*W. Va. Code § 49-4-602*

### B. Allegations of Abandonment

Syl. Pt. 1, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996); Syl. Pt. 1, *In re Christine Tiara W.*, 198 W. Va. 266, 479 S.E.2d 927 (1996)

When the DHHS finds a situation in which apparently one parent has abused or neglected the children and the other has abandoned the children, both allegations should be included in the abuse and neglect petition filed under W. Va. Code § 49-6-1(a). Every effort should be made to comply with the notice requirements for both parents. To the extent that *State ex rel. McCartney v. Nuzum*, 161 W. Va. 740, 248 S.E.2d 318 (1978) holds that a noncustodial parent can be found not to have abused and neglected his or her child it is expressly overruled.

*W. Va. Code § 49-4-601*

Syl. Pt. 6, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995); Syl. Pt. 8, *In the Matter of Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995)

When the DHHR seeks to terminate parental rights where an absent parent has abandoned the child, allegations of such abandonment should be included in the petition and every effort made to comply with the notice requirements of W. Va. Code § 49-6-1.

### C. Duty to File Petition - Prior Termination Involving Sibling

Syl. Pt. 1, *In re George Glen B., Jr.*, 207 W. Va. 346, 532 S.E.2d 64 (2000); Syl. Pt. 1, *In re James G.*, 211 W. Va. 339, 566 S.E.2d 226 (2002)

When the parental rights of a parent to a child have been involuntarily terminated, W. Va. Code § 49-6-5b(a)(3) requires the Department of Health and Human Resources to file a petition, to join in a petition, or to otherwise seek a ruling in any pending proceeding, to terminate parental rights as to any siblings of that child.

*W. Va. Code § 49-4-605(a)(3)*

Syl. Pt. 2, *In re George Glen B., Jr.*, 207 W. Va. 346, 532 S.E.2d 64 (2000); Syl. Pt. 2, *In re James G.*, 211 W. Va. 339, 566 S.E.2d 226 (2002)

While the Department of Health and Human Resources has a duty to file, join or participate in proceedings to terminate parental rights in the circumstances listed in W. Va. Code § 49-6-5b(a)(3), the Department must still comply with the evidentiary standards established by the Legislature in W. Va. Code § 49-6-2 before a court may terminate parental rights to a child, and must comply with the evidentiary standards established in W. Va. Code § 49-6-3 before a court may grant the Department the authority to take emergency, temporary custody of a child.

*W. Va. Code § 49-4-601*

*W. Va. Code § 49-4-602*

## D. Non-Emergency Abuse and Neglect Petition

*State ex rel. Virginia M. v. Virgil Eugene S.*, 197 W. Va. 456, 475 S.E.2d 548 (1996)

The Court noted that "West Virginia Code 49-6-1(a) provides the appropriate procedures for resolving non-emergency abuse or neglect situations . . .."

## E. Amendments to Petition

*Note: Rule 19 provides additional guidance concerning the amendment of petitions.*

*State v. Julie G.*, 201 W. Va. 764, 500 S.E.2d 877 (1997)

After a lengthy pre-adjudicatory improvement period, the circuit court found that the child did not meet the definition of an abused and neglected child. In making this finding, the circuit court disregarded evidence that was discovered during the pre-adjudicatory improvement period because such evidence did not relate back to conditions that existed at the time the petition was filed. Reversing the circuit court, the Supreme Court explained that the petition should have been amended so that the circuit court could have properly considered evidence that was discovered after the original petition was filed. Clarifying the procedure for proper consideration of such evidence, the Court held that:

Syl. Pt. 2, in part: Evidence regarding a parent's pre-adjudication improvement period may not be used to informally amend a previously-filed petition. The proper method of presenting new allegations to the circuit court is by requesting permission to file an amended petition pursuant to Rule 19 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings.

Providing further guidance concerning the procedure for amending a child abuse and neglect petition, the Court held that:

Syl. Pt. 4: Under Rule 19 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, amendments to an abuse/neglect petition may be allowed at any time before the final adjudicatory hearing begins. When modification of an abuse/neglect petition is sought, the circuit court should grant such petition absent a showing that the adverse party will not be permitted sufficient time to respond to the

amendment, consistent with the intent underlying Rule 19 to permit liberal amendment of abuse/neglect petitions.

Syl. Pt. 5, *In re Randy H.*, 220 W. Va. 122, 640 S.E.2d 185 (2006); Syl. Pt. 6, *In re Lilith H.*, 231 W. Va. 170, 744 S.E.2d 280 (2013)

To facilitate the prompt, fair and thorough resolution of abuse and neglect actions, if, in the course of a child abuse and/or neglect proceeding, a circuit court discerns from the evidence or allegations presented that reasonable cause exists to believe that additional abuse or neglect has occurred or is imminent which is not encompassed by the allegations contained in the Department of Health and Human Resource's petition, then pursuant to Rule 19 of the *Rules of Procedure for Child Abuse and Neglect Proceedings* the circuit court has the inherent authority to compel the Department to amend its petition to encompass the evidence or allegations.

The DHHR filed a child abuse and neglect petition after two children, ages four and six, were hospitalized because their eight-year-old sister gave them prescription medication. The person watching the children when this incident occurred was a registered sex offender. Hospital personnel noted that the children had a lice infestation, that the six-year-old girl had a yeast infection, had bruising on her inner thigh, and acted as if she had been sexually abused. They also noted that the sex offender was acting affectionately towards the oldest child, a 16-year-old girl, in the waiting area.

During the course of the proceedings, the respondent mother corrected certain physical conditions in the residence. However, it became apparent the respondent mother associated with two other sex offenders. Although this information was known to the DHHR, it did not present any evidence on these issues. Ultimately, counsel for the respondent requested dismissal of the case, and the DHHR agreed. Over the objections of the guardians *ad litem*, the circuit court dismissed the petition.

Finding that the circuit court should have taken a more proactive role regarding this evidence, the Court stated that: "[T]he circuit court had the authority to compel the DHHR to further investigate these allegations and had a duty to make findings of fact and conclusions of law regarding those allegations." 640 S.E.2d at 190. Concerning the additional evidence that was not included in the allegations of the original petition, the Court held that a circuit court has the inherent authority to compel the DHHR to amend a petition to encompass additional allegations of abuse or neglect.

*In re Summer D.*, 222 W. Va. 219, 664 S.E.2d 104 (2008)

Although this case involved two unmarried parents who resided together, the record was developed primarily with regard to the mother. After the mother's improvement period was terminated, the guardian *ad litem* requested that the petition be amended to include allegations regarding the father. The circuit court denied the motion and ordered the parties to develop a plan to reunify the child with her father.

On appeal, the Court found that the record concerning the father's parenting skills had not been sufficiently developed. The Court further noted that the record contained sufficient evidence to conclude that additional abuse or neglect by the father would be imminent, but the allegations were not encompassed in the original petition. Based upon these conclusions, the Court held that the circuit court erred when it denied the guardian *ad litem's* motion to amend the petition.

*In re Lilith H.*, 231 W. Va. 170, 744 S.E.2d 280 (2013)

The DHHR filed an abuse and neglect petition after a father and grandfather engaged in a physical altercation that was witnessed by the minor children. The mother also intervened and struck the grandfather. Although a police officer and a caseworker observed the extremely poor conditions in the home, the petition was never amended to include these allegations. After the initial adjudicatory hearing, the guardian *ad litem* requested that the petition be amended. The circuit court incorrectly ruled that the petition could not be amended because the adjudicatory hearing had already been conducted. In spite of this ruling, the parties agreed that the condition of the home could be considered at disposition.

On appeal, the Supreme Court held that it was plain error when the circuit court terminated parental rights based upon allegations and issues which had never been the subject of adjudication. In addition, the Court noted that it was troubled that the record was devoid of any reference to the condition of the home and the proper care and treatment of the children, even though the caseworker had testified at the preliminary hearing that these issues were serious enough to include in the petition. The Court found that the failure to amend the petition, along with insufficient evidence at adjudication and disposition, constituted reversible error.

## IV. PRELIMINARY HEARING

### A. Notice Requirements

n. 18, *In the Matter of George Glen B., Jr.*, 205 W. Va. 435, 518 S.E.2d 863 (1999)

The Court noted that Rule 20 of the Rules of Procedure for Child Abuse and Neglect Proceedings provides for actual notice of at least five days prior to the preliminary hearing.

### B. Time Standard for Preliminary Hearing

n. 20, *In the Matter of George Glen B., Jr.*, 205 W. Va. 435, 518 S.E.2d 863 (1999)

The Court noted that Rule 22 of the Rules of Procedure for Child Abuse and Neglect Proceedings provides that a preliminary hearing on emergency custody shall be conducted within 10 days after the continuation or transfer of custody is ordered as provided by W. Va. Code § 49-6-3(a).

*W. Va. Code § 49-4-602(b)*

### C. Prima Facie Case

State ex rel. Virginia M. v. Virgil Eugene S., 197 W. Va. 456, 475 S.E.2d 548 (1996) (per curiam)

*W. Va. Code § 49-4-602(a)*

As an initial matter, the Court noted that "West Virginia Code § 49-6-3(a) gives a court the authority to order a grant of temporary custody only 'if it finds that: (1) there exists imminent danger to the physical well-being of the child; and (2) there are no reasonably available alternatives to the removal of the child . . .. '" 475 S.E.2d at 552. The Court observed that this case was more like a custody dispute between a mother and a grandmother, rather than a typical abuse and neglect case. The Court held that the circuit court was clearly wrong in granting emergency custody to the grandmother because the petition did not allege imminent danger. Rather, the allegations only involved the mother's failure to contribute financially to the child's care.

## V. ABUSE AND NEGLECT PROCEEDINGS AND THE RIGHT TO REMAIN SILENT

### A. Silence as Affirmative Evidence

Syl. Pt. 2, W. Va. DHHR v. Doris S., 197 W. Va. 489, 475 S.E.2d 865 (1996); Syl. Pt. 2, In re Daniel D., 211 W. Va. 79, 562 S.E.2d 147 (2002); Syl. Pt. 2, In re K.P., 235 W. Va. 221, 772 S.E.2d 914 (2015) ; In re B.V., --- W. Va. ---, 886 S.E.2d 364 (2023)

Because the purpose of an abuse and neglect proceeding is remedial, where the parent or guardian fails to respond to probative evidence offered against him/her during the course of an abuse and neglect proceeding, a lower court may properly consider that individual's silence as affirmative evidence of that individual's culpability.

In re K.P., 235 W. Va. 221, 772 S.E.2d 914 (2015)

*Note: A complete discussion of this case is found in Section VIII.B.*

In this case, the DHHR alleged that the stepfather had engaged in sexual misconduct against his 13-year-old stepdaughter. Also facing criminal charges for the allegations, the stepfather elected not to testify at the adjudicatory hearing. The trial court found that the stepfather's silence could not be used against him and at the adjudicatory phase of the case. Rather, the trial court reasoned that silence could only be used against an adult respondent at disposition. On appeal, the Supreme Court found that the cases of W. Va. DHHR v. Doris S., 475 S.E.2d 865 (W. Va. 1996) and In re Daniel D., 562 S.E.2d 147 (W. Va. 2002) squarely addressed this issue and that the stepfather's silence in the face of the allegations could be used as evidence of his culpability. Accordingly, the Court found that the trial court's analysis was plainly wrong and reversed the trial court on this issue.

## B. Right to Remain Silent

*W. Va. DHHR v. Doris S.,* 197 W. Va. 489, 475 S.E.2d 865 (1996)

In footnote 22, the Court listed the protections afforded to respondents who are facing both criminal charges and abuse and neglect proceedings. It should be noted that *In re Daniel D.* provides further guidance with regard to the right to remain silent and the use of statements made in an abuse and neglect proceeding.

Citing to statutory provisions that prevent the use of information outside of an abuse and neglect case, the Court noted that:

> Such a parent or guardian may be invoking his/her right to remain silent pursuant to the Fifth Amendment because that individual also may be facing criminal charges arising out of the abuse and neglect of the child. The rights of the criminally accused are sufficiently protected, however, by the following statutory provisions: 1) West Virginia Code § 49-6-4(a) which allows medical and mental examinations of the child or other parties involved in an abuse and neglect proceeding provides that "[n]o evidence acquired as a result of any such examination of the parent or any other person having custody of the child may be used against such person in any subsequent criminal proceedings against such person;" 2) West Virginia Code § 49-7-1 provides that "[a]ll records of the state department, the court and its officials, law-enforcement agencies and other agencies or facilities concerning a child as defined in this chapter shall be kept confidential and shall not be released ...[;]" and 3) West Virginia Code § 57-2-3 provides that "[i]n a criminal prosecution other than for perjury or false swearing, evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination."
>
> *W. Va. Code § 49-4-603(a)*
>
> *W. Va. Code § 49-5-101*

*In re Aaron Thomas M.*, 212 W. Va. 604, 575 S.E.2d 214 (2002) (per curiam)

When a respondent objected to a question about drug use based upon her right to remain silent, the trial court purported to grant her use immunity. On the advice of counsel, the respondent waived her right against self-incrimination and answered the question. The circuit court terminated the respondent's parental rights as a disposition.

On appeal, the respondent argued that the circuit court erred because it lacked authority to grant use immunity. Although the Supreme Court agreed that the circuit court could not grant use immunity, it found that the respondent invited any error when defense counsel approved the waiver of her right against self-incrimination. Providing further reasoning for affirming the termination of her parental rights, the Court noted that the respondent's silence could have been used as affirmative evidence of culpability and that her statement merely confirmed other evidence about her drug use.

*In re B.V.*, --- W. Va. ---, 886 S.E.2d 364 (2023)

*Note: The primary legal issue addressed in this case involved subject matter jurisdiction of the children who had been placed in legal guardianships before this case was initiated. See Section I.A.*

In this case, the father did not testify because of a pending criminal case against him for the same conduct as the abuse and neglect case. On appeal, the father argued that he could not testify because he had criminal charges against him. Although he raised this issue on appeal, the Court explained that: "In short, the laws of this state already account for the possibility that civil abuse and neglect proceedings may run parallel to criminal proceedings, and afford protection to the criminally accused should that be the case." 886 S.E.2d at 374-75. The Court concluded, therefore, that the circuit court did not err when it considered the father's failure to testify or his silence when it terminated his parental rights.

## C. Medical and Mental Examinations - Subsequent Criminal Proceedings

Syl. Pt. 3, *State v. James R., II*, 188 W. Va. 44, 422 S.E.2d 521 (1992); Syl. Pt. 6, *In re Daniel D.*, 211 W. Va. 79, 562 S.E.2d 147 (2002)

No evidence that is acquired from a parent or any other person having custody of a child, as a result of medical or mental examinations performed in the course of civil abuse and neglect proceedings, may be used in any subsequent criminal proceedings against such person. W. Va. Code § 49-6-4(a).

*W. Va. Code § 49-4-603(a)*

Syl. Pt. 7, *In re Daniel D.*, 211 W. Va. 79, 562 S.E.2d 147 (2002)

West Virginia Code § 49-6-4 was intended to constitute a full and comprehensive prohibition against criminal utilization of information obtained through court-ordered psychological or psychiatric examination, whether for diagnosis, therapy, or other treatment of any nature ordered in conjunction with abuse and neglect proceedings.

*W. Va. Code § 49-4-603*

## D. Confidentiality of Statements Obtained During a Court-Ordered Examination

### 1. Statute Affords No Meaningful Protection of Confidentiality

Syl. Pt. 3, *In re Daniel D.*, 211 W. Va. 79, 562 S.E.2d 147 (2002)

West Virginia Code § 49-7-1 provides no meaningful protection of confidentiality or privilege for statements made by an accused in an abuse and neglect proceeding and is, in fact, designed to facilitate the dissemination of information to those charged with the public duty of prosecuting those who may be or are accused of criminal conduct.

*W. Va. Code § 49-5-101*

2. Court-Ordered Examination by Experts Who are not Physicians, Psychologists, or Psychiatrists

Syl. Pt. 8, *In re Daniel D.*, 211 W. Va. 79, 562 S.E.2d 147 (2002)

If a trial court, in the course of an abuse and neglect proceeding, requires by its order that an accused submit to an examination by a person proposed by any party as an expert who is neither a *physician, psychologist or psychiatrist*, such an examination is conducted under warrant of law and is, accordingly, subject to the prohibitions of West Virginia Code § 57-2-3. To the extent that our holding in *State ex rel. Wright v. Stucky*, 205 W. Va. 171, 517 S.E.2d 36 (1999), conflicts with our holding here regarding the protections afforded by West Virginia Code § 57-2-3, *Stucky* is hereby modified to exclude from its holding court-ordered examinations in abuse and neglect proceedings.

In *State ex rel. Wright v. Stucky*, *supra*, the Supreme Court held that W. Va. Code § 57-2-3 does not provide "use immunity." Therefore, the defendants, subject to both civil and criminal cases after an alleged assault, could not be ordered by the circuit court to answer deposition questions after the defendants asserted a fifth amendment privilege.

As noted, the Supreme Court expressly excluded abuse and neglect cases from the holding of *Wright v. Stucky*. However, the Court limited the protections afforded by *In re Daniel D.* to *court-ordered* examinations, not to investigations before a petition is filed, not to other contact with DHHR workers, and not to MDTs.

3. Protective Order

Syl. Pt. 9, *In re Daniel D.*, 211 W. Va. 79, 562 S.E.2d 147 (2002)

In an abuse and neglect proceeding, an accused required by court order to undergo an examination by an expert who is neither a physician, psychologist, or psychiatrist is entitled to have the trial court's determinations regarding the protections afforded by West Virginia Code § 57-2-3 set forth in a protective order for further reference.

## VI. IMPROVEMENT PERIODS

### A. Written Motion Required

*Note: For a complete discussion of this case, see Section VI.O. Extension of Improvement Period.*

Syl. Pt. 4, *State ex rel. P.G.-1 v. Wilson*, 247 W. Va. 235, 878 S.E.2d 730 (2021)

A circuit court may not grant a post-adjudicatory improvement period under W. Va. Code § 49-4-610(2) unless the respondent to the abuse and neglect petition files a written motion requesting the improvement period.

This case arose when the guardian *ad litem* filed a petition for a writ of prohibition because the circuit court had granted the respondent mother multiple extensions to her post-adjudicatory improvement period. As an initial matter, the Supreme Court found that the circuit court had impermissibly granted the mother a post-adjudicatory improvement period because the mother had never filed a written motion. The Supreme Court pointed out that West Virginia Code § 49-4-610(2) requires a respondent to file a written motion before an improvement period may be granted. In addition, the Supreme Court found that the circuit court's multiple extensions to the mother's post-adjudicatory improvement period violated the provisions for extensions set forth in West Virginia Code § 49-4-610(6) and the time standard set forth in West Virginia Code § 49-4-610(9), that is that no combination of improvement period should result in a child's stay in foster care beyond 15 of the last 22 months. Further, the Court found that the circuit court had never made the necessary statutory findings that must be made before an extension is granted.

## B. Burden of Proof

*In re Charity H.*, 215 W. Va. 208, 599 S.E.2d 631 (2004)

*W. Va. Code § 49-4-610*

With regard to West Virginia Code § 49-6-12, the statute governing improvement periods, the Court noted "that entitlement to an improvement period is conditional upon the ability of the parent/respondent to demonstrate 'by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period . . ..'" 599 S.E.2d at 638. Further, the Court emphatically stated that: "Both statutory and case law emphasize that a parent charged with abuse and/or neglect is not unconditionally entitled to an improvement period. Where an improvement period would jeopardize the best interests of the child, for instance, an improvement period will not be granted." 599 S.E.2d at 639.

## C. Improvement Period Must Be in Child's Best Interests

Syl. Pt. 3, *State ex rel. W. Va. DHHR v. Dyer*, 242 W. Va. 505, 836 S.E.2d 472 (2019)

Compliance with the statutory requirements contained in West Virginia Code § 49-4-610 does not unconditionally entitle a parent to an improvement period. Only where such an improvement period does not jeopardize a child's best interests should one be granted and the circuit court's order granting an improvement period should set forth findings demonstrating the lack of prejudice or harm to the child.

An abuse and neglect petition was filed against the parents of five adopted children and one foster child. The allegations in the petition involved physical abuse by the mother, which included locking the children in their room at night, hitting the children with implements for discipline, using excessive force to require one child to take medication, and holding a child's head underwater to make one child pay attention. Allegations against the father included the fact that he drank a substantial amount of alcohol every night, that he engaged in loud, threatening arguments with the mother, and that the arguments sometimes became physical.

Before adjudication, the respondents filed a motion for supervised visitation. To determine whether to grant the motion, the children testified *in camera*. During their interview, the children testified that three of the children were considered good children and that the second set of the children were considered "bad" children. According to the children, the "bad" children received less food, had fewer belongings and were subject to harsher discipline. The two oldest children did not want to return home, nor did they want to visit with their parents. Another of the children wanted to visit the adoptive parents but did not want to return home. The two younger children wanted to visit and return to their adoptive parents. After hearing the testimony, the court found that the children's testimony was credible.

At a contested adjudicatory hearing, a CPS representative testified to the abuse and neglect of the children and described the children as being "terrified" about disclosing the abuse because their adoptive mother had warned them against telling CPS about conditions in the home. The CPS worker also testified that there were locks on the outside of some of the doors to the bedrooms. Further, she noted that a bedroom for two of the children had significantly fewer items than one of the other children, which corroborated the children's claims that some of the children were treated more favorably than others. A second CPS representative testified to the attitude of the parents -- that the parents believed that they had done nothing wrong. For that reason, services were not offered to the parents. The CPS worker also testified to an earlier incident in which the parents had requested removal of some of the children and then withdrew the request because they had been told that other children would not be placed with them.

At the adjudicatory hearing, the respondents testified on their behalf and either denied or minimized the allegations of abuse or neglect. The father admitted to drinking four to six beers each night, but he claimed that it did not affect his parenting. He denied spanking the children with implements, and also denied any threats towards the children that were made by his wife. The mother also denied the allegations against her. She claimed that the locks were on the inside of the rooms, but this testimony was contrary to photographs admitted into evidence. To sum up her testimony, the mother denied all wrongdoing by both herself and her husband.

After the adjudicatory hearing, the circuit court found that the parents' account was contradicted by the credible testimony of the children. It also found that the adoptive parents inflicted emotional and mental injuries on the children, that the father's alcohol abuse negatively affected his parenting, and that the domestic violence threatened the children's health, life and safety.

Subsequently, the court ordered the parents to participate in psychological evaluations. The psychologist noted that the mother failed to acknowledge the maltreatment of the children and this failure resulted in a finding that her prognosis was "poor." Similarly, the father denied maltreatment and minimized his alcohol abuse. The psychologist also concluded that his prognosis was "poor."

At disposition, both the DHHR and the guardian *ad litem* recommended termination of parental rights. The service provider for the respondents testified that the respondents

had participated in services, and that they had described themselves as being "overwhelmed." The mother described her actions as "overly harsh." After the hearing, the circuit court granted the respondents post-adjudicatory improvement periods. The court found that the parents had accepted responsibility based upon the testimony of the service provider. The court, however, did not address the psychological evaluations and only noted that the children's wishes concerning reunification were not dispositive. The circuit court also was critical of the DHHR's request for termination, its objection to visitation, and its failure to provide the respondents with services.

In its opinion, the Court first discussed that that its case law had moved away from a "parental entitlement paradigm to reunification" and that reunification should only be pursued when it is the children's best interests. *Dyer*, 836 S.E.2d at 482 (citing *State ex rel. C.H. v. Faircloth*, 815 S.E.2d 540, 552 (W. Va. 2018)). The Court also noted that the children had been re-victimized by placement with the adoptive parents and that DHHR should have ensured that the children were placed in a home in which they would have been nurtured and cared for. *Dyer*, 836 S.E.2d 472, n. 20. The Court noted that the DHHR had acted improperly in telling the adoptive parents that no further children would be placed with them if certain of the children were placed in another home at the request of the adoptive parents. *Id.*

After its initial discussion, the Court concluded that the circuit court had failed to consider relevant evidence, specifically the psychological evaluations. In addition, the Court pointed out that the circuit court had failed to mention or discuss the written recommendations of the guardian *ad litem*. Further, the Court found that the respondents' statements about their actions could not constitute an "acknowledgment" which is necessary before an improvement period can be granted.

The Court found that the circuit court had not considered the guardian *ad litem's* observation -- that the respondent parents had been provided significant training before the adoption and that further services would not be effective. The Court also concluded that the respondent parents' actions constituted "chronic abuse," which should properly be characterized as "aggravated circumstances." Finally, the Court concluded that the circuit court had not considered the children's best interests when it granted improvement periods to the adult respondents. It adopted Syllabus Point Three, quoted above, that requires a circuit court to only grant an improvement period if it does not "jeopardize a child's best interests" and that the order must include findings that show that an improvement period would not harm a child. Based on its conclusions, the Court granted the writ of prohibition and directed the circuit court to terminate the parental rights of the adult respondents.

## D. Multidisciplinary Treatment Teams

*E.H. v. Matin*, 201 W. Va. 463, 498 S.E.2d 35 (1997)

Syl. Pt. 2: Multidisciplinary treatment teams must assess, plan, and implement service plans pursuant to W. Va. Code § 49-5D-3.

*W. Va. Code § 49-4-403*

Syl. Pt. 3: The language of W. Va. Code § 49-5D-3 is mandatory and requires the Department of Health and Human Resources to convene and direct treatment teams not only for juveniles involved in delinquency proceedings, but also for victims of abuse and neglect.

Syl. Pt. 5: Circuit courts may specify direct placements of juveniles in out-of-state facilities only: (1) if in accord with the plan(s) of the juvenile's multidisciplinary team, or if not in accord with that plan(s), then (2) after the circuit court has made specific findings of fact, following an evidentiary hearing, that the plan(s) of the juvenile's multidisciplinary treatment team is inadequate to meet the child's needs.

*In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001)

*W. Va. Code §§ 49-4-401-411*

The Court noted that: "Pursuant to Rule 51 of the Rules of Procedure for Child Abuse and Neglect Proceedings, a multidisciplinary treatment team, as defined in West Virginia Code §§ 49-5D-1 to -7, is to be convened for each abuse and neglect case within thirty days of its filing, consisting of the parties and representatives of agencies who may be able to help in the particular situation." 558 S.E.2d at 632. In *Edward B.*, the Court noted that the multidisciplinary team was not convened and relied, in part, on this failure to reverse the circuit court.

## E. Goals of Improvement Periods and Family Case Plans

*In the Interest of Renae Ebony W.*, 192 W. Va. 421, 452 S.E.2d 737 (1994)

The goal [of improvement periods and family case plans] should be the development of a program designed to assist the parents in dealing with any problems which interfere with the ability to be an effective parent, and to foster an improved relationship between parent and child with an eventual restoration of full parental rights a hoped-for result. The improvement period and family case plans must establish specific measures for the achievement of these goals, as an improvement period must be more than a mere passage of time. It is a period in which the DHS and the court should attempt to facilitate the parent's success, but wherein the parent must understand that he bears a responsibility to demonstrate sufficient progress and improvement to justify return to him of the child.

## F. Formulation of Improvement Period and Family Case Plan

Syl. Pt. 3, *State ex rel. W. Va. DHS v. Cheryl M.*, 177 W. Va. 688, 356 S.E.2d 181 (1987); Syl. Pt. 9, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997); Syl. Pt. 4, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996); Syl. Pt. 3, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996); Syl. Pt. 2, *In re Elizabeth Jo "Beth" H.*, 192 W. Va. 656, 453 S.E.2d 639 (1994); Syl. Pt. 3, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991); Syl. Pt. 2, *In re Faith C.*, 226 W. Va. 188, 699 S.E.2d 730 (2010)

*W. Va. Code § 49-4-604*

Under W. Va. Code § 49-6-2(b), when an improvement period is authorized, then the court by order shall require the DHS to prepare a family case plan pursuant to W. Va. Code § 49-6D-3.

*W. Va. Code § 49-4-408*

*In re Elizabeth Jo "Beth" H.*, 192 W. Va. 656, 453 S.E.2d 639 (1994) (per curiam)

W. Va. Code § 49-6D-3(b) further requires "the family case plan . . . shall be furnished to the court within thirty days after the entry of the order referring the case to the department[.]"

*W. Va. Code § 49-4-408(a)*

Syl. Pt. 4, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991); Syl. Pt. 6, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001); Syl. Pt. 5, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996); Syl. Pt. 4, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996); Syl. Pt. 4, *In the Matter of Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995); Syl. Pt. 3, *In re Elizabeth Jo "Beth" H.*, 192 W. Va. 656, 453 S.E.2d 639 (1994); Syl. Pt. 4, *Boarman v. Boarman*, 190 W. Va. 533, 438 S.E.2d 876 (1993); Syl. Pt. 3, *In re Faith C.*, 226 W. Va. 188, 699 S.E.2d 730 (2010)

In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family.

Syl. Pt. 5, *State ex rel. W. Va. DHS v. Cheryl M.*, 177 W. Va. 688, 356 S.E.2d 181 (1987); Syl. Pt. 3, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001)

The purpose of the family case plan as set out in W. Va. Code § 49-6D-3(a) is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening these problems.

*In the Interest of Jamie Nicole H.*, 205 W. Va. 176, 517 S.E.2d 41 (1999)

Since the procedural mechanisms for objecting to and modifying a family case plan are clearly in place, a parent cannot wait until the improvement period has lapsed to raise

objections to the conditions imposed on him/her. The rules of procedure which govern abuse and neglect proceedings clearly require that a party seeking to modify a family case plan must act promptly and inform the court as soon as possible of the need for modification.

*In re Desarae M.*, 214 W. Va. 657, 591 S.E.2d 215 (2003) (per curiam)

The trial court granted the appellant an improvement period, but no formal family case plan was ever prepared. The trial court did, however, list goals and requirements for the improvement period on the record. At the conclusion of the improvement period, the trial court terminated the appellant's parental rights.

Holding that the failure to formulate a family case plan was reversible error, the Supreme Court recognized that the relevant statute requires the preparation of a family case plan when the trial court grants an improvement period. The Court further explained the significance of a family case plan as follows:

> A formal family case plan, as mandated by West Virginia Code § 49-6D-3(a), is not only for the benefit and information of the parent seeking improvement; it is equally beneficial and necessary for the caseworkers and other assistive personnel. Without a family case plan, the individuals seeking to assist a parent are limited in their ability to formulate distinct goals, methods of achieving such goals, or means by which success will be judged. 591 S.E.2d at 220.

*W. Va. Code § 49-4-408*

## G. Statutory Limits

Syl. Pt. 2, *State ex rel. S.W. v. Wilson*, 243 W. Va. 515, 845 S.E.2d 290 (2020)

"Prohibition is available to abused and/or neglected children to restrain courts from granting improvement periods of a greater extent and duration than permitted under [W. Va. Code §§ 49-4-601 et seq.]." Syllabus Point 2, *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 470 S.E.2d 205 (1996).

In this case, the circuit court granted a post-dispositional improvement period to the respondent mother even though two of the children had been in foster care for 20 months, and a later born child had been in foster care for 14 months. In granting the improvement period, the circuit court found that there were no compelling circumstances to justify the denial of the improvement period and relied upon Syllabus Point 9 of *State ex rel. Diva P. v. Kaufman*, 490 S.E.2d 642 (W. Va. 1997). At this point in the case, the mother had made progress towards sobriety, but she had not completed services provided by the DHHR. She also had not obtained suitable housing for herself and her children.

To challenge the circuit court order, the guardian *ad litem* filed a petition for a writ of prohibition and argued that the dispositional improvement ran afoul of the time limitation for improvement periods found in West Virginia Code § 49-4-610(9), which specifies that

any combination of improvement periods may not cause a child to be placed in foster care for more than 15 of the last 22 months. The guardian *ad litem* also argued that the circuit had not made any findings that it was in the children's best interests to grant this additional improvement period. In response, the respondent mother argued that she was likely to participate in the improvement period, that she had experienced a substantial change in circumstances, that there was no compelling circumstance to deny the improvement period, and that the improvement period was in the children's best interests.

On appeal, the Supreme Court found that West Virginia Code § 49-4-610(9) clearly requires a circuit court to make detailed findings that an extension of the applicable time limits is in the children's best interests. Without those findings, the time limits must apply. In this case, the Court acknowledged the mother's progress, but it also concluded that her progress had come too late in the proceedings. Apparently, the mother had left a drug rehabilitation program three times during her earlier post-adjudicatory improvement period.

With regard to proceedings upon remand, the guardian *ad litem* advocated for the termination of the mother's parental rights, and the respondent mother requested a lesser restrictive alternative. The Court held that there was no reasonable likelihood that the mother could correct the circumstances that led to the filing of the abuse and neglect petition and directed the circuit court to terminate the mother's parental rights upon remand. In footnote 14, the Court further commented that it disagreed with the circuit court finding that the improvement period did not interfere with the achievement of permanency because the children had remained in the same foster home throughout the case. The Court stated that the time limit in West Virginia Code § 49-4-610(9) is intended to prevent "extended uncertainty" about a child's permanent home and that the improvement period would have hindered the establishment of permanency for the children.

*State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 470 S.E.2d 205 (1996)

Statutory limits on improvement periods are mandatory and there comes a time for decision despite genuine emotional bonds. Children deserve resolution and permanency in their lives. Statutorily unauthorized extensions of improvement periods and procedural delays can be so protracted as to violate clear statutory constitutional and common law mandates.

*In re Emily B.*, 208 W. Va. 325, 540 S.E.2d 542 (2000)

Syl. Pt. 5: The commencement of a dispositional improvement period in abuse and neglect cases must begin no later than the date of the dispositional hearing granting such improvement period.

Syl. Pt. 6: At all times pertinent thereto, a dispositional improvement period is governed by the time limits and eligibility requirement provided by W. Va. Code § 49-6-2, W. Va. Code § 49-6-5, and W. Va. Code § 49-6-12.

*W. Va. Code §§ 49-4-602, 604 and 610*

Syl. Pt. 2, *In re J.G.*, 240 W. Va. 194, 809 S.E.2d 453 (2018)

"Pursuant to West Virginia Code § 49-6-12(g) (1998), before a circuit court can grant an extension of a post-adjudicatory improvement period, the court must first find that the respondent has substantially complied with the terms of the improvement period; that the continuation of the improvement period would not substantially impair the ability of the Department of Health and Human Resources to permanently place the child; and that such extension is otherwise consistent with the best interest of the child." Syl. Pt. 2, *In the Interest of Jamie Nicole H.*, 205 W. Va. 176, 517 S.E.2d 41 (1999).

The child, J.G., was born prematurely with marijuana, opiates, and benzodiazepines in his system. At six weeks old, he was placed with his foster parents, with whom he remained throughout the case and the appeal. Due to his prematurity and drug exposure, J.G. had significant medical issues that required medical monitoring and treatment.

At the beginning of the case, the circuit court ordered two successive six-month pre-adjudicatory improvement periods. Prior to ordering the initial pre-adjudicatory improvement period, the parents had multiple positive drug screens, failed to return calls to the DHHR, cancelled several visits, and fell asleep during visitation. Prior to the second pre-adjudicatory improvement period, the parents continued the same pattern of minimal participation and positive drug screens. After being repeatedly advised by the DHHR that the improvement periods were failures, the circuit court entered orders twice stating that the parents had "demonstrated the likelihood to fully participate in the improvement period."

In addition to the two pre-adjudicatory improvement periods, the court granted the parents two successive six-month post-adjudicatory improvement periods, based on oral motions, along with general continuances of hearings so that there was a total of 20 months of improvement periods between adjudication and disposition. For the first post-adjudicatory improvement period, the record indicated that the parents had not shown a substantial change in circumstances warranting the granting of an additional improvement period. They still engaged in domestic violence, had positive drug screens, and unstable housing.

By the end of the first six-month post-adjudicatory improvement period, J.G. had been in foster care in excess of 18 months. By the final disposition hearing, he had been in foster care for approximately three years. At the conclusion of the final disposition hearing, the court ordered a gradual transition to his biological parents. In response, the foster parents appealed on the grounds that the circuit court failed to comply with statutory time limits and abused its discretion in ordering reunification.

With regard to the two pre-adjudicatory improvement periods, the Court noted that the length of these two improvement periods violated both West Virginia Code § 49-4-610(1) and Rule 23(b), which limit this type of improvement period to three months. The Court further noted the evidence failed to demonstrate that respondents were likely to fully participate in the requested improvement periods.

With regard to the two post-adjudicatory improvement periods, the Court noted that the respondents had been afforded 20 months of improvement periods between adjudication and disposition. In addition, the Court noted that allowing the improvement periods violated the statute because a post-adjudicatory improvement period may only last six months and a written motion requesting such an improvement period must be filed. Further, the Court noted that by the final disposition hearing, the child had been in foster care for approximately three years, which violated the cumulative limits on improvement periods set forth in West Virginia Code § 49-4-610(9). This statutory subsection mandates that no combination of improvement periods should cause a child to be in foster care for more than 15 of the most recent 22 months. Finally, the Court found that the circuit court disregarded the requirement that extensions to improvement periods must not impair the DHHR's ability to permanently place the child. In footnote 17 of the opinion, the Court indicated that the DHHR and guardian *ad litem* could have sought relief much earlier by filing a petition for a writ of prohibition.

Remanding the case, the Court ordered the circuit court to proceed with termination of parental rights and the attainment of permanency. In addition, the Court indicated that post-termination visitation could be addressed.

*In re A.P.-1*, 243 W. Va. 435, 844 S.E.2d 470 (2020)

*Note: In addition to addressing a pre-adjudicatory improvement period that violated the statutory requirements, the Court found that the termination of parental rights was not supported by the record and noted that the guardian ad litem had not filed the required report. For a discussion of these issues, see Section IX.O. and Chapter 6, Section III.A.*

This case involved allegations that the parents' home was unfit for human habitation, that there were episodes of domestic violence between the parents, that the parents lacked knowledge of normal childhood development and thereby caused the children harm, and that one of the children had an untreated fractured leg. At the preliminary hearing, the circuit court granted each of the parents a pre-adjudicatory improvement period. Subsequently, the circuit court granted multiple extensions to the improvement periods, two of which were requested by the parents, and the rest were requested by the DHHR. In total, the pre-adjudicatory improvement period lasted 26 months. During the case, the mother stopped participating in the case, and the termination of her parental rights were not an issue on appeal.

After the case had been pending for over two years, the DHHR moved to amend the petition because the children had been in foster care for more than 15 of the last 22 months. See W. Va. Code §§ 49-4-610(9) and -605(a)(1). During the improvement period, the court, at review hearings, found that the father was substantially complying. Once the father was adjudicated and the DHHR requested disposition, the reports concerning the father became more critical. It was undisputed, however, that the father had moved to a suitable home, had married a new spouse and had maintained full-time employment. At disposition, the circuit court terminated parental rights based upon findings that the parents lacked capacity to parent, that the parents had shown no

improvement, and that there was no reasonable likelihood that the conditions of abuse or neglect could be corrected in the near future.

Before the Supreme Court addressed the assignments of error, it first addressed the excessive length of the pre-adjudicatory improvement periods, a period of 26 months. The Court noted the plain language of West Virginia Code § 49-4-610(1) that limits pre-adjudicatory improvement periods to three months and does not allow them to be extended. The Court also noted that combinations of improvement periods should not result in children staying in foster care for more than 15 out of the most recent 22 months. W. Va. Code §§ 49-4-610(9) and -605(a)(1). The Court found that the extensions were erroneously granted and constituted clear error.

Ultimately, the Court conducted a detailed review of the factual record in the case and concluded that the circuit court order that terminated the father's parental rights was clearly erroneous. The Court based its conclusion on numerous reports in the record that indicated that the father had substantially complied and had shown progress. As noted above, the father moved to a suitable home, married a spouse who assisted him with parenting, and maintained full-time employment. For this reason, the Supreme Court reversed and remanded the case.

## H. Court Must Make Ruling on Improvement Period

*In re Thaxton*, 172 W. Va. 429, 307 S.E.2d 465 (1983) (per curiam)

A motion for improvement period was made but never formally ruled upon. However, as a practical matter an improvement period did occur as the mother and the DHHR entered into a voluntary agreement, subsequent to the motion. Mother agreed to obtain housing, attend parenting classes, and visit her children. She failed to meet the conditions and circuit court terminated her parental rights. This Court reversed, holding that the trial court never ruled on the motion for improvement period, and that when an improvement period is denied the court must state the compelling circumstances warranting the denial.

## I. Prohibition Available to Challenge Improvement Periods

Syl. Pt. 2, *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 470 S.E.2d 205 (1996)

Prohibition is available to abused and/or neglected children to restrain courts from granting improvement periods of a greater extent and duration than permitted under West Virginia Code 49-6-2(b) and 49-6-5(c) (1995).

*State ex rel. W. Va. DHHR v. Dyer*, 242 W. Va. 505, 836 S.E.2d 472 (2019)

This case involved the chronic abuse of five adopted children by their adoptive parents and one other foster child. After a disposition hearing, the circuit court granted the adoptive parents an improvement period over the objections of both the DHHR and the guardian *ad litem*. In addition, the psychological evaluations indicated that the

adoptive parents should not be granted an improvement period. To challenge the ruling, the DHHR and the guardian *ad litem* filed an appeal. As set forth in footnote 17, the Supreme Court refused to docket the appeal, and it stayed the circuit court's disposition order so that the DHHR and guardian *ad litem* could file a petition for a writ of prohibition. This ruling reaffirms prior guidance from the Supreme Court that the proper way to challenge a wrongfully granted improvement period is to file a petition for a writ of prohibition.

For a complete discussion of this case, see Section VI.C.

*State ex rel. W. Va. DHHR v. Sims*, 230 W. Va. 542, 741 S.E.2d 100 (2013) (per curiam)

In this case, the respondent parents were unsuccessful during a pre-adjudicatory improvement period, entered into a stipulated adjudication and were granted a post-adjudicatory improvement period. The DHHR and the guardian *ad litem* challenged the second improvement period by petitioning for a writ of prohibition. In its analysis, the Supreme Court concluded that the circuit court did not lack jurisdiction to grant the post-adjudicatory improvement period. The Supreme Court also concluded that it could not find that the challenged circuit court ruling was erroneous as a matter of law. Therefore, the Supreme Court denied the petition for a writ of prohibition.

n. 17, *In re J.G.*, 240 W. Va. 194, 809 S.E.2d 453 (2018)

In this case, the circuit court had granted the adult respondents two six-month pre-adjudicatory improvement periods and two post-adjudicatory improvement periods, the combination of which violated statutory timelines set forth in West Virginia Code § 49-4-610. Reiterating the availability of original jurisdiction writs as a remedy in these types of circumstances, the Court expressly stated that:

> Relief may have more promptly been granted had any of the aggrieved parties availed themselves of this Court's original jurisdiction, as has been suggested: "Prohibition is available to abused and/or neglected children to restrain courts from granting improvement periods of a greater extent and duration than permitted under West Virginia Code §§ 49-6-2(b) and 49-6-5(c) (1995)." Syl. Pt. 2, *Amy M.*, 196 W. Va. 251, 470 S.E.2d 205. Certainly when the circuit court is in such egregious violation of the time standards contained in West Virginia Code § 49-4-601 *et seq*., prudence and zealous advocacy would suggest that the DHHR and/or guardian ad litem are burdened with seeking such relief. 809 S.E.2d 453, n. 17.

## J. Responsibility for Initiation and Completion of Terms

*In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996)

The respondent's argument concerning the stoppage of services by the DHHR after the children were removed was based on the assumption that the DHHR, and not the mother, had the responsibility for initiating contact after the children were removed.

The Court found, however, that the parents or custodians have the responsibility to initiate and complete all the terms of the improvement period. Citing to the statute governing improvement periods, the Court noted that while the DHHR, in some circumstances, must make reasonable efforts to reunify a family, a parent has the responsibility to initiate and complete the terms of an improvement period. See W. Va. Code § 49-4-610(4). Therefore, the Court affirmed the termination of parental rights.

n. 14, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996)

The Court pointed out that the level of interest demonstrated by a parent in visiting his or her children while they are out of the parent's custody is a significant factor in determining the parent's potential to improve sufficiently and achieve minimum standards to parent the child. *See In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 182, 191 (1996); *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 259, 470 S.E.2d 205, 213 (1996).

## K. Grounds for Denial of Improvement Period

### 1. No Reasonable Likelihood that Conditions of Neglect or Abuse Could be Corrected

*State v. C.N.S.*, 173 W. Va. 651, 319 S.E.2d 775 (1984)

This case involved four children, ages 2 months to 3 1/2 years old. Although there was no evidence of deliberate misconduct or malicious neglect, the parents were so intellectually, socially, and culturally lacking in parenting ability in both physical and emotional levels, the circuit court finding that there was no reasonable likelihood that conditions of neglect or abuse could be substantially corrected in the near future was justified.

An important factor justifying denial of the improvement period was the lengthy pattern of the parent's failure to improve despite concerted efforts of the DHHR to provide services and assistance.

*In the Interest of Kaitlyn P.*, 225 W. Va. 123, 690 S.E.2d 131 (2010)

A child who had been previously adjudicated as an abused and neglected child presented at the emergency room with a spiral fracture to his right femur. The DHHR obtained emergency custody of him and his four siblings. The DHHR presented medical evidence at the adjudicatory hearing that established the injury was due to non-accidental trauma. The parents did not present evidence to the contrary; and further, they did not identify the perpetrator or acknowledge the child had been abused. The circuit court found the children were abused. Over the objections of the DHHR, the circuit court granted the parents' motions for a six-month post-adjudicatory improvement period. The DHHR and the guardian *ad litem* appealed.

The Supreme Court reversed the circuit court's order granting an improvement period to the parents. The Court found that in order to establish they were likely to participate in an improvement period the parents were required to acknowledge that the child had been abused. The parents did not make this important initial acknowledgment, and therefore, they did not satisfy the requirements of the statute governing improvement periods.

*In re M.M.*, 236 W. Va. 108, 778 S.E.2d 338 (2015)

This case involved the severe emotional and, arguably, physical abuse of four children. The DHHR removed the children on an emergency basis after the parents, at a youth basketball game, cursed at one of their sons, pulled him, slung him into a wall and knocked his head against a door multiple times.[24] Because the petition did not allege imminent danger, three of the four children returned home before adjudication. As a result of two of the children's *in camera* testimony at adjudication, the court ordered the removal of all of the children from the home.

Before disposition, the DHHR had initially agreed to an improvement period. In her report, the guardian *ad litem* had originally indicated that she was leaning against an improvement period. At the outset of the disposition hearing, the guardian *ad litem* stated that she was opposed to an improvement period. Counsel for the respondents, however, indicated that they were prepared to proceed with an evidentiary hearing. After hearing extensive testimony, the circuit court denied the respondents' motions for improvement periods. The circuit court relied upon: 1) the respondents' past history of abuse; 2) the older boys' *in camera* testimony; 3) the parent educator's testimony; 4) psychological evaluations showing that the mother had a "guarded" prognosis and that the father had a "very guarded" prognosis; and 5) the court's assessment of the respondents' credibility.

Discussing relevant law, the Court noted that respondent parents are not unconditionally entitled to improvement periods and that they must show that they should be afforded the opportunity to remedy the abusive or neglectful conditions. The Court also noted that a parent may show compliance with aspects of a case plan but fail to improve their attitude and approach to parenting. The Court expressly stated that: "Fully participating in an improvement period necessarily requires implementing the parenting skills that are being taught through services." 778 S.E.2d at 345.

Reviewing the record in the instant case, the Court concluded that the trial court properly determined that the abusive situation would not be easily corrected and was not likely to improve. The Court referred to facts involving the provision of services several years earlier that did not reduce and prevent further abuse. Therefore, the Court affirmed the termination of parental rights.

As another basis for appeal, the adult respondents argued that the requisite procedures for child abuse and neglect cases had been substantially frustrated because the DHHR had initially submitted a case plan that recommended an improvement period.

[24] The parents were also charged with domestic assault and battery for this incident.

The Court, however, rejected this argument because counsel for the respondents knew that the guardian *ad litem* might not agree with the improvement period, and they also indicated their willingness to proceed. Further, the Court noted that the respondents had the opportunity to present evidence at two hearings. The Court, therefore, affirmed the circuit court.

2. Abandonment by Parent

*James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991)

A writ of prohibition was brought against the circuit court judge seeking relief from a court order which granted the father's motion for an in-home improvement period in Ohio and further ordered that two of the children, Timothy M. and James M. be immediately surrendered to their father, with the remaining two siblings to be surrendered within 30 days. The father had abandoned the wife and children (then ages 3, 2, and 1, with a fourth child on the way) in December 1988, and did not become involved in the children's lives again until January 1991. The natural mother was unable and or unwilling to care for them despite a great deal of assistance and intervention for more than two years after the abandonment. The children were placed in foster care by DHHR based on physical abuse and medical neglect. There was also evidence that two of the children had been sexually abused by their father.

Granting the writ of prohibition, the Court held Granting the writ of prohibition, the Court held that abandonment of a child by a parent constitutes compelling circumstances sufficient to justify the denial of an improvement period.

3. Not Likely to Fully Participate

*In re H.D.*, --- W. Va. ---, 888 S.E.2d 419 (2023)

The mother in this case used methamphetamine during her pregnancy, and she was also diagnosed with tuberculosis at the child's birth. When the petition was filed, the father was identified as a non-offending parent, and the child was placed with him. After adjudication, the mother was granted an improvement period for 90 days, and the circuit ordered her to complete a long-term substance abuse rehabilitation program. There was some dispute as to whether the mother cooperated with the DHHR so that the caseworker could obtain her medical records. Additionally, the mother either did not attempt or could not be admitted to a long-term substance abuse facility because of her tuberculosis diagnosis. The mother also tested negative for all substances for several months.

Approximately nine months into the case, the father was arrested, and he had methamphetamine in his possession. An amended petition was filed with regard to him. It also came to light that the mother was staying at the home with the father and the child. In addition, the mother tested positive for methamphetamine twice within several days of each other after the father's arrest. The mother next entered a 60-day rehabilitation program that she believed was a long-term facility. The court conducted a hearing,

revoked the mother's improvement period, and set a disposition hearing. The following day, the mother entered a nine-month drug rehabilitation program.

At the disposition hearing, both the DHHR and guardian *ad litem* supported the mother's motion for a dispositional improvement period. However, the circuit court denied the mother's motion for a dispositional improvement period, and it also terminated her parental rights.

On appeal, the Supreme Court found that the circuit court did not err when it required the mother to attend a long-term rehabilitation program. The Supreme Court also found that the mother waited too long to attend an appropriate treatment program and that she failed to execute a proper medical release. Although the Supreme Court affirmed the lower court, it observed that the circuit court's characterization of the factual record was "unduly harsh." 888 S.E.2d 419, n. 8.

Both Justices Walker and Wooton dissented, and their separate opinion stated that, the majority "does backflips to factually justify an otherwise trumped-up order terminating parental rights without any evidence sufficient to make the finding that the conditions of abuse and neglect could not be remedied." 888 S.E.2d at 429. The dissenting opinion also pointed out that the only evidence presented related to the finding that the mother was not likely to fully participate in an improvement period, not the findings necessary to terminate parental rights. The dissenting justices asserted that the "too little, too late" analysis was not supported by the facts in the record. 888 S.E.2d at 430.

## L. Non-Custodial Improvement Periods

*In the Interest of Renae Ebony W.*, 192 W. Va. 421, 452 S.E.2d 737 (1994)

The infant, Renae Ebony W., through an emergency removal by DHHR, was taken from her parents' custody. The circuit court ratified the emergency removal but returned the child to the parents for a three-month in-home improvement period. In a syllabus point, the Court held that:

> Where a child is initially removed from the custody of his or her parents pursuant to W. Va. Code § 49-6-3, and where such emergency taking is subsequently ratified on the basis of a finding of imminent danger, the child shall remain in the temporary legal and physical custody of the State or some responsible relative within the meaning of W. Va. Code § 49-6-3 and out of the alleged abusive home during the improvement period until the circumstances which constitute the imminent danger have ceased to exist, or the alleged abusing person has been precluded from residing in or visiting the home. 452 S.E.2d 737.

*W. Va. Code § 49-4-602*

*In the Interest of Betty J.W.*, 179 W. Va. 605, 371 S.E.2d 326 (1988)

Mother against whom, with father, a neglect petition was filed should have been granted an improvement period without custody of her five minor children before

termination of her parental rights; record did not support conclusion that she had knowingly allowed father's sexual abuse, mother's perceived inability to break from the pattern of abuse was part of the "battered woman's syndrome," and there was no showing that any improvement plan had been developed which mother had failed to follow.

## M. Termination by Court of Improvement Period

Syl. Pt. 2, *In re Lacey P.*, 189 W. Va. 580, 433 S.E.2d 518 (1993); Syl. Pt. 6, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996)

*See W. Va. Code § 49-4-610 for the statutory requirements for improvement periods.*

Neither W. Va. Code § 49-6-2(b) nor W. Va. Code § 49-6-5(c) mandates that an improvement period must last for twelve months. It is within the court's discretion to grant an improvement period within the applicable statutory requirements; it is also within the court's discretion to terminate the improvement period before the time frame has expired if the court is not satisfied that the defendant is making the necessary progress.

*In the Matter of Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995)

If a respondent refuses to participate in services designed to remediate the circumstances giving rise to the abuse and neglect, such as participation in individual counseling, then an improvement period will be considered "for naught." Therefore, a "circuit court always has the authority to terminate an improvement period if there is evidence that the parent is not following the conditions prescribed or is failing to make improvement." 461 S.E.2d at 142.

## N. Conclusion of Improvement Period

Syl. Pt. 6, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991); Syl. Pt. 7, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996); Syl. Pt. 2, *In re Jonathan Michael D.*, 194 W. Va. 20, 459 S.E.2d 131 (1995); Syl. Pt. 10, *In re Daniel D.*, 211 W. Va. 79, 562 S.E.2d 147 (2002); Syl. Pt. 5, *In re B.B.*, 224 W. Va. 647, 687 S.E.2d 746 (2009); Syl. Pt. 6, *In the Matter of Bryanna H.*, 225 W. Va. 659, 695 S.E.2d 899 (2010); Syl. Pt. 4, *In re Faith C.*, 226 W. Va. 188, 699 S.E.2d 730 (2010); *In re Kristin Y.*, 227 W. Va. 558, 712 S.E.2d 55 (2011); Syl. Pt. 2, *In re C.M.*, 235 W. Va. 16, 770 S.E.2d 516 (2015); *In re M.M.*, 244 W. Va. 316, 853 S.E.2d 556 (2020)

At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child.

*In re F.N.*, 247 W. Va. 620, 885 S.E.2d 558 (2022)

The issue in this case involved whether the mother had successfully completed her improvement period. The case began when the mother had allowed her five children

to have contact with her boyfriend who was required to register as a sex offender. The registry requirement was imposed because of a misdemeanor battery conviction, found to be sexually motivated, against a 13-year old girl. A provision in a domestic violence protective order in a neighboring county prohibited the mother from allowing contact between her boyfriend and the children.

After a stipulated adjudication, the mother was granted a post-adjudicatory improvement period. The mother's case plan required her to participate in individualized therapy to address her boundaries in romantic relationships. She was also required to notify the MDT if she began another relationship so that the MDT could assess safety for the children.

At the beginning of the improvement period, the mother refused to participate in individualized therapy, but began therapy after approximately eight months. At disposition, the mother had been participating in therapy for approximately six months. In addition, the mother continued a relationship with her boyfriend throughout most of the improvement period. However, she initially denied that she had maintained the relationship. Shortly before the disposition hearing, she asserted that she had recently ended the relationship, but that she had had some contact with him.

At the disposition hearing, the mother argued that the case plan did not require her to discontinue a relationship with her boyfriend but that she had recently done so. In contrast, the DHHR argued that the mother had never achieved the primary goal -- that of understanding how her relationship with a sex offender affected her children's well-being. Similarly, the two guardians *ad litem* agreed with the DHHR's position. After hearing the evidence, the circuit court terminated the mother's parental rights, but allowed post-termination with the younger children.

Reviewing the record, the Supreme Court found that the circuit court's credibility determination concerning the mother's inconsistent testimony about her boyfriend should not be disturbed on appeal. The Supreme Court also found that a disposition must be consistent with the child's best interests. *In re Frances J.A.S.,* 584 S.E.2d 492, 502 (W. Va. 2003). The Court further concluded that the evidence in the record supported the statutory findings under West Virginia Code § 49-4-604(c)(6) and (d), that there was no reasonable likelihood that the conditions of neglect or abuse could be corrected in the near future because the mother had not followed through with a reasonable family case plan. Accordingly, it affirmed the circuit court ruling.

In his dissenting opinion, Justice Wooton asserted that the mother's rights were not terminated because of her failure to comply with the terms of the improvement period, but rather because she had not immediately ended her relationship with her boyfriend. He noted the term of the improvement period, that she participate in counseling, which she did and had done for approximately six months at the time of the disposition hearing. Secondly, he pointed out that her boyfriend's sentencing order did not restrict him from contact with children. Justice Wooton stressed that the mother would have needed time to recognize that a relationship with a registered sex offender would be an unacceptable

risk for her children. Further, he characterized the standard, that a parent show an improvement in his or her "overall attitude and approach to parenting" as "nebulous and subjective." *F.N.*, 885 S.E.2d at 568 (quoting *State ex rel. Amy M. v. Kaufman*, 470 S.E.2d 205, 212 (W. Va. 1996)) (Wooton, J. dissenting). He indicated that this standard was insufficient given the fundamental constitutional right that a parent has in a relationship with his or her child. 885 S.E.2d at 568. For these reasons, Justice Wooton dissented and would have reversed the termination of parental rights.

*In re M.M.*, 244 W. Va. 316, 853 S.E.2d 556 (2020)

*Note: For a complete discussion of this case, see Section XII.N.*

During an improvement period, the respondent mother was participating in a medication-assisted treatment program that was paid for by a special medical card. There was no dispute that the mother's progress, while in the program, was good. When the card expired, the mother relapsed. Although the mother's counsel requested that the court order the DHHR to renew the card, the court did not do so. Ultimately, the mother started using methamphetamine and stopped participating in visits and services. At disposition, the court concluded that the mother's parental rights should be terminated.

On appeal, the Supreme Court concluded that the DHHR's initial funding of the treatment and the abrupt termination of the special medical card indicated that the DHHR had not made reasonable efforts to preserve the family. The Court concluded that the DHHR should have continued to pay for the treatment through the end of the extension of the mother's improvement period. It further concluded that the circuit court abused its discretion when it did not order the DHHR to renew the special medical card. On remand, the circuit court was instructed to reinstate the mother's improvement period.

*In re C.M.*, 235 W. Va. 16, 770 S.E.2d 516 (2015)

The pivotal issue in this case was whether the mother had successfully completed her improvement period. As a basis to find that the mother was *not* successful, the trial court relied upon the mother's decision to enter a substance abuse treatment program in another county, as opposed to attending treatment in the county where the abuse and neglect case was pending. For this reason, the court found that the mother had frustrated the goal of reunification and had not made her children her first priority. Accordingly, the mother's parental rights were terminated.

Reversing the circuit court, the Supreme Court noted that the mother had satisfactorily completed both inpatient and outpatient substance abuse treatment and had participated in therapy and 12-step groups. The Court also noted that the mother had left an abusive relationship, had remained sober, was employed, was planning to attend college and had obtained housing. In his dissenting opinion, Justice Loughry pointed out that the children had been in the DHHR's custody 29 of the last 32 months and that the mother had been afforded with more than enough time to demonstrate her fitness as a parent.

*State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 470 S.E.2d 205 (1996)

A circuit judge overseeing a case such as this has an immensely difficult task, for in many abuse and neglect cases there is a genuine emotional bond as well as the natural biological bond between parent and child which courts are understandably hesitant to break if there is hope of meaningful change. In most abuse and neglect cases, the parent(s) may have redeeming qualities that create such hope that they will be able to make the necessary changes to become adequate parents.

Although it is sometimes a difficult task, the trial court must accept the fact that the statutory limits on improvement periods (as well as our case law limiting the right to improvement periods) dictate that there comes a time for decision, because a child deserves resolution and permanency in his or her life, and because part of that permanency must include at minimum a right to rely on his or her caretakers to be there to provide the basic nurturance of life.

## O. Extension of Improvement Period

Syl. Pt. 5, *State ex rel. P.G.-1 v. Wilson*, 247 W. Va. 235, 878 S.E.2d 730 (2021); *In re H.D.*, --- W. Va. ---, 888 S.E.2d 419 (2023)

West Virginia Code § 49-4-610(6) authorizes only *one* extension of a post-adjudicatory improvement period.

Syl. Pt. 6, *State ex rel. P.G.-1 v. Wilson*, 247 W. Va. 235, 878 S.E.2d 730 (2021)

West Virginia Code § 49-4-610(6) provides that when a circuit court extends a post-adjudicatory improvement period, the extension must be for a period that does not exceed three months.

*State ex rel. P.G.-1 v. Wilson*, 247 W. Va. 235, 878 S.E.2d 730 (2021)

The guardian *ad litem* filed a petition for a writ of prohibition to prevent the circuit court from granting another extension to the mother's post-adjudicatory improvement period because the children had been in foster care for approximately 25 months. The abuse and neglect case had been originally filed because of the father's domestic violence and substance abuse and the mother's participation in domestic violence and failure to protect the children from domestic violence. In her psychological evaluation, the mother's IQ was determined to be 45, and she also denied the occurrence of domestic violence in the home. Throughout the case, the mother's bond with her children was recognized.

At adjudication, the mother stipulated to the allegations in the petition. Although the mother was granted a post-adjudicatory improvement period, she never filed a written motion requesting one. Throughout the case, the mother was non-compliant with various aspects of her improvement period, and various members of the MDT brought the mother's non-compliance to the court's attention. In fact, the guardian *ad litem* filed a

motion to revoke the mother's improvement period, and the DHHR later joined in the motion. However, the circuit court did not grant the motion or otherwise terminate the mother's improvement period. Rather, it granted multiple extensions to the mother's post-adjudicatory improvement period. As a result, the children had been in foster care for approximately 25 months when the guardian *ad litem* ultimately sought relief in prohibition.

Reviewing the record below, the Supreme Court first found that the circuit court had made a clear error because the mother had not filed a *written* motion for a post-adjudicatory improvement period as required by West Virginia Code § 49-4-610(2). The Court explained that the statute necessitates the filing of a written motion.

Next, the Court noted that West Virginia Code § 49-4-610 only allows a six-month post-adjudicatory improvement period with a three-month extension. In the case below, however, the mother's improvement period had been in effect for more than 22 months, and it had far exceeded the allowable time periods. As for the extensions, the Court found that it was erroneous to grant multiple extensions without limiting the extensions to a single three-month period at the conclusion of a six-month improvement period.

Further, the Court found that the circuit court did not make the findings required by West Virginia Code § 49-4-610(6), that the mother had substantially complied with the terms of her improvement period when it granted the extensions. In fact, the circuit court had found that the mother had not been in compliance. Noting another omission, the Court observed that circuit court had not addressed whether the extensions would impair the ability of the DHHR to plan for the children's permanency. Rather, the record showed that the foster parents had stopped fostering the children for a time because of the extreme length of the case. Finally, the Court concluded that the circuit court had never found that the extensions were consistent with the children's best interests. Completing its analysis, the Court reasoned that even if the required findings had been made, granting the extensions would still have been erroneous because the combination of extensions far exceeded the limit of 15 months for any combination of improvement periods. After issuing a writ of prohibition, the Court remanded the case for a prompt evidentiary dispositional hearing.

*In re H.D.*, --- W. Va. ---, 888 S.E.2d 419 (2023)

This case involved a mother's substance abuse, her medical diagnosis of tuberculosis which barred her admission to an inpatient treatment program, and a relapse during an improvement period. Originally, the mother was granted a post-adjudicatory improvement period of 90 days. At the next hearing, the mother requested an extension, and it was granted. Because of the relapse, the DHHR moved to revoke the mother's improvement period, which was granted. At disposition, the mother requested a post-dispositional improvement period and indicated that she had at least another month available to her. She asserted that that the initial improvement period was six months and the extension was three month, for a total of nine months. However, the court denied her motion for a post-dispositional improvement period.

In her first assignment of error, the mother asserted that the circuit court erred when it denied her motion to extend her improvement period as she should have been afforded additional time. The Supreme Court, in a strict reading of the improvement period statute, held that the circuit court did not err because the initial improvement period was only allowed for 90 days, and that she was only entitled to one extension of the improvement period that could not exceed 90 days. W. Va. Code § 49-4-610(2) & (6). It found that the mother's claim concerning additional time was not supported by the statute.

Syl. Pt. 2, *In the Interest of Jamie Nicole H.*, 205 W. Va. 176, 517 S.E.2d 41 (1999); Syl. Pt. 7, *In re Isaiah A.*, 228 W. Va. 176, 718 S.E.2d 775 (2010)

*W. Va. Code § 49-4-610(6)*

Pursuant to West Virginia Code § 49-6-12(g), before a circuit court can grant an extension of a post-adjudicatory improvement period, the court must first find that the respondent has substantially complied with the terms of the improvement period; that the continuation of the improvement period would not substantially impair the ability of the Department of Health and Human Resources to permanently place the child; and that such extension is otherwise consistent with the best interest of the child.

## VII. ADJUDICATORY HEARING

### A. Burden of Proof of Conditions Existing at the Time of Filing the Petition

Syl. Pt. 1, *In the Interest of S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981); Syl. Pt. 5, *W. Va. DHHR v. Scott C.*, 200 W. Va. 304, 489 S.E.2d 281 (1997); Syl. Pt. 1, *In re Joseph A.*, 199 W. Va. 438, 485 S.E.2d 176 (1997); Syl. Pt. 1, *W. Va. DHHR v. Brenda C.*, 197 W. Va. 468, 475 S.E.2d 560 (1996); Syl. Pt. 5, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996); Syl. Pt. 2, *In re Katelyn T.*, 225 W. Va. 264, 692 S.E.2d 307 (2010); Syl. Pt. 3, *In re F.S.*, 233 W. Va. 538, 759 S.E.2d 769 (2014); Syl. Pt. 3, *In re K.P.*, 235 W. Va. 221, 772 S.E.2d 914 (2015)

*W. Va. Code § 49-4-601(i)*

W. Va. Code § 49-6-2(c), requires the State Department of Welfare [now the DHS], in a child abuse or neglect case, to prove "conditions existing at the time of the filing of the petition . . . by clear and convincing proof." The statute, however, does not specify any particular manner or mode of testimony or evidence by which the DHS is obligated to meet this burden.

*In re Walter G.*, 231 W. Va. 108, 743 S.E.2d 919 (2013)

The DHHR filed an abuse and neglect case after one of two twin infant boys died. A toxicology report indicated that the cause of death was the ingestion of buprenorphine (Suboxone) with diphenhydramine (Benadryl) adding to the adverse effects. The circuit court conducted a six-day adjudicatory hearing and ultimately found that that the mother had failed to provide appropriate supervision of the infant. After adjudication, the mother successfully completed an improvement period, and she was reunified with her surviving son.

On appeal, the Court conducted an extensive review of the record and found that the circuit court erred in adjudicating the mother. Specifically, the Court noted that the mother was at work at the time the infant must have ingested the drug and the caregivers were appropriate. Secondly, there was no evidence that anyone in the home was either using or abusing buprenorphine. Neither CPS, nor law enforcement had been able to determine how the infant had ingested the drug. Accordingly, the Court reversed the adjudication order.

## B. Requirement of a Hearing

Syl. Pt. 2, *In re Emily G.*, 224 W. Va. 390, 686 S.E.2d 41 (2009)

In a child abuse and neglect [case], . . . a court . . . must hold a hearing under W.Va. Code, 49-6-2, and determine "whether such child is abused or neglected." Such a finding is a prerequisite to further continuation of the case. Syl. Pt. 1, in part, *State v. T.C.*, 172 W. Va. 47, 303 S.E.2d 685 (1983)

*W. Va. Code § 49-4-601(c)*

When grandparents filed an abuse and neglect petition and the circuit court dismissed the case without a hearing, the Supreme Court held that it was error for the petition to have been dismissed without a hearing. The Supreme Court noted that West Virginia Code § 49-6-2 requires a court to conduct a hearing on an abuse and neglect petition.

*In re D.P.*, 230 W. Va. 254, 737 S.E.2d 282 (2012)

This case involved a situation in which a 16-year-old girl had lived with her grandmother in Pennsylvania throughout her life. During a time that she was extremely upset, she came to visit her father in West Virginia for five days. The West Virginia DHHR removed her from her father's home after allegations of abuse and neglect were reported. An MDT was convened, and all members agreed that the girl should be placed with her grandmother and the case should be dismissed. While the case was pending, the circuit court conducted several hearings, appointed the grandmother as the girl's legal guardian and ultimately dismissed the case.

The DHHR, even though it had originally agreed to the dismissal, objected and argued that the court should conduct a full adjudicatory hearing. On appeal, the Supreme Court affirmed the dismissal of the petition because the circuit court had provided the DHHR with an opportunity to be heard as required by West Virginia Code § 49-6-2(c) and because the circuit court found that a full adjudication would not be in the girl's best interests. In footnote 3 of the opinion, the Court cited *In re T.W.*, 737 S.E.2d 69 (W. Va. 2012) as a contrary example.

*W. Va. Code § 49-4-601(h)*

## C. Collateral Acts or Crimes and Expert Opinion Testimony

*State v. Edward Charles L., Sr.*, 183 W. Va. 641, 398 S.E.2d 123 (1990)

The Court held that collateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards children generally or a lustful disposition to specific other children provided such incidents relate reasonably close in time to the incidents giving rise to the indictment. This holding overruled the Court's prior holding in *State v. Dolin*, 347 S.E.2d 208 (W. Va. 1986) involving collateral acts.

The lower court's admission of the child's statements to the treating psychologist was upheld under W.Va.R.Evid. 803(4) (statements for the purpose of medical diagnosis or treatment) and a two-part test for admitting statements under this exception was established:

> (1) the declarant's motive in making the statements must be consistent with the purposes of promoting treatment, and
>
> (2) the content of the statement must be such as is reasonably relied upon by a physician in treatment or diagnosis.

The child's statements to his mother were also properly admitted under the exception found in W.Va.R.Evid. 803(24). The critical factor in upholding the admission under this exception was the fact that the children involved in this case both testified at trial, and neither the mother nor the psychologist added anything substantive to the children's testimony.

*The residual exception to the hearsay rule is now set forth in W. Va. R. Evid. 807.*

Finally, this Court upheld the lower court's admission of opinion testimony by a psychologist. Expert psychological testimony in cases involving incidents of child sexual abuse is permissible and an expert may state an opinion based on objective findings that the child has been sexually abused. Children who are victims of sexual abuse and assault frequently exhibit behavioral and emotional characteristics indicative of child sexual abuse victims. Such an expert may not, however, give an opinion as to whether he personally believes the child, nor may he give an opinion as to whether the sexual assault was committed by the defendant.

## D. Expert Testimony Regarding Statements Made by a Child During Treatment

*In re the Marriage of Misty D.G.*, 221 W. Va. 144, 650 S.E.2d 243 (2007)

In a child custody case, the family court admitted testimony from a counselor who evaluated and treated a child because of sexual abuse allegations. The counselor testified about the child's identification of the abuser, her mother's boyfriend, and the details of the sexual abuse. Based upon the testimony, the family court ordered supervised visitation for the mother. On appeal, the circuit court held that the family court

improperly allowed the counselor to testify as to the identity of the abuser and improperly allowed other family members to testify as to statements the child had made.

The Supreme Court recognized that statements a child makes to their treating therapist or counselor regarding the identity of their abuser and the nature of the abuse may be relevant to proper diagnosis and treatment. The Court held that such statements may be admitted pursuant to the hearsay exception in Rule 803(4) of the West Virginia Rules of Evidence, the rule that allows for the admission of statements for the purposes of medical diagnosis or treatment. Affirming the admission of statements made to a treating therapist, the Court held that:

> When a social worker, counselor, or psychologist is trained in play therapy and thereafter treats a child abuse victim with play therapy, the therapist's testimony is admissible at trial under the medical diagnosis or treatment exception to the hearsay rule, West Virginia Rule of Evidence 803(4), if the declarant's motive in making the statement is consistent with the purposes of promoting treatment and the content of the statement is reasonably relied upon by the therapist for treatment. The testimony is inadmissible if the evidence was gathered strictly for investigative or forensic purposes. Syl. Pt. 4, *Misty D.G.*, 650 S.E.2d 243 (quoting Syl. Pt. 9, *State v. Pettrey*, 549 S.E.2d 323 (W. Va. 2001), *cert. denied*, 534 U.S. 1142 (2002)).

## E. Transcript of Criminal Case

Syl. Pt. 2, in part, *Mary D. v. Watt*, 190 W. Va. 341, 438 S.E.2d 521 (1992); Syl. Pt. 2, *State ex rel. George B. W. v. Kaufman*, 199 W. Va. 269, 483 S.E.2d 852 (1997)

If the sexual abuse allegations were previously tried in a criminal case, then the transcript of the criminal case may be utilized to determine whether credible evidence exists to support the allegations. If the transcript is utilized to determine that credible evidence does or does not exist, the transcript must be made a part of the record in the civil proceeding so that this Court, where appropriate, may adequately review the civil record to conclude whether the lower court abused its discretion.

## F. Stipulation

*W. Va. DHHR v. Brenda C.*, 197 W. Va. 468, 475 S.E.2d 560 (1996) (per curiam)

Parties may stipulate as to adjudication and specific factual basis; therefore, however, there must be compliance with the Rules of Evidence and follow appropriate procedure.

The concurring opinion also addresses issues pertaining to the petition, notice, non-waiver of defects, adjudication, stipulations, finality of orders and termination of parental rights.

## VIII. GROUNDS FOR ADJUDICATION

### A. Abandonment

*In re Destiny Asia H.*, 211 W. Va. 481, 566 S.E.2d 618 (2002)

When a biological mother left her child in the care of a third party for a much longer period of time than anticipated, the circuit court held that the child was not neglected because the mother had simply transferred guardianship to another caretaker. The Supreme Court reversed and held that the child was abandoned when the mother's "stay exceeded what was contemplated and when she allowed the thread of potential contact between her and the child's actual care giver to break." 566 S.E.2d at 621.

*In re A.P.-1*, 241 W. Va. 688, 827 S.E.2d 830 (2019)

This case involved a respondent father who was subject to life sentence with mercy for first degree murder. The circuit court found that the respondent father had not abandoned the child because he telephoned his children, sent them cards, and paid support. At disposition, the circuit court proceeded to terminate his parental rights under *In re Cecil T.*, 717 S.E.2d 873 (W. Va. 2011) even though he had not been adjudicated.

The Supreme Court reversed the termination because the father had never been adjudicated. In a separate opinion, Justice Workman asserted that long term incarceration could be considered a type of neglect at adjudication, even if the facts of a case did not justify a finding of abandonment.

*In re C.M.-1*, 247 W. Va. 744, 885 S.E.2d 875 (2023)

An eight-year-old child was removed from his mother and stepfather's care because of substance abuse, domestic violence, and unsanitary living conditions. After the original adjudication of the mother and stepfather, the DHHR discovered that C.M-1's father was named on his birth certificate, and it filed an amended petition alleging abandonment. According to the petition, the father had not seen the child for approximately four years, and he had not protected the child from the abusive and neglectful conditions in the mother's home.

At the adjudicatory hearing, the father testified that the mother had not allowed him to see the child. but he had not sought any relief from a court to obtain visitation. The father asserted that he provided support through income withholding. However, the evidence indicated that the father's income tax refunds were disbursed to the mother, but no monthly support was paid. After the conclusion of the hearing, the circuit court found that the father was not a neglectful parent because he had fulfilled his parental duties by paying support and because the mother had denied him access to the child. From this ruling, the guardian *ad litem* and the DHHR appealed.

After reviewing the evidence, the Court did not overturn the factual finding that the mother had blocked the father from visitation. It did, however, find that the father acted

with indifference to the child's well-being because he did not seek relief in court to develop a relationship with the child and did not investigate the neglectful conditions in which his child was living. With regard to child support, the Court relied on an adoption case, *In re H.G.*, 866 S.E.2d 170 (W. Va. 2021), in which a circuit court found that a mother had abandoned her child despite her payment of support through wage withholding. On appeal, the Supreme Court affirmed the lower court's finding of abandonment because the mother had not visited the child at all and had not otherwise developed a relationship with the child. After reviewing the facts of the instant case, the Supreme Court found that the circuit court erred when it concluded that the father had fulfilled his parental duties.

In a dissenting opinion, Justice Wooton asserted that the majority had ignored the applicable standard of review by conducting a *de novo* review as to whether the evidence met the statutory definition of abandonment. He also noted that Court had conducted this type of review because it disagreed with the lower court's finding and that it should have given deference to the circuit court findings.

## B. Sexual Abuse

*In re F.S.*, 233 W. Va. 538, 759 S.E.2d 769 (2014)

This case involved a father's alleged sexual abuse of his 11-year-old daughter. At the adjudicatory hearing, the daughter's counselor testified to the girl's statements in therapy that included specific, sensory details of her father's sexual acts. On the other hand, the girl refused to testify at the father's criminal trial, and he was acquitted. At the end of the adjudicatory hearing, the circuit court found that the allegations in the petition had not been proven by clear and convincing evidence.

On appeal, the Supreme Court reviewed the evidence presented to the trial court and noted that: "the evidence is simply not crystal clear, beyond all doubt." Providing guidance on the applicable standard, the Court went on to explain that the standard of clear and convincing evidence is "the measure or degree of proof that will produce in the mind of the fact finder a firm belief or conviction as to the allegations sought to be established." 759 S.E.2d at 777 (quoting *Brown v. Gobble*, 474 S.E.2d 489, 494 (W. Va. 1996)). The Court further stated that: "[T]he clear and convincing standard is 'intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt in criminal cases.'" *Id.* (citing cases).

After providing guidance on the standard of proof, the Court noted that the girl, in many interviews, had recounted sexually explicit details and sensory aspects of the abuse. For that reason, the Court concluded that the evidence met the required standard of proof, clear and convincing evidence, and remanded the case for the entry of an order adjudicating the minor children as abused children.

*In re K.P.*, 235 W. Va. 221, 772 S.E.2d 914 (2015)

*Note: A discussion of the stepfather's silence as evidence of culpability is found in Section V.A.*

This case was initiated after a 13-year-old girl, K.P., disclosed that her stepfather, had engaged in sexual misconduct against her. The initial allegations in the petition against the mother and stepfather related to the stepfather's sexual abuse and the mother's failure to protect her daughter. The DHHR later amended the petition to include allegations that the mother had committed emotional abuse against her daughter.

Over the course of multiple interviews, K.P. stated that her stepfather came into her bedroom and rubbed her back and stomach on July 1, 2013. He also rubbed her vaginal area over her clothes. He asked to lick her breasts, but she said no. He then stayed in the room for another 30 minutes and rubbed her back.

In response to this incident in July of 2013, K.P. texted a friend who told her to ask her parents for help. She tried to contact her mother and her father. Initially, she was only able to reach her stepmother, A.P., who made arrangements to come pick her up. Before K.P. left the home, the stepfather begged K.P. not to tell anyone because of the consequences to his life. After the initial disclosure, K.P. also disclosed that her stepfather had touched her in this manner on multiple occasions during the previous year. She explained that the stepfather's request to lick her breasts in July worried her and that was the reason she decided she needed to tell someone. After K.P.'s stepmother picked her up, she took K.P. to meet her father. Her mother, A.C., met up with them and berated her for disclosing what had occurred.

After the initial disclosure, a CPS worker interviewed K.P., and a detective watched the interview. During the course of the abuse and neglect case, K.P. was also subject to an interview and diagnostic testing by Dr. Adrienne Bean, a psychologist. At the adjudicatory hearing, Dr. Bean testified about the sexual abuse allegations and also testified about the fact that K.P.'s mother obsessed about K.P.'s weight and limited her food. According to K.P., her mother was more concerned that she had eaten macaroni and cheese the morning she made the disclosures as opposed to the sexual abuse allegations. Dr. Bean also indicated that she found K.P. to be truthful and that K.P. was not exhibiting symptoms typically shown by victims of sexual abuse. She, however, pointed out that K.P. could well experience them in the future.

At the adjudicatory hearing, the stepfather presented the testimony of Dr. Fremouw who performed diagnostic testing of him. Dr. Fremouw testified that the stepfather did not have the two most common characteristics of convicted sex offenders: an antisocial-psychopathic personality combined with the presence of cognitive schemas or attitudes that justify adult-child or adult forced sexual interactions. Dr. Fremouw, however, made it clear that the evaluation could not prove whether the stepfather had committed the abuse or not. The stepfather did not testify at the adjudicatory hearing.

The mother testified at the adjudicatory hearing and denied the allegations of name-calling. She explained that she restricted unhealthy food from K.P.'s diet. She testified that she knew K.P. was lying on the day of the initial disclosure by the look on her face. She also asserted that K.P. had fabricated the abuse allegations so that she could live with her father.

Dr. Amy Wilson Strange performed a parental fitness evaluation on K.P.'s mother, and she testified that the mother had a very low risk of maltreating her children or allowing another person to do so. She did admit that she knew very little about the sexual abuse allegations and all of her information concerning the allegations came from the mother.

Upon the motion of the respondent parents, K.P. was interviewed and subject to psychological testing by Dr. Bobby Miller. At the adjudicatory hearing, Dr. Miller testified that K.P. believes she can manage things better than the adults in her life, that K.P. had made simple allegations that are hard to prove or disprove and that he believed that K.P.'s actions were motivated by her grandmother's death and by her desire to live with her father. However, Dr. Miller admitted that K.P. had been consistent in recounting the allegations and there was no indication that she was untrustworthy.

After a multi-day adjudicatory hearing, the circuit court concluded that the DHHR had not, by clear and convincing evidence, proven that K.P. had been abused by either of the respondents. The circuit court also found that the stepfather's refusal to testify could not be used as evidence against him at adjudication. The circuit court then dismissed the abuse and neglect petition, and the DHHR and the guardian *ad litem* jointly filed the appeal.

After the Court found that the father's silence could be considered against him at the adjudicatory hearing, the Court addressed the circuit court's finding that the DHHR had not presented clear and convincing evidence that the respondents had committed abuse of K.P. With regard to this issue, the Court noted that the applicable statute does not specify the manner or mode by which the DHHR must meet its burden. See W. Va. Code § 49-4-601(j). The Court also reiterated that a victim's uncorroborated testimony may be used to prove sexual abuse. See Syl. Pt. 5, *State v. Beck*, 286 S.E.2d 234 (W. Va. 1981).

The Court noted that the respondents had argued that K.P. was motivated by her desire to live with her father. The Court, however, found the evidence in the record did not support this conclusion. With regard to the alleged inconsistencies in K.P.'s statements, the Court noted that the frequency of the sexual abuse had been described in different ways. As for the inconsistency, the Court noted that K.P.'s inability to be more specific about frequency related to the fact that the conduct had occurred over the course of a year and that the conduct had escalated during the course of the year. With regard to the characterization of the allegations as "simple" and lacking a witness or corroborating evidence, the Court found that just because K.P. had not been subject to penetration or ejaculation, it did not mean that she was lying about the type of sexual misconduct she had experienced. After thoroughly examining the record in this case, the Court held that the circuit court erred when it found that the DHHR had not proved its case by clear and convincing evidence.

As for the allegations of emotional abuse by the mother, the Court first determined that there was no evidence that the mother failed to protect her daughter because there was no evidence that she knew about the sexual abuse before K.P. initially disclosed it. The Court, however, found that the circuit court erred when it failed to recognize that the

mother's actions after the disclosure constituted emotional abuse. The Court noted that the mother took actions to prevent K.P. from reporting the abuse and claimed that the stepfather had only rubbed the girl's shoulders. Other evidence indicated that the mother told K.P. that the disclosure could ruin the stepfather's life. The Court expressly stated that: "The post-disclosure conduct of a parent, guardian, or custodian may constitute abuse and neglect." 772 S.E.2d at 926. Based upon this analysis, the Court reversed the circuit court and remanded the case for adjudication orders consistent with the opinion and to conduct post-adjudication proceedings and disposition.

*In re A.M.*, 243 W. Va. 593, 849 S.E.2d 371 (2020)

The allegations against the respondent father involved sexual abuse of his minor daughter, A.M., and her friend. At the adjudicatory hearing, the DHHR introduced the forensic interviews of the two children as evidence, and the children did not testify. In his defense, the father offered testimony of other witnesses that contradicted the children's testimony. In its order, the circuit court found that the children's testimony was less credible than the defense witnesses because the children had not been cross-examined. The circuit court, therefore, found that the allegations of sexual abuse against the father had not been proven, but it adjudicated the father for his alcohol and substance abuse. Since it did not adjudicate the father based upon the sexual abuse allegations, it did not adjudicate the respondent mother. The guardian *ad litem*, joined by the DHHR, appealed the adjudicatory hearing order.

In its opinion, the Supreme Court explained that children who testify in abuse and neglect proceedings often experience further trauma if they are required to testify in the presence of their alleged abusers. It also discussed the rebuttable presumption that the potential psychological harm to the child outweighs the need for the child's testimony. Rule 8(a), RPCANP. It further noted that the admission of forensic interviews is allowed in abuse and neglect cases. See *In re J.S.*, 758 S.E.2d 747 (W. Va. 2014).

Reviewing the record, the Supreme Court concluded that the lower court erred when it found the children's testimony to be less credible simply because the father had not cross-examined the children. The Court concluded that:

> Discounting both the weight and the veracity of the child victims' testimony for this reason in an abuse and neglect proceeding that specifically allows the presentation of such evidence in this manner was clearly an erroneous ruling by the circuit court. *A.M.,* 849 S.E.2d at 377.

Discussing the details involving the alleged sexual abuse, the Court concluded that the father's actions constituted sexual abuse and that the lower court, upon remand, must adjudicate him for this reason. It also concluded that the circuit court committed error when it did not adjudicate the mother. It remanded the case with instructions to vacate the adjudicatory hearing order and to proceed to disposition consistent with the opinion.

## C. Substance Abuse

*In re S.C.*, --- W. Va. ---, 889 S.E.2d 710 (2023)

The DHHR filed a petition against a mother when she admitted to methamphetamine abuse while pregnant with her newborn son. The putative father was named as a non-offending party, and his one-year-old child was left in his care. On the day of the mother's preliminary hearing, the father was required to drug test, and he tested positive for methamphetamine and marijuana. He also admitted to his drug use. His one-year-old child was placed in the legal and physical custody of the DHHR, and the DHHR filed an amended petition that addressed the father's substance abuse. Before the father's adjudicatory hearing, he either skipped his drug tests or tested positive for methamphetamine and other substances. Since he continued to use methamphetamine, the father had not had any supervised visits during the case.

At the adjudicatory hearing, the circuit court heard testimony concerning the father's methamphetamine use. The evidence indicated that the father had used methamphetamine for over a decade, but claimed he only used it at work. He also testified to using marijuana to calm himself. The CPS worker testified that the father's substance abuse did not affect her meetings with him and that he showed insight into parenting. She had not been able to observe him with his older child because he had not passed a drug test and thus had not had any supervised visitations. At the hearing, the court allowed the parties to submit legal authority as to whether a custodian's use of methamphetamine constitutes abuse and/or neglect. The father's attorney relied upon *In re J.L.-1*, No. 20-0168 (W. Va. Nov. 4, 2020) (memorandum decision) as support for his position. After reviewing the case, the circuit court found that the father had not abused or neglected his child based upon the cited case because the substance abuse had not occurred while the child was in his custody. In response, the guardian *ad litem* filed an appeal that was supported by the DHHR and the child's mother.

As to the first issue, the Supreme Court distinguished the facts of the instant case from the facts of *In re J.L*. because the father, in this case, tested positive for methamphetamine while the child was in his physical care. In contrast, in *In re J.L.,* the child had been in DHHR custody when the father tested positive. The Court also noted that: "But a parent with physical custody serves as a child's primary supervisor and day-to-day decision-maker. And it follows that he does not discharge his supervisory and decision-making responsibilities when he entrusts his child to a temporary caretaker." 889 S.E.2d at 715. The Court found that the circuit court erred in relying on *In re J.L.* as the basis to not adjudicate the father.

The next issue raised by the guardian *ad litem* was whether the child met the definition of a neglected child. W. Va. Code § 49-1-201. The Court observed that a judge may take judicial notice of the harmful effects of methamphetamine, as the judge did in this case, and it noted that the doctrine of judicial notice is synomous with common sense. The Court also cited to the findings of the Legislature concerning the harmful effects of methamphetamine. W. Va. Code § 60A-10-2(c)-(d). The Court found that the circuit court

acted within its discretion in doing so. The Court also found that "admitted, chronic, and pervasive methamphetamine abuse" would negatively affect a child. 889 S.E.2d at 716. The Court further reasoned that a child need not suffer harm; rather, threatened harm is sufficient to constitute neglect. In this case, the Court found that the child met the definition of a neglected child because of the father's methamphetamine use. The case was remanded with the instruction to adjudicate the father.

In his dissenting opinion, Justice Wooton asserted that the DHHR did not meet its evidentiary burden to show that the child's welfare was at risk or threatened by the father's substance abuse. Specifically, he pointed out that the home was appropriate, and that the child was receiving adequate care. He also explained his disagreement with the majority's finding that the facts of *In re J.L.* were distinguishable from the instant case and cited to another opinion, *In re D.A.*, No. 22-0151 (W. Va. Oct. 31, 2022) (memorandum decision) as support for his position.

*In re H.L.*, 243 W. Va. 551, 848 S.E.2d 376 (2020)

The petition included allegations of domestic violence that the children witnessed and of substance abuse and failure to comply with court-ordered drug screens. The primary error addressed on appeal was the circuit court's failure to consider whether the mother, who had been the victim of severe domestic violence, was a battered parent. See W. Va. Code § 49-4-601(i). However, the Supreme Court also noted that the record failed to indicate how many drug screens the mother missed and how the mother's substance abuse affected her children. The Court directed that this evidence should be considered in the adjudicatory hearing upon remand.

*In re A.L.C.M.*, 239 W. Va. 382, 801 S.E.2d 260 (2017)

Syl. Pt. 1: When a child is born alive, the presence of illegal drugs in the child's system at birth constitutes sufficient evidence that the child is an abused and/or neglected child, as those terms are defined by W. Va. Code § 49-1-201, to support the filing of an abuse and neglect petition pursuant to W. Va. Code § 49-4-601.

This case involved a certified question as to whether prenatal substance abuse could support an abuse and neglect petition at a child's birth. During her pregnancy with twins, the mother used illegal drugs and abused prescription medication. The father had an extensive criminal background involving drugs, but also had taken protective steps to address the mother's drug use, including helping the mother obtain subutex treatment. At birth, one of the twins died because of twin-to-twin transfusion syndrome and complications from the premature birth. The second child had extensive medical problems, and he had tested positive for opiates and other substances at birth. During the proceedings, the mother voluntarily relinquished her rights. Before his adjudication, the father moved to dismiss the petition based upon *State v. Louk*, 786 S.E.2d 219 (W. Va. 2016), a case which prohibits criminal prosecution under West Virginia Code § 61-8D-4a for prenatal acts that result in death to a subsequently born child. In response, the circuit court certified a question to the Supreme Court concerning this issue -- whether prenatal drug use supports the filing of an abuse and neglect petition after a child is born.

After reviewing the question certified by the lower court, the Supreme Court reformulated the question as follows: "When a child is born alive, is the presence of illegal drugs in the child's system at birth sufficient evidence that the child is an abused and/or neglected child to support the filing of an abuse and neglect petition?" To answer the question, the Court reviewed the definitions of an "abused" and "neglected" child and caselaw addressing whether a parent has knowingly allowed abuse of a child. See e.g., *In the Interest of Betty J.W.*, 371 S.E.2d 326 (W. Va. 1988). Holding that the presence of illegal drugs in a child's system at birth constitutes abuse and/or neglect, the Court answered the question in the affirmative.

*In re Aaron Thomas M.*, 212 W. Va. 604, 575 S.E.2d 214 (2002) (per curiam)

"We believe that the circuit court was not clearly erroneous in finding the children were emotionally abused by Christina L.'s repeated drug use in their presence."

## D. Abuse of Another Child in the Home

Syl. Pt. 2, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995); Syl. Pt. 8, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997); Syl. Pt. 4, *State ex rel. DHHR v. Fox*, 218 W. Va. 397, 624 S.E.2d 834 (2005)

Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W. Va. Code § 49-1-3(a).

*W. Va. Code § 49-1-201*

*State ex rel. DHHR v. Fox*, 218 W. Va. 397, 624 S.E.2d 834 (2005)

Although there was no direct evidence of abuse against the child named in the petition, the DHHR contended that the child was abused because the child's brother had been allegedly killed by the child's father. Based upon extensive expert testimony, the trial court found that the child was not abused because the testimony indicated that the child's death was the result of an earlier accidental fall, not the result of Shaken Baby Impact Syndrome. After a careful review of the record, the Supreme Court concluded that the trial court's finding was not clearly wrong.

The dissenting and two concurring opinions addressed the significance of the father's entry of an *Alford* or *Kennedy* plea, "a guilty plea by a defendant who continues to protest his or her innocence," 624 S.E.2d 834, n. 4, in his criminal case. (This type of plea was recognized by the West Virginia Supreme Court in *Kennedy v. Frazier*, 357 S.E.2d 43 (W. Va. 1987), and it may be referred to as *Kennedy* plea).

The dissent indicated that the entry of an *Alford* plea to an involuntary manslaughter charge supported a conclusion of child abuse. In a concurring opinion, however, it was noted that the father's entry of an *Alford* plea allowed him the opportunity to avoid prison and thereby the chance to regain custody of his son. In the second

concurring opinion, it was recognized that the entry of the plea was the result of the financial burden associated with the defense of the criminal charges.

## E. Domestic Violence

*In re Lilith H.*, 231 W. Va. 170, 744 S.E.2d 280 (2013)

This case involved a situation in which a grandfather and father engaged in a physical alternation with each other. The children's mother attempted to intervene, but ultimately struck the grandfather. Also, the children witnessed the fight. The circuit court adjudicated the father because he engaged in domestic violence in the presence of the children and the mother because she failed to protect them. However, the Supreme Court held that the one isolated occurrence of domestic violence could not serve as a basis for adjudication of the father. Similarly, the Court held that there was an insufficient basis to find that the mother had "knowingly allowed" the father to commit abuse or neglect.

*In re J.P.*, 240 W. Va. 266, 810 S.E.2d 268 (2018)

The father appealed his adjudication based upon allegations of domestic violence. The case was initiated when the father attacked and choked the mother in the presence of one of the children. During the incident, the father fled the house with two of the other children. In addition to this incident, the mother testified that the father had committed various acts of domestic violence in front of the children. Further, the father had a history of domestic violence and involvement with child protective services in several states. Specifically, he had two prior domestic violence convictions in Florida. The Court upheld the father's adjudication, and distinguished this case from *Lilith H.* due to the level of domestic violence witnessed by the children over time and the fact that this was not an "unexpected and isolated" event. The Court remanded the case to address the parenting plan because there had been a change of circumstances. For a discussion of this issue, see Section XVI.E.

*In re H.L.*, 243 W. Va. 551, 848 S.E.2d 376 (2020)

The petition included allegations of domestic violence that the children witnessed, substance abuse and failure to comply with court-ordered drug screens. At adjudication, the mother presented evidence that she had been the victim of severe domestic violence at the hands of the father. At the end of the hearing, the mother's attorney requested a finding that she was a battered spouse, but the circuit court did not make any findings concerning her request. Rather, the circuit court adjudicated both parents, and the mother's parental rights were terminated at disposition after a motion for an improvement period was denied.

On appeal, the Supreme Court found that the circuit court had ignored critical evidence that indicated that the mother was a victim of domestic violence and had not considered whether the mother was a "battered parent." W. Va. Code § 49-4-601(i). Further, it found that the record was devoid of evidence that showed that the mother's substance use negatively affected her ability to parent her children. For these reasons,

the Court vacated the adjudicatory and disposition orders and remanded the case for another adjudicatory hearing for the mother.

## F. Death of a Child Before Adjudication

*In re I.M.K.*, 240 W. Va. 679, 815 S.E.2d 490 (2018)

Syl. Pt. 2: When an infant child is born alive and becomes the subject of an abuse and neglect petition, but the child dies during the pendency of the abuse and neglect proceedings, the matter may proceed to an adjudicatory hearing, and the presiding circuit court may make findings of fact and conclusions of law as to whether the subject child is an abused and/or neglected child and whether the respondents are abusing and/or neglectful as contemplated by W. Va. Code § 49-4-601(i). The circuit court's findings and conclusions regarding the existence of abuse and/or neglect must, however, be based upon the conditions alleged in the abuse and neglect petition and any amendments thereto.

Syl. Pt. 4: If an infant child is born alive, becomes the subject of an abuse and neglect petition, and is appointed a guardian ad litem to represent him/her in such case, but the child dies during the pendency of the abuse and neglect proceedings, the guardian ad litem remains involved in the case to advocate for the child until the conclusion of such proceedings.

At birth, the child I.M.K. tested positive for opiates and had severe neurological and respiratory conditions because of the mother's admitted prenatal drug use. An only child, I.M.K. died at approximately 17 days old.

While the child was still living, the DHHR filed an abuse and neglect petition. The circuit court conducted a preliminary hearing at which time the parents waived the hearing so they could attend a medical appointment for I.M.K. After this initial hearing, I.M.K. died. At a second preliminary hearing, the parents moved to dismiss the petition because of the child's death, and because no other children were involved. However, the DHHR and the guardian *ad litem* objected.

To resolve the case, the circuit court certified the following two questions to the Supreme Court:

> 1. When an infant child is born alive, but dies during the pendency of an Abuse and Neglect proceeding, prior to adjudication, and said infant child is the only child in the home, may the matter proceed to an adjudicatory hearing, and may the deceased child be found and adjudicated to be an abused or neglected child?
>
> 2. If an infant child is born alive, but dies during the pendency of an Abuse and Neglect proceeding, and said infant child is the only child in the home,

should the *Guardian ad Litem* remain a party to the proceeding to advocate for the rights of the deceased child?

To address the first question, the Supreme Court noted that: "This process of adjudication enables the presiding tribunal to identify what abuse and/or neglect the subject children have sustained and to implement procedures to help the parents remedy these conditions to prevent future incidences thereof in the future." 815 S.E.2d at 496. Additionally, the Court noted that abuse and neglect cases have the following purposes: identifying child abuse and neglect, protecting children who have experienced abuse and neglect and remedying or resolving the conditions of abuse and neglect.

Finding that an adjudicatory hearing should be conducted, the Court noted that the allegations contained in the petition, filed shortly after the child's birth, provide the factual basis for adjudication. In addition, the Court noted that adjudication is based upon conditions existing at the time of the filing of the petition, not facts that occur after the filing of the petition. In other words, the child's death should not impede the circuit court from proceeding to adjudication because the death occurred after the petition was filed. The Court also relied on an earlier case, *In re A.L.C.M.*, 801 S.E.2d 260 (W. Va. 2017), as a basis for proceeding because the Court had held that prenatal drug use can serve as a factual basis for an abuse and neglect petition. The Court noted that a petition could be amended to reference a child's death, and it would serve as added proof of abuse and neglect.

The Court went on to observe that another purpose of adjudication is to identify the persons who are responsible for the abuse and neglect and allow parties to remedy the circumstances. The Court further discussed that proceeding with adjudication would protect future children. The Court, therefore, concluded that an adjudication should be conducted even though a child has died and had no siblings.

With respect to the second question, whether the guardian *ad litem* should continue representation, even though the child has died, the Court found that "the guardian ad litem's role as the child's advocate becomes even more essential for it is the child's representative who must speak for the child whose voice has been forever silenced." 815 S.E.2d at 502. The Court further noted that: "As the child's advocate and legal representative, the guardian ad litem is in the best position to speak to the circumstances leading to the child's death and to ensure that justice is achieved for the child." *Id.* The Court, therefore, held that the guardian *ad litem's* duties should continue until the case is concluded, even though the child had died and had no siblings.

*In re A.P.*, 245 W. Va. 248, 858 S.E.2d 873 (2021)

*Note: Although parents of a child who pass away during a case may be subject to an adjudicatory hearing, the parent's rights to a deceased child may not be subject to disposition. See XI.O. for a summary of this case.*

Syl. Pt. 7: West Virginia Code § 49-4-604(c)(6) does not permit the termination of parental, guardianship, or custodial rights to a child who is deceased at the time of disposition.

## IX. DISPOSITIONAL HEARING -- PROCEDURAL ISSUES

### A. Adjudication is a Prerequisite

Syl. Pt. 1, *State v. T.C.*, 172 W. Va. 47, 303 S.E.2d 685 (1983); Syl. Pt. 2, *W. Va. DHHR v. Brenda C.*, 197 W. Va. 468, 475 S.E.2d 560 (1996); Syl. Pt. 1, *In the Matter of Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995); Syl. Pt. 1, *In re Kasey M.*, 228 W. Va. 221, 719 S.E.2d 389 (2011)(per curiam); Syl. Pt. 3, *In re T.W.*, 230 W. Va. 172, 737 S.E.2d 69 (2012); Syl. Pt. 3, *In re A.P.-1*, 241 W. Va. 688, 827 S.E.2d 830 (2019)

*W. Va. Code § 49-4-604*

*W. Va. Code § 49-4-601(i)*

In a child abuse and neglect hearing, before a court can begin to make any of the dispositional alternatives under W. Va. Code § 49-6-5, it must hold a hearing under W. Va. Code § 49-6-2, and determine "whether the child is abused or neglected." Such a finding is a prerequisite to further continuation of the case.

*In re A.P.-1*, 241 W. Va. 688, 827 S.E.2d 830 (2019)

An abuse and neglect case was initiated against a mother, T.W., and the father of three of the mother's children, D.P., who was serving a sentence of life with mercy for first degree murder and who would not be eligible for parole until 2029. At the adjudicatory hearing, the DHHR alleged that the father had abandoned the children because of his lengthy incarceration. The father, however, presented evidence that he had provided financial and emotional support for the children before his incarceration. Additionally, the father testified that he kept in contact with his children via twice-weekly telephone calls and by sending them cards. Further, his prison wages were directed to his sister for support of his children. At the adjudicatory hearing, the State conceded that it could not support a finding of abandonment. At the conclusion of the hearing, the circuit court did not find that the father had abandoned his children and did not adjudicate the father as an abusive or neglectful parent.

During the case, the mother was adjudicated as an abusive or neglectful parent, and ultimately the circuit court terminated the mother's parental rights to D.P.'s three children and a fourth child who had another father. At the disposition hearing, the father argued that, under *State v. T.C.*, his rights could not be terminated because he had not been adjudicated. Relying on *In re Cecil T.*, the guardian *ad litem* argued that the father's parental rights could be terminated. The circuit court adopted the guardian *ad litem's* position and terminated the father's parental rights so that the DHHR would be able to develop permanent placements for the children.

In its opinion, the Supreme Court emphasized that a finding of abuse or neglect must occur during the adjudicatory phase before the circuit court can proceed to the disposition phase. The Court distinguished *Cecil T.* from the instant case because the

father in *Cecil T.* had been adjudicated. The Court further explained that the circuit court could have found that the children were neglected, as defined by West Virginia Code § 49-1-201,[25] and after so finding could have proceeded to disposition. The Court, therefore, reversed the circuit court order that terminated the father's parental rights. The Court further stated that the circuit court lacked jurisdiction to proceed to disposition once it found that the father had not abandoned the children. Finally, the Court stated that the DHHR could file an amended petition.

In a separate opinion, Justice Workman concurred in part and dissented in part. She concurred that the adjudication and disposition findings should have been made in separate hearings. However, she dissented with regard to several points in the majority opinion. First, she asserted that the case should have been remanded for further proceedings, as opposed to allowing, but not requiring the DHHR to file a new petition. She reasoned that the children would be left without a permanent placement if the DHHR did not proceed with a new or amended petition. Secondly, she pointed out that the majority should have clarified that long-term incarceration is a form of neglect. Third, she asserted that the factors set forth in *Cecil T.* could be properly considered at either the adjudicatory or dispositional phase of a case. She concluded her separate opinion by stating that the circuit court should consider financial assistance that could be provided to the relative placement, the type of long-term placement that would be appropriate for the children, and whether post-termination visitation should be allowed.

*In re Kasey M.*, 228 W. Va. 221, 719 S.E.2d 389 (2011)(per curiam)

The Supreme Court held that the circuit court erred when it transferred custody of a child from his father to his mother when the DHHR, before adjudication, voluntarily dismissed the abuse and neglect petition against the father. The Court explained that it was error to proceed to disposition when the child had not been adjudicated as an abused or neglected child.

*In re A.G.*, 247 W. Va. 249, 878 S.E.2d 744 (2022)

*Note: For a complete discussion of this case, see Chapter 6, Section VII.B.*

In this case, paternity of one of the children had not been established at the time that the petition was filed. Separate attorneys were appointed for the unknown father and the putative father, A.G.-2. The order scheduling the hearing indicated it that it was a status hearing for paternity and adjudication for the other respondents. At the hearing, the unknown father was adjudicated, but the putative father, A.G.-2, was not.

[25] In relevant part, West Virginia Code § 49-4-201 states that: "Neglected child" means a child: (A) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care, or education, when that refusal, failure, or inability is not due primarily to a lack of financial means on the part of the parent, guardian, or custodian;
(B) Who is presently without necessary food, clothing, shelter, medical care, education, or supervision because of the disappearance or absence of the child's parent or custodian….

Subsequently, A.G.-2 participated in paternity testing and was found to be the child's father. After conducting disposition proceedings, the circuit court found that the adjudication of the unknown father applied to A.G.-2, and it terminated his parental rights.

In the opinion, the Supreme Court found that the circuit court erred when it conducted an adjudicatory hearing of which the putative father did not have notice. The Supreme Court noted that a written order from the adjudicatory hearing indicated that the unknown father, not A.G.-2, had been adjudicated. After reviewing the record, the Supreme Court concluded that A.G.-2 had never been afforded an adjudicatory hearing of which he had notice. It further concluded that the circuit court erred by proceeding to disposition as to A.G.-2 when A.G.-2 had not been properly adjudicated.

*In re K.L.,* 247 W. Va. 657, 885 S.E.2d 595 (2022)

The petition included allegations of educational neglect, medical neglect, and substance abuse against the parents of K.L., a school-aged child. At the adjudicatory hearing, the father stipulated to the allegations of educational neglect and medical neglect, but not to the substance abuse allegations. However, evidence in the record indicated that the father had been found guilty of possession of methamphetamine and that he had been using a synthetic urine product to pass drug screens after the petition was filed. At the adjudicatory hearing, the DHHR reserved the right to produce evidence with regard to any matter that was not admitted, presumably the father's substance abuse issues.

Before disposition, the father filed a written motion for an improvement period, but he later withdrew his motion at a hearing. Subsequently, the circuit court conducted two hearings on the father's disposition. The evidence was mixed in that it showed that the father had a good relationship with K.L., but that he denied a substance abuse problem and he would not participate in drug screens. At the conclusion of the disposition hearings, the court found that a post-dispositional improvement period was the appropriate disposition. The court directed the parties to establish the terms of the improvement period at an MDT. Although the court directed the parties to consider drug testing, the order from the hearing did not require the father to drug screen. At the status hearing conducted approximately two months later, the father had not yet screened. The circuit court found that the father had failed to participate in his improvement period because he did not drug screen; therefore, it terminated his parental rights.

On appeal, the father asserted that his parental rights should not have been terminated based up substance abuse because he had not been adjudicated on the substance abuse allegations. As authority, he primarily relied on *In re Lilith H.*, 744 S.E.2d 280 (W. Va. 2013), a case in which a disposition order that terminated parental right was reversed because it was based upon facts on which the parents were not adjudicated. The West Virginia Supreme Court agreed with the father because the father's alleged substance abuse was the basis for the termination of his parental rights, but he had never been adjudicated on the substance abuse allegations.

As another basis for reversal, the Supreme Court noted that there was no indication in the record that the parties had participated in an MDT and had established the terms of an improvement period. The Supreme Court also noted that a family case plan, required by West Virginia Code § 49-4-610(3)(E), had not been prepared and filed. The Supreme Court found that "Failure to comply with amorphous improvement period requirements cannot form the basis of a termination of parental rights." See *In re Desarae M.*, 591 S.E.2d 215 (W. Va. 2003). The Supreme Court further explained that drug screening could be required in a case where the adjudication was not based upon substance abuse. However, it pointed out that the error in this case was that the drug screening requirement had not been incorporated into an improvement period and a case plan.

In a separate opinion, Justice Armstead dissented because he asserted that there was sufficient evidence of the father's substance abuse in the record. Additionally, he pointed out that the respondent father had agreed to participate in drug screens, but then refused to do so. Further, he noted that the circuit court's reason for the termination was the father's failure to participate in his improvement period, not his substance abuse.

## B. Voluntary Dispositional Plan

Syl. Pt. 2, *State v. T.C.*, 172 W. Va. 47, 303 S.E.2d 685 (1983); Syl. Pt. 4, *In re T.W.*, 230 W. Va. 172, 737 S.E.2d 69 (2012)

W.Va. Code, 49-6-1, *et seq.*, does not foreclose the ability of the parties, properly counseled, in a child abuse or neglect proceeding, to make some voluntary dispositional plan. However, such arrangements are not without restrictions. First, the plan is subject to the approval of the court. Second, and of greater importance, the parties cannot circumvent the threshold question which is the issue of abuse or neglect.

Syl. Pt. 2, *In re Beth Ann B.*, 204 W. Va. 424, 513 S.E.2d 472 (1998)

In a child abuse and/or neglect proceeding, even where the parties have stipulated to the predicate facts necessary for a termination of parental rights, a circuit court must hold a disposition hearing, in which the specific inquiries enumerated in Rules 33 and 35 of the Rules of Procedure for Child Abuse and Neglect Proceedings are made, prior to terminating an individual's parental rights.

Syl. Pt. 9, *In re T.W.*, 230 W. Va. 172, 737 S.E.2d 69 (2012)

In an abuse and neglect case, the offer of a voluntary relinquishment of parental rights does not obviate the statutory requirements regarding the necessity for proceeding with the adjudicatory and dispositional phases of the abuse and neglect case. Prior to accepting an offer of voluntary termination of parental rights, a reviewing court must conduct the hearings required by West Virginia Code §§ 49-6-2 and 49-6-5.

*W. Va. Code § 49-4-601(i)*

*W. Va. Code § 49-4-604*

A father, John W., resided in West Virginia with his two older children. His younger two children resided primarily with their mother, Stephanie D., in Maryland, but they visited with their father in West Virginia. An abuse and neglect petition was filed against the father, and it was based upon deplorable conditions in his home, abandonment, physical abuse and the father's sexual misconduct with one of his older daughters. Although one of the younger girls was allegedly raped by the boyfriend of one of the older girls during a visit with her father, this fact was never included in the original or amended petition.

As a defensive maneuver, the father offered to relinquish his parental rights to his older children without any admission of abuse or neglect and conditioned his relinquishment upon the absence of any further proceedings against him in the abuse and neglect case. Although the guardian *ad litem* requested that the court conduct an *in camera* hearing to hear testimony from the older children, the circuit court did not do so. Ultimately, it accepted the father's relinquishment with regard to his older children and dismissed the younger two children from the case. In response, the mother of the younger two children filed an appeal.

After reviewing the record, the Supreme Court found that the circuit court erred by failing to conduct a full evidentiary hearing, including an *in camera* hearing with the older children, concerning the grievous allegations of abuse and neglect. The Court held that the offer of a voluntary relinquishment does not relieve a circuit court of its obligation to conduct adjudicatory and disposition hearings.

As additional grounds for reversal, the Court noted that the failure to conduct the required hearings was contrary to the children's best interests because the father's visitation with both sets of children remained a possibility. However, the allegations of the petition indicated that the children would be at risk if visitation were allowed to occur. The Court, therefore, concluded that it was contrary to the children's best interests for the circuit court to have failed to conduct full adjudicatory and disposition hearings. Providing guidance for further proceedings upon remand, the Court directed the circuit court to appoint a separate guardian *ad litem* for the younger children, as had been previously requested by the guardian *ad litem*. The Court further directed the DHHR to include the allegations of the rape of one of the younger children in an amended petition.

Syl. Pt. 4, *In re Marley M.*, 231 W. Va. 534, 745 S.E.2d 572 (2013)

Where during the pendency of an abuse and neglect proceeding, a parent offers to voluntarily relinquish his or her parental rights and such relinquishment is accepted by the circuit court, such relinquishment may, without further evidence, be used as the basis of an order of adjudication of abuse and neglect by that parent of his or her children.

*Note: For a complete discussion of this case, see Section XIII.C.*

## C. Mandatory to Conduct Dispositional Hearing

Syl. Pt. 2, *In re Beth Ann B.*, 204 W. Va. 424, 513 S.E.2d 472 (1998); Syl. Pt. 8, *In re T.W.*, 230 W. Va. 172, 737 S.E.2d 69 (2012)

In a child abuse and/or neglect proceeding, even where the parties have stipulated to the predicate facts necessary for a termination of parental rights, a circuit court must hold a disposition hearing, in which the specific inquiries enumerated in Rules 33 and 35 of the Rules of Procedure for Child Abuse and Neglect Proceedings are made, prior to terminating an individual's parental rights.

Syl. Pt. 3, *State ex rel. W. Va. DHHR and Chastity D. v. Hill*, 207 W. Va. 358, 532 S.E.2d 358 (2000); Syl. Pt. 7, *In re T.W.*, 230 W. Va. 172, 737 S.E.2d 69 (2012)

In a child abuse and neglect proceeding where abandonment of the child by either or both biological parents is alleged and proven, the circuit court should decide in the dispositional phase of the proceeding whether to terminate any or all parental rights to the child. Before making that decision, even where there are written relinquishments of parental rights, the circuit court is required to conduct a disposition hearing, pursuant to West Virginia Code § 49-6-5 and Rules 33 and 35 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, at which the issue of such termination is specifically and thoroughly addressed.

*W. Va. Code § 49-4-604*

*In re K.S.*, 246 W. Va. 517, 874 S.E.2d 319 (2022)

An abuse and neglect petition was filed after a mother tested positive for illicit substances during a family court hearing. Each of the mother's three children were placed with their biological fathers because of the mother's methamphetamine use. During her post-adjudicatory improvement period, the mother, who had been testing negative, relapsed and went to an inpatient 28-day treatment program. After her completion, she remained clean for several months and was granted a post-dispositional improvement period. During this time, the mother's visits were suspended for administrative reasons. Shortly thereafter, the mother relapsed in March of 2020. Although the planned disposition had been reunification or placement with the fathers, the DHHR began to request termination of the mother's parental rights after the second relapse. A disposition hearing was originally scheduled for July of 2020, it but was rescheduled for three months later. During the interim, the mother was not provided with drug screens, nor was she afforded any visitation.

At the beginning of the hearing, the guardian *ad litem* and the assistant prosecutor recommended a disposition 5, but the DHHR and the three fathers all requested termination of parental rights. At the hearing, the assistant prosecutor did not present any testimony, nor did she introduce any other evidence. The mother presented the testimony of her therapist, who indicated that the mother was faithfully attending therapy, even though the termination of her parental rights appeared to be imminent. The mother's therapist also testified as to the mother's insight into her substance abuse and her plan

to continue in therapy even if her parental rights were terminated. The mother further testified to obtaining employment. At the end of the hearing, the mother requested that she be allowed additional time on her dispositional improvement period. The circuit court, however, terminated her parental rights and placed each child with his or her biological father.

The first issue that the Supreme Court addressed was the DHHR's failure to present any testimony at the disposition hearing. Relying on prior cases, the Supreme Court noted that: "[A] dispositional hearing is a necessary and vital part of abuse and neglect proceedings." 872 S.E.2d at 327. The Court also reiterated that the DHHR is required to produce clear and convincing evidence before parental rights may be terminated and that the burden does not shift to the parents or custodians.

Turning to the record below, the Supreme Court observed that the DHHR had not obtained drug test results from the mother's treatment providers when the DHHR was not performing drug testing because of Covid. It also found that the DHHR's reliance on case summaries was not a sufficient evidentiary basis for the termination of parental rights and that much of the information contained in the summaries was not current. Further, the Court pointed out that the failure to provide the mother with any services left her without any avenue to demonstrate her improvement. Finally, the Court noted that the DHHR had not been providing any services to the mother, even though she remained on an improvement period.

Pointing to further errors, the Court that the DHHR had not provided any evidence to the circuit court that it was necessary for the children's welfare to terminate their mother's parental rights. Secondly, the Court found that DHHR's failure to present any evidence resulted in shifting the evidentiary burden to the mother. Accordingly, the Supreme Court reversed the termination of the mother's parental rights.

### D. Burden of Proof

Syl. Pt. 4, *In re K.L.*, 233 W. Va. 547, 759 S.E.2d 778 (2014)

"[T]he burden of proof in a child neglect or abuse case does not shift from the State Department of [Health and Human Resources] to the parent, guardian or custodian of the child. It remains upon the State Department of [Health and Human Resources] throughout the proceedings." Syl. Pt. 2, in part, *In the Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981).

The petition in *K.L.* was based solely upon the mother's prior involuntary termination of parental rights to the child's older sibling. At disposition, the circuit court shifted the burden to the mother and required her to show a substantial change in circumstances since the prior involuntary termination of her parental rights. Although this issue was not presented on appeal, the Supreme Court applied the plain error doctrine and held that the mother's due process rights had been violated by shifting the burden to her. The case was remanded to the circuit court with the directive that, if the DHHR

wanted to proceed on abuse or neglect allegations against the mother, it would have to include specific allegations of abuse or neglect in any amended petition. The Court observed that such allegations could include that the mother had failed to correct the circumstances of abuse and neglect that led to the prior termination of her parental rights, the standard established by Syllabus Point 5 of *In re George Glen B., Jr.*, 532 S.E.2d 64 (W. Va. 2000).

## E. Controlling Standard for Disposition

Syl. Pt. 4, *In re B.H.*, 233 W. Va. 57, 754 S.E.2d 743 (2014)

In making the final disposition in a child abuse and neglect proceeding, the level of a parent's compliance with the terms and conditions of an improvement period is just one factor to be considered. The controlling standard that governs any dispositional decision remains the best interests of the child.

The respondent mother was subject to an abuse and neglect case because she was in a relationship with a registered sex offender who, in turn, sexually abused her two minor daughters. During the case, custody of the children was granted to the noncustodial father. At disposition, the circuit court placed the children with their father as the primary residential parent and granted the mother unsupervised visitation. She appealed the final disposition on the basis that she had complied with the case plan and had not been afforded enough unsupervised visitation time to prove that the abusive and neglectful conditions in her home had been corrected.

Rejecting the mother's argument, the Supreme Court recognized that completing assigned tasks in an improvement period is not the pivotal question at disposition. Rather, the Court stated that: "Indeed, the overriding consideration must be whether the issues that brought about the allegations of abuse and/or neglect have been addressed by the parent in a substantive and effective manner, and whether those conditions of abuse and/or neglect have been sufficiently remedied such that it is in the child's best interests to be returned to the parent's custody." 754 S.E.2d at 751.

The Supreme Court further observed that the circuit court had a difficult task in determining whether the mother had made sufficient improvements to justify the return of the children. The Court noted that:

> Unlike an abuse and neglect proceeding that involves a dirty home or a parent abusing drugs, where a parent's success in an improvement period can be measured in concrete terms of whether the home is clean or the parent's drug screens are negative, here, the circuit court had to assess whether the mother had internalized what the service providers endeavored to teach her during her improvement period and whether she would, in fact, protect her children by avoiding relationships with individuals in whose presence her children were placed at risk of abuse. 754 S.E.2d at 752.

## F. Accelerated Disposition Hearing

Syl. Pt. 3, *In re Travis W.*, 206 W. Va. 478, 525 S.E.2d 669 (1999)

*W. Va. Code § 49-4-604*

*W. Va. Code § 49-4-408*

Pursuant to Rule 32 of the West Virginia Rules of Procedure for Child Abuse and Neglect, circuit courts may hold accelerated disposition hearings immediately following adjudication hearings if: (1) the parties agree; (2) the child's case plan which meets the requirements of W. Va. Code §§ 49-6-5 and 49-6D-3 is provided to the court or the party or parties waive the requirement that the child's case plan be submitted prior to disposition; and (3) notice is provided or waived.

## G. Child Case Plan and Permanency Plan

*State ex rel. S.C. v. Chafin*, 191 W. Va. 184, 444 S.E.2d 62 (1994)

*W. Va. Code § 49-4-601*

*W. Va. Code § 49-4-604(a)*

Syl. Pt. 1, in part: If, pursuant to W. Va. Code § 49-6-2, the court finds the child to be abused or neglected, then both the DHHR and the court, no later than 60 days after the child is placed in the temporary custody of the DHHR, are to proceed with the disposition of the child, in compliance with W. Va. Code § 49-6-5. West Virginia Code § 49-6-5(a) requires the DHHR to file with the court a copy of the child's case plan, including the permanency plan for the child.

*W. Va. Code § 49-4-408*

West Virginia Code § 49-6-5(a) defines a case plan as a written document which includes, where applicable, the requirements of the family case plan as set forth in W. Va. Code § 49-6D-3, as well as the additional requirements set forth in W. Va. Code § 49-6-5(a).

Syl. Pt. 4, in part: The purpose of the child's case plan is the same as the family case plan except that the focus of the child's case plan is on the child rather than the family unit.

## H. Reasonable Efforts Not Required to Preserve the Family

*In re B.V.*, --- W. Va. ---, 886 S.E.2d 364 (2023)

*Note: The primary legal issue addressed in this case involved subject matter jurisdiction of the children who had been placed in legal guardianships before this case was filed. See Section I.A.*

On appeal, the mother argued that the circuit court erred when it found that the DHHR was not required to make reasonable efforts to preserve the family pursuant to West Virginia Code § 49-4-604(c)(7). The Supreme Court, however, pointed out that one of the children had been subject to chronic physical abuse by the father and that the mother had not taken steps to prevent it. The Court, therefore, concluded that the circuit court did not err when it made a finding of chronic abuse, which relieved the DHHR from its duty to make reasonable efforts to preserve the family.

In addition, the Supreme Court noted that the DHHR had attempted to provide services to the family, but that the parents did not provide contact information and they moved across the state without informing the DHHR. Further, the Court pointed out that neither parent admitted to the abuse. For these reasons, the Court found that the circuit court did not err when it found that the DHHR was not required to make reasonable efforts to preserve the family.

## I. Modification of Dispositional Orders

*In re Cesar L.*, 221 W. Va. 249, 654 S.E.2d 373 (2007)

A mother had been subject to prior abuse and neglect cases, and her rights to her first three children were terminated. When her fourth child was born, both she and her son tested positive for drugs. Based upon the previous involuntary termination of parental rights and the positive drug tests, the fourth child was removed from her care. During the case, she was incarcerated in Virginia for an outstanding warrant.

*W. Va. Code § 49-4-606*

While incarcerated, the mother executed a voluntary relinquishment of her parental rights. Approximately seven months later, she moved to modify the dispositional order pursuant to West Virginia Code § 49-6-6. This code section allows a child, a child's parent or custodian or the DHHR to move for a modification of a dispositional order until the child has been adopted. The circuit court held that the mother lacked standing to modify the dispositional order because she could no longer be considered the child's parent. In response to this ruling, she moved to withdraw her voluntary relinquishment, but the circuit court concluded that she had failed to prove that she had been subject to fraud or duress.

On appeal, the West Virginia Supreme Court held that the mother could no longer be considered the child's parent because the voluntary relinquishment severed her parental relationship to her child. Extending this reasoning to cases of both voluntary and involuntary termination of parental rights, the Court concluded that: "[A]n involuntary termination or a voluntary relinquishment of parental rights permanently severs the parent-child relationship and relieves such person of all the rights and privileges, as well as duties and obligations, considered to be 'parental rights . . ..'"

After examining the language of the relevant statute, the West Virginia Supreme Court adopted the following syllabus points that concern voluntary relinquishments:

*W. Va. Code § 49-4-607*

Syl. Pt. 3: W. Va. Code § 49-6-7 permits a parent to voluntarily relinquish his/her parental rights. Such voluntary relinquishment is valid pursuant to W. Va. Code § 49-6-7 if the relinquishment is made by "a duly acknowledged writing" and is "entered into under circumstances free from duress and fraud."

Syl. Pt. 5: A valid voluntary relinquishment of parental rights, effectuated in accordance with W. Va. Code § 49-6-7, includes a relinquishment of "rights to participate in the decisions affecting a minor child," W. Va. Code § 49-1-3(o), and causes the person relinquishing his/her parental rights to lose his/her status as a parent of that child.

*W. Va. Code § 49-1-204*

With regard to cases involving both voluntary and involuntary termination of parental rights, the Supreme Court held that such a person has lost his or her status as a parent and, therefore, lacks standing to modify a dispositional order. Affirming the circuit court, the Supreme Court adopted the following syllabus points:

Syl. Pt. 1: The plain language of W. Va. Code § 49-6-6 permits a child, a child's parent or custodian, or the West Virginia Department of Health and Human Resources to move for a modification of the child's disposition where a change of circumstances warrants such a modification. However, a child's disposition may not be modified after he/she has been adopted.

*W. Va. Code § 49-4-606*

Syl. Pt. 2: For purposes of W. Va. Code § 49-6-6, "parent" means the biological or natural father or mother of a child; the adoptive father or mother of a child; or the legal guardian of a child.

Syl. Pt. 4: A final order terminating a person's parental rights, as the result of either an involuntary termination or a voluntary relinquishment of parental rights, completely severs the parent-child relationship, and, as a consequence of such order of termination, the law no longer recognizes such person as a "parent" with regard to the child(ren) involved in the particular termination proceeding.

Syl. Pt. 6: A person whose parental rights have been terminated by a final order, as the result of either an involuntary termination or a voluntary relinquishment of parental rights, does not have standing as a "parent," pursuant to W. Va. Code § 49-6-6, to move for a modification of disposition of the child with respect to whom his/her parental rights have been terminated.

*In re S.W.*, 236 W. Va. 309, 779 S.E.2d 577 (2015)

The mother's substance abuse and related problems resulted in this abuse and neglect case. After initial proceedings, the trial court issued a disposition order and placed custody of S.W., a young child, with his paternal grandparents. Under this same order, the mother and the maternal grandparents were afforded liberal visitation with the child. At the permanency hearing, the trial court granted legal guardianship to the grandparents.

Approximately nine months after the permanency hearing, the mother petitioned to overturn or dissolve the legal guardianship. As grounds for her petition, the mother cited her graduation from drug court and continued sobriety for over a year. She also presented evidence of the bond between herself and the child. As a result of this evidence, the circuit court terminated the legal guardianship and ordered a transfer of custody to occur within ten days.

On appeal, the guardian *ad litem* and the paternal grandparents argued that the circuit court erred by terminating the legal guardianship. The DHHR joined in their position.

The Court noted that the mother's petition to terminate the legal guardianship was premised upon West Virginia Code § 49-6-6 (now codified at West Virginia Code § 49-4-606). Under this statute, there are two prerequisites for the modification of a dispositional order: 1) a material change of circumstances; and 2) the modification or alternation of the disposition must serve the best interests of the child. As part of its analysis, the Court reviewed the minor guardianship statute, West Virginia Code § 44-10-3, and Rule 46 of the West Virginia Rules of Child Abuse and Neglect, and concluded that they include the same two requirements for the modification of a guardianship: 1) a substantial change of circumstances; and 2) the child's best interests. Further, the Court noted that it had addressed the same requirements in a case involving the termination of a family court guardianship. See *In re K.H.*, 773 S.E.2d 20 (W. Va. 2015).

After reviewing the evidence presented, the Court found that the record was insufficient to conclude that it was in S.W.'s best interests to terminate the guardianship. The Court noted that the mother had made significant improvements but pointed out that the mother did not articulate how the termination of the guardianship would promote the child's best interests. As an example, the Court noted that the mother was unaware as to whether the child would have to change schools. The Court reversed the circuit court and remanded the case for the entry of a visitation order with the mother and maternal grandparents. The Court instructed that the contact between the child and his mother should be extensive. The Court also noted that the visitation schedule would be subject to modification as the circumstances might warrant and as the child aged.

*In re B.W.*, 244 W. Va. 535, 854 S.E.2d 897 (2021)

The case was initiated when the parents failed to take care of the basic needs of their child, and they were identified as having intellectual disabilities. During the case, the DHHR made efforts to modify existing parenting services to assist the parents. At the conclusion of the case, the circuit court did not terminate parental rights, but imposed a disposition 5 because there were no parenting services that met the parents' needs under the Americans with Disabilities Act. See W. Va. Code § 49-4-604(c)(5). The parents did not appeal this disposition, but later the mother submitted a handwritten letter to the circuit court, and she asked when she would get her child back. At a status hearing conducted in response to the letter, the parents recounted the improvements that they had made. However, the circuit court terminated parental rights for both respondents, and it indicated its hope that the parents would appeal the termination to bring attention to the lack of ADA parenting services available in West Virginia.

After reviewing the case, the Supreme Court noted that the parents' argument concerning lack of ADA-compliant services had been waived because neither parent had appealed the disposition order. The Court, however, concluded that it was error for the circuit court to modify the disposition, *sua sponte*, without a pending motion and without any notice to the parties. The Court concluded its opinion by pointing out that DHHR

could move to modify the disposition should it believe that termination of parental rights was warranted. The Court vacated the termination order and remanded the case for reinstatement of the prior disposition order.

## J. Least Restrictive Alternatives

Syl. Pt. 2, *In re R.J.M.,* 164 W. Va. 496, 266 S.E.2d 114 (1980); Syl. Pt. 2, *W. Va. DHHR v. Billy Lee C.*, 199 W. Va. 541, 485 S.E.2d 710 (1997); Syl. Pt. 7, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996); Syl. Pt. 1, *In re Danielle T.*, 195 W. Va. 530, 466 S.E.2d 189 (1995); Syl. Pt. 2, *In re Dejah Rose P.*, 216 W. Va. 514, 607 S.E.2d 843 (2004); Syl. Pt. 3, *In re Maranda T.*, 223 W. Va. 512, 678 S.E.2d 18 (2009); Syl. Pt. 5, *In re Nelson B.*, 225 W. Va. 680, 695 S.E.2d 910 (2010)

*W. Va. Code § 49-4-604(b)*

Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. Va. Code § 49-6-5 may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code § 49-6-5(b) that conditions of neglect or abuse can be substantially corrected.

Syl. Pt. 1, *In re R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114 (1980); Syl. Pt. 5, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996); Syl. Pt. 1, *In re Lacey P.*, 189 W. Va. 580, 433 S.E.2d 518 (1993); Syl. Pt. 1, *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991); Syl. Pt. 4, *In re Nelson B.*, 225 W. Va. 680, 695 S.E.2d 910 (2010); Syl. Pt. 5, *In re Kristin Y.*, 227 W. Va. 558, 712 S.E.2d 55 (2011)

As a general rule the least restrictive alternative regarding parental rights to custody of a child under W. Va. Code § 49-6-5 will be employed; however, courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements.

*In re Nelson B.*, 225 W. Va. 680, 695 S.E.2d 910 (2010)

In this case, the respondent father had a serious mental illness and, despite receiving significant assistance during an improvement period, was unable to adequately parent his son. At the conclusion of the improvement period, the circuit court declined to terminate the father's parental rights and instead approved a permanency plan that involved legal guardianship of the child by a maternal aunt and uncle.

The father appealed the ruling and argued that the circuit court failed to consider a less drastic alternative. Affirming the circuit court, the Supreme Court noted that the ruling, although difficult, afforded the father regular and meaningful contact with his son. The Supreme Court further noted that this permanency plan would allow the father to

modify the role he was playing in his son's life if his mental health significantly improved in the future. The Court concluded the opinion by encouraging the circuit court to promptly rule on the pending guardianship petition.

*In re B.S.*, 242 W. Va. 123, 829 S.E.2d 754 (2019)

A child was removed from the mother's custody because of her substance abuse and was, during the case, placed with the father. During an improvement period, the mother entered a sober living facility and maintained her sobriety for approximately six months. After the mother relapsed and moved out of the sober living facility, the court conducted a disposition hearing. The DHHR, the guardian *ad litem*, and the father requested that the mother's rights be terminated. The mother, however, requested that only her custodial rights be terminated. The court agreed and terminated the mother's custodial rights, but not her parental rights.

On appeal, the father argued that the mother's parental rights should have been terminated. The Supreme Court, however, found that the circuit court order was consistent with the directive in West Virginia Code § 49-4-604(b), that precedence be given to the least restrictive alternative. Affirming the circuit court, the Court held that the ruling was plausible in light of the record viewed in its entirety.

*In re D.P.*, 245 W. Va. 791, 865 S.E.2d 812 (2021)

An abuse and neglect petition was filed after a three-year old autistic child had left his home twice in two days and was found on a busy road. The two children in the home were placed in foster care, and the mother gave birth to another child during the case who was also placed in foster care. During their post-adjudicatory improvement periods, the parents had times of compliance, as well as times of significant non-compliance. At disposition, the parents' post-adjudicatory improvement periods had lasted for 34 months for the older two children and 21 months for the youngest child. The testimony at disposition indicated that there were serious doubts as to whether the parents could provide effective supervision for all of the children. At the conclusion of the hearing, the circuit court terminated their parental rights.

On appeal, the parents argued that the circuit court erred by failing to grant them the least restrictive disposition. Specifically, the parents argued that one or two of the children should have been returned to them.

In its review, the Supreme Court pointed out that the circuit court had not adhered to the statutory time frames for improvement periods, nor had it made the findings mandated by West Virginia Code § 49-4-610 to extend the post-adjudicatory improvement periods. The Court reiterated that the time limits are mandatory and that the delay in establishing permanency was detrimental to the children.

The Court also concluded that the circuit court did not err when it found that there was no reasonable likelihood that the parents could substantially correct the conditions of abuse or neglect in the near future. The Court observed that the parents had significant

times of non-compliance and that their improvement was minimal, despite having almost three years to show progress. The Court, therefore, affirmed the termination of parental rights.

*In re Aaron Thomas M.*, 212 W. Va. 604, 575 S.E.2d 214 (2002)

*In re Tiffany P.*, 215 W. Va. 622, 600 S.E.2d 334 (2004)

*In re B.B.*, 224 W. Va. 647, 687 S.E.2d 746 (2009)

## K. Time Lines at Disposition

*In re C.S.*, 247 W. Va. 212, 875 S.E.2d 350 (2022)

Syl. Pt. 4: Pursuant to West Virginia Code § 49-4-605(a)(1), the Department of Health and Human Resources has a duty to file, join, or participate in proceedings to terminate parental rights when "a child has been in foster care for 15 of the most recent 22 months as determined by the earlier of the date of the first judicial finding that the child is subjected to abuse or neglect or the date which is 60 days after the child is removed from the home." West Virginia Code § 49-4-605(a)(1) does not relieve the Department of its burden of proof in abuse and neglect cases.

Syl. Pt. 5: West Virginia Code § 49-4-605(a)(1) does not mandate that a circuit court terminate parental rights merely upon the filing of a petition pursuant to this statute. To terminate parental rights, the circuit court must make the findings required by West Virginia Code § 49-4-604(c)(6).

The respondent mother had two children, one who was placed in a legal guardianship approximately five years before the abuse and neglect case was filed and one who was placed in foster care when the petition was filed. The record indicated that the mother's problems with substance abuse and lack of participation continued throughout the earlier part of the case. Later in the case, the mother showed progress in that she had passed her drug screens, had moved to a new apartment, and was participating in outpatient counseling. At the disposition hearing, the DHHR presented a minimal amount of evidence and relied primarily on the length of time that the younger child had been in foster care. The circuit court noted that the mother's progress was not sufficient and terminated the mother's parental rights to both of the children. The court's written order did not include the required findings of fact or conclusions of law. In response, the mother appealed.

In its opinion, the Supreme Court explained that the relevant statute, West Virginia Code § 49-4-605(a), requires that the DHHR request termination of parental rights if a child has been in foster care for 15 out of the most recent 22 months. Despite this requirement, the Supreme Court found that the DHHR must still meet the burden of proof established by West Virginia Code § 49-4-604(c)(6). The Court also observed that a circuit must also make the findings required by the statute. In summary, the Court held

that: "The presence of a child in foster care for than fifteen of the most recent twenty-two months cannot be the sole reason for termination of a parent's rights." 875 S.E.2d at 359.

Reviewing the disposition orders, the Supreme Court noted that the circuit court did not make any of the findings required by West Virginia Code § 49-4-604(c)(6) -- whether there was no reasonable likelihood that the conditions of neglect or abuse could be substantially corrected in the near future and why termination would be necessary for the child's welfare. Although the circuit court had, on the record, expressed that the mother's efforts were not sufficient to avoid termination, the Supreme Court recognized that the reasoning was only mentioned after the lower court had determined that the mother's rights should be terminated. Therefore, the Supreme Court reversed the termination order and remanded the case for another dispositional hearing.

The second issue addressed in the opinion involved the older child, B.S., who had been placed in a guardianship five years before the abuse and neglect case. The Supreme Court found that the child B.S. did not meet the definition of an abused or neglected child because the child was subject to a legal guardianship and because the mother could have only regained custody of B.S. by filing a petition to terminate the guardianship.[26] Since the evidence failed to show that the mother should have been adjudicated with respect to B.S., the Supreme Court found that the circuit court did not have jurisdiction to terminate the mother's parental rights to her older child.

## L. Standard of Proof

Syl. Pt. 6, *In the Matter of Ronald Lee Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973); Syl. Pt. 3, *In re Jessica M.*, 231 W. Va. 254, 744 S.E.2d 652 (2013)

The standard of proof required to support a court order limiting or terminating parental rights to the custody of minor children is clear, cogent and convincing proof.

*In re Jessica M.*, 231 W. Va. 254, 744 S.E.2d 652 (2013)

On appeal, a mother argued that the evidence that served as a basis for the termination of her parental rights failed to meet the requisite level of proof. Apparently, the primary basis for the termination of parental rights was an alleged statement by the

[26] Although the Supreme Court did not discuss the statute that governs petitions, it should be noted that the applicable subpart states as follows:

> In a case *where there is more than one child in the home, or in the temporary care, custody or control of the alleged offending parent*, the petition shall so state. Notwithstanding the fact that the allegations of abuse or neglect may pertain to less than all of those children, *each child in the home for whom relief is sought shall be made a party to the proceeding*. Even though the acts of abuse or neglect alleged in the petition were not directed against a specific child who is named in the petition, the court shall order the removal of the child, pending final disposition, if it finds that there exists imminent danger to the physical well-being of the child and a lack of reasonable available alternatives to removal. W. Va. Code § 49-4-602(a)(3) (emphasis added).

daughter that the mother had taught her how to masturbate. Supposedly, the child made this statement to a CPS worker during a forensic interview, but neither the CPS worker, nor the child ever testified that the child actually made this statement. In addition, the Court noted that the mother had consistently visited with her children and interacted well with them. The bond between the mother and her children was recognized by visit supervisors. The mother also engaged in parenting classes and attended all hearings. Further, a therapist testified that the mother had gained insight, both concerning her self-worth and what she needed to do to be reunified with her children. The only unfavorable evidence was presented by a CPS worker, and his allegations were uncorroborated. Therefore, the Court concluded that the disposition order must be reversed on the grounds of clear error.

## M. Finding of Imminent Danger Not Required

*State v. Carl B.*, 171 W. Va. 774, 301 S.E.2d 864 (1983) (per curiam)

The circuit court terminated parental rights after four improvement periods. The Supreme Court affirmed, holding: (1) there is no requirement that the court find that the children were in imminent danger; and (2) that immediate appointment of counsel for indigent parent in hearing following emergency taking was sufficient.

*Kenneth B. v. Elmer Jimmy S.*, 184 W. Va. 49, 399 S.E.2d 192 (1990)

*Nancy Viola R. v. Randolph W.*, 177 W. Va. 710, 356 S.E.2d 464 (1987)

*In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991)

*James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991)

## N. Proof of Failure to Comply with Family Case Plan Unnecessary

Syl. Pt. 4, *In re B.H.*, 233 W. Va. 57, 754 S.E.2d 743 (2014)

In making the final disposition in a child abuse and neglect proceeding, the level of a parent's compliance with the terms and conditions of an improvement period is just one factor to be considered. The controlling standard that governs any dispositional decision remains the best interests of the child.

For a complete discussion of this case, see Sections IX.E. and X.C.

*W. Va. DHS v. Peggy F.*, 184 W. Va. 60, 399 S.E.2d 460 (1990) (per curiam)

DHS filed for temporary custody of six of the mother's 11 children alleging abuse and neglect. DHS was ordered to prepare and submit a family case plan. Following hearings on success of improvement period, the circuit court ordered termination of mother's parental right to five of the six children and ordered the child over 14 to remain in the temporary custody of the DHS until her eighteenth birthday. The mother appealed and Supreme Court upheld the trial court's findings and conclusions, found that DHS was

not required to prove its case by showing that the mother failed to comply with the family case plan, and found the trial court complied with the statutory requirements in terminating the parental rights.

*In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996)

The court may terminate parental rights even if the DHHR does not prove that the parents have failed to comply with the Family Case Plan while on an improvement period.

*In re Jonathan Michael D.*, 194 W. Va. 20, 459 S.E.2d 131 (1995)

Even though parents perform all of the tasks set forth in the family case plan filed pursuant to the granting of an improvement period, parental rights may be terminated where the parents' attitudes and beliefs did not change during the improvement period. 459 S.E.2d at 138.

Simply going through the motions to appease the DHHR is insufficient--there must be an improvement in the overall attitude and approach to parenting.

*In re N.H.*, 241 W. Va. 648, 827 S.E.2d 436 (2019)

Three children, N.H., C.H., and B.H., were removed from their mother's custody because of her substance abuse and because of domestic violence between the mother and her live-in boyfriend. In addition, one of the children was autistic, and the mother had not provided the school with required medical documentation so that educational services could be provided. A second child had serious behavioral issues and health problems, and the third child suffered from anxiety and depression. Further, there were multiple occasions when the mother had not met the children at their bus stop, and the children had to be returned to school.

During the course of a post-adjudicatory improvement period, the mother participated in drug treatment and was in a program that was designed to wean her from Subutex. Her boyfriend also participated in an online anger management class. Despite the mother's progress with substance abuse treatment, the circuit court found that the mother, although compliant with the terms of her improvement period, had failed to change her overall approach and attitude towards parenting.

On appeal, the Court noted that the children continued to be afraid of the mother's boyfriend, but she remained in a relationship with him and had another baby with him. The Court also found that the mother had not educated herself about her children's medical and psychological treatment. The Court, therefore, affirmed the order that terminated the mother's parental rights. However, it remanded the case because the petition had not been amended with respect to the child who was born during the case.

## O. Required Findings to Warrant Termination of Parental Rights

Syl. Pt. 4, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001)

Where a trial court order terminating parental rights merely declares that there is no reasonable likelihood that a parent can eliminate the conditions of neglect, without explicitly stating factual findings in the order or on the record supporting such conclusion and fails to state statutory findings required by West Virginia Code § 49-6-5(a)(6) on the record or in the order, the order is inadequate. Likewise, where a trial court removes a child from the custody of an alleged neglectful parent and places exclusive custody in another individual, the court must adhere to the mandates of West Virginia Code § 49-6-5(a)(5), and failure to include statutorily required findings in the order or on the record renders the order inadequate.

*W. Va. Code § 49-4-604 (c)(5),(6)*

## P. Standard for Termination of Parental Rights

Syl. Pt. 2, *In re R.J.M.,* 164 W. Va. 496, 266 S.E.2d 114 (1980); Syl. Pt. 1, *In re Danielle T.*, 195 W. Va. 530, 466 S.E.2d 189 (1995); Syl. Pt. 2, *In re Dejah Rose P.*, 216 W. Va. 514, 607 S.E.2d 843 (2004); Syl. Pt. 6, *In re Isaiah A.*, 228 W. Va. 176, 718 S.E.2d 775 (2010)

Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W. Va. Code § 49-6-5 may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code § 49-6-5(b) that conditions of neglect or abuse can be substantially corrected.

*W. Va. Code § 49-4-604(c)*

*In re A.T.-1*, 243 W. Va. 435, 844 S.E.2d 470 (2020)

*Note: This opinion also addressed the impermissible extension of multiple pre-adjudicatory improvement periods. For a discussion of this issue, see Section VI.G. The Court further addressed the guardian ad litem's failure to file a written report and conduct other duties. For a discussion of this issue, see Chapter 6, Section III.A.*

In this case, the DHHR received a report that a home was unfit for human habitation. After an investigation, the DHHR substantiated the allegations. Specifically, the home was filthy, there was little food in the home, and one of the three children had pain in her legs that turned out to be an untreated broken leg. Additionally, there was evidence that the parents engaged in domestic violence and the children were developmentally delayed because the father lacked knowledge about normal or average childhood development. The mother eventually stopped participating in the case, her rights were terminated, and she did not appeal the termination. In contrast, the father was granted a succession of pre-adjudicatory improvement periods over the course of more than two years. The circuit court eventually adjudicated him and then terminated his rights after disposition.

On appeal, the father first argued that the circuit court had impermissibly or erroneously granted him pre-adjudicatory improvement periods in violation of the statute governing improvement periods. W. Va. Code §§ 49-4-610(1) & (9). The Supreme Court held that the circuit court erred in granting the extensions that resulted in a pre-adjudicatory improvement period of 26 months. In its opinion, the Court noted that the parents had only requested two of the extensions and the rest had been requested by the DHHR.

With regard to whether the father's rights should have been terminated, the Supreme Court carefully reviewed the factual record in the case. Apparently, the father began participating with services beginning shortly after the preliminary hearing. He also visited with the children during the case, and his bond with them was noted. His psychological and parental fitness examination indicated that he could effectively parent his children.

After the case was set for disposition, the father moved to dismiss the petition based upon his assertion that he had substantially complied with his improvement period. After the children had been in care over two years, the DHHR moved to amend its petition to request termination because the children been in foster care for 15 out of the last 22 months. W. Va. Code § 49-4-610(9). The court granted the DHHR's motion to amend the petition, and again the father renewed his motion to dismiss based upon his suitable housing, his full-time employment, and his marriage to a new spouse who could assist with the care of the children. After hearing the evidence, the court terminated the father's parental rights because it found that he had shown no improvement in parenting, that the children were in foster care for 34 months at the time of disposition, and that the father had failed to follow through with rehabilitative services to prevent future abuse and/or neglect of the children. The mother's rights were also terminated, but she had abandoned the proceedings and did not appeal

With regard to the termination of the father's parental rights, the Supreme Court carefully reviewed the factual record and found that written reports indicated the father had been showing improvement with regard to his parenting and that the psychological evaluation concluded that he had the capacity to parent his children effectively. The records also indicated that the father was appropriately parenting his children during his visits with them. However, the Court noted that the tone of the reports changed after the DHHR had requested that the case be set for disposition. Reviewing the factual record, the Court noted that there were two minor, isolated incidents, but that overall, the father was providing appropriate care of his children. In terms of whether the father had shown that he had corrected the conditions of abuse or neglect, the Court found that he had obtained suitable housing, had full-time employment and had married a new spouse who assisted in the care of the children. After a detailed review, the Court concluded that the record did not support the circuit court finding that there was no reasonable likelihood that the father could correct the conditions of abuse or neglect in the near future. Therefore, the Court held that the findings were clearly erroneous and that they should be set aside. The case was remanded for a dispositional hearing consistent with the opinion.

*In re J.D.-1*, 247 W. Va. 270, 879 S.E.2d 629 (2022)

This case involved a father of six children who had been subject to a third abuse and neglect petition. The cases spanned over four years and involved allegations of substandard housing and inappropriate living conditions. Apparently, the father had made sufficient improvements to his homes to regain custody of his children in the first two cases, but extremely poor conditions again became an issue. During this case, one of the caseworkers testified that his current residence was one of the most unsafe that she had seen. In addition, the father had not participated in visitation during the third case for approximately six months.

Although the father requested an improvement period, the circuit court denied it because the father, despite receiving extensive services for his family in the past, had reverted to a pattern of neglect of his children. In this case, the father obtained a better residence before the disposition hearing, something that he had done in the other cases. At the disposition hearing, the father argued that the DHHR did not link him to affordable housing resources and that his prior counsel had not adequately advised him to maintain contact with the DHHR. Apparently, the DHHR had filed an ethics complaint against the father's previous counsel because of the attorney's substandard representation. However, the guardian *ad litem* and the DHHR requested termination because the father had not shown that he could maintain appropriate living conditions. Additionally, the guardian *ad litem* argued that the father, by not visiting with the children, had damaged his relationship with them. After hearing the evidence, the circuit court terminated the father's parental rights.

On appeal, the Supreme Court reviewed the record and found that the circuit court did not err in its findings and conclusions concerning the father. In addition, the Supreme Court reiterated that the best interests of the children must be the determining factor when it crafts a disposition. Therefore, it affirmed the circuit court order that terminated the father's parental rights.

## Q. Considering the Wishes of a Child Who Is of An Age of Discretion

Syl. Pt. 4, *In re J.A.*, 242 W. Va. 226, 833 S.E.2d 487 (2019)

When determining whether to permanently terminate the parental, custodial and guardianship rights and responsibilities of an abusing parent, West Virginia Code § 49-4-604(b)(6)(C) requires a circuit court to give consideration to the wishes of a child who is fourteen years of age or older or otherwise of an age of discretion as determined by the court. A circuit court is not obligated to comply with the child's wishes, but shall make the termination decision based upon a consideration of the child's best interests. The child's preference is just one factor for the circuit court's consideration.

In this case, the children were removed from their parents' home because the house was extremely unsanitary and because all of the children had excessive absences from school. At the time of the removal, two of the five children were teenagers. At the disposition hearing, the court did not grant the improvement periods because the parents

had received services over the course of almost 20 years, including services immediately before the petition was filed, and the parents had not shown improvement. The circuit court, therefore, concluded that the parental rights of the adult respondents should be terminated.

In response to the circuit court ruling, the guardian *ad litem* indicated that the two teenagers did not want their parents' rights terminated, but the guardian *ad litem* did not provide the court with an explanation as to the teenagers' wishes. In turn, the circuit court issued an order that terminated the adult respondents' parental rights to the three younger children, but it did not address any disposition with regard to the two teenagers. One of the teenagers turned 18 while the appeal was pending.

When the Supreme Court reviewed the record, it first required the parties to submit supplemental briefs with regard to the two teenagers even though none of the parties had assigned error with regard to the failure to establish a disposition for the two teenagers. See Syl. Pt. 6, *In re Timber M.*, 743 S.E.2d 352 (W. Va. 2013).

Even after the supplemental briefing, the Court concluded that the parental rights were not terminated because the teenagers had simply expressed the desire that parental rights not be terminated. The Court, however, pointed out that "rather than blindly accepting a teenager's wishes carte blanche, those wishes should instead be factored into an analysis of what outcome would be in the minor's best interests." *J.A.*, 833 S.E.2d at 497. The Court emphasized that: "Simply because a teenager wishes to remain with his or her abusing parents, does not automatically mean that it would be in the teen's best interests to do so." 833 S.E.2d at 497. In a syllabus point, the Court clarified that a teenager's wishes should be considered as one factor when a circuit court determines whether to terminate parental rights, but it must make the decision based upon the child's best interests. The Court indicated that a circuit court could consider whether full termination is appropriate, whether only custodial or guardianship rights should be terminated, and/or whether post-termination visitation would be appropriate.

With regard to the particular case, the Court noted that a dispositional order with regard to the younger teenager was important because it would have allowed the paternal grandmother to pursue a guardianship. With regard to the older teenager who had aged out, the Court indicated that he should be contacted to determine whether he would be amenable to receiving further services from the DHHR.

*In the Interest of Jessica G.*, 226 W. Va. 17, 697 S.E.2d 53 (2010)

Respondent father failed to meet the terms of his improvement, and DHHR petitioned the circuit court to terminate his parental rights to his 13-year-old daughter. The guardian *ad litem* argued against termination, asserting that while placement in the home was not in her best interests, the child did not want her father's rights terminated and her wishes should be considered. The circuit court granted DHHR's petition, and the father appealed, claiming that the court failed to consider his daughter's wishes as required by the relevant statute.

*W. Va. Code § 49-4-604(c)(6)*

The Supreme Court vacated the circuit court's order and remanded the case for further proceedings. The Court found that given the child's age, her express wishes, and the bond that existed between her and her father, the circuit court should have determined whether termination was in her best interests. Specifically, the circuit court should have considered the child's wishes, as required by the disposition statute, before terminating her father's parental rights. On remand, the circuit court was instructed to conduct this analysis, and further, it was to determine whether permanent foster care would serve the child's best interests.

*In re Ashton M.*, 228 W. Va. 584, 723 S.E.2d 409 (2012)

In this case, the circuit court found that a 16-year-old girl had been sexually abused by her mother's boyfriend. The girl's mother refused to believe that the sexual abuse had occurred and continued to live with her boyfriend. At disposition, the mother asserted that only her custodial rights, not her parental rights should be terminated. The DHHR agreed with this position. The guardian *ad litem* indicated that she was not sure that the girl would understand the difference between the termination of parental rights versus custodial rights, but that she wished to maintain contact with her mother. On the record, the circuit court noted that it did not know the girl's wishes with regard to the termination of parental rights. Ultimately, however, it terminated the mother's parental rights and ordered post-termination visitation, in part, because terminating only the mother's custodial rights would leave the mother with standing to modify the disposition.

On appeal, the Supreme Court found that the circuit court erred because it had not followed the procedure established by Rule 34, a rule governing objections to a child's case plan, and because it had not adequately determined and considered the girl's wishes. On remand, the Supreme Court directed the circuit court to comply with Rule 34 and to determine the girl's wishes concerning the termination of her mother's parental rights.

In her dissenting opinion, Justice Workman noted that the guardian *ad litem* and the mother's counsel had not considered the concept of post-termination visitation. She also noted that the guardian *ad litem*, even though she had not used the correct terminology, had expressed the child's wishes very clearly and that the judge's disposition, termination of parental rights with an award of post-termination visitation, had taken the girl's wishes into account. Justice Workman further noted that relevant statutory provision, requires a court to consider a child's wishes, but does not control the court's ultimate decision.

*W. Va. Code § 49-4-604 (c)(6)(C)*

## R. Adult Rights and Children Rights

*In the Matter of Brian D.,* 194 W. Va. 623, 461 S.E.2d 129 (1995)

Mother appealed termination of her parental rights to her son, Jeffrey D. After reviewing the record, we reversed the termination order and remanded the case to the lower court to consider fashioning a meaningful improvement period and ultimately to

determine whether it is in the best interest of Jeffrey to be returned to his mother's custody.

Regardless of the eventual disposition of the parent's rights, the reality of the child's life, including the fact that he may have lived for several years in foster care, cannot be ignored. "Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren). Thus, how Jeffrey has fared educationally and emotionally with these foster parents and Jeffrey's own feelings and emotional attachments should be taken into consideration by the lower court." 461 S.E.2d at 142.

*In the Matter of Jonathan P.,* 182 W. Va. 302, 387 S.E.2d 537 (1989)

The termination of parental rights was upheld in case of infant where schizophrenic mother failed to provide proper food and shelter.

The mother was not entitled to improvement period prior to termination of parental rights where the mother did not make request for improvement period until the final hearing to terminate parental rights approximately 14 months after the initial temporary custody order was entered.

*In re Carolyn Jean T.,* 181 W. Va. 383, 382 S.E.2d 577 (1989) (per curiam)

Where the mother had been released from treatment prior to entry of final order terminating parental rights, due process would preclude termination of her parental rights because of inability or unwillingness to seek treatment for her mental illness unless the DHS put into evidence the results of the treatment which was eventually forced upon her. The case was remanded for further evidentiary development.

## X. PLACEMENT WITH A PARENT

### A. Reunification

*In the Matter of Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995)

If a court should eventually determine that the child should be reunified with a parent, such change should be accomplished with a sufficient gradual transition period to enable the child to accept the change with as little upheaval as possible to his life.

If a court eventually reunifies a child with a parent, the court should "inquire into the relationship [the child] has formed with his foster parents and, if it is in his best interest, fashion a plan for continued association between the foster parents and the child. . . [A] child has a right to continued association with those to whom he has formed an emotional bond." 461 S.E.2d at 144.

*State ex rel. L.D. v. Cohee*, 247 W. Va. 695, 885 S.E.2d 633 (2022)

The petition was filed against the respondent parents because of extreme bruising on a child. During the investigation, the parents admitted that some of the bruising was the result of excessive corporal punishment. The parents also admitted that they had not promptly sought medical treatment for the child. After the petition was filed, the child was placed with the father's cousin.

During the case, the parents ended their relationship with each other. However, both parents were granted post-adjudicatory improvement periods, and they participated exceptionally well. In fact, at the disposition hearing the DHHR, the CASA volunteer and the guardian *ad litem* all recommended reunification. During the hearing, the presiding judge asked the relative caregivers what their thoughts were. They indicated that the child should not be reunified because she had developed a substantial bond with them. After hearing this opinion, the judge voluntarily recused himself because he had known the caregivers from a time when he had served as a guardian *ad litem*.

At the next hearing before the newly appointed judge, the parties and CASA again requested that the child be reunified with his parents. However, the circuit court questioned whether reunification was in the child's best interests because of the time that the child had been in foster care and whether DHHR could recommend reunification given the length of the child's foster care stay. W. Va. Code § 49-4-605. The court, without a pending motion to intervene, granted party status to the caregivers and appointed counsel for them. The court also ordered that respondent parents and relative caregivers must undergo a bonding assessment. In response to the court's decision, the guardian *ad litem* filed a petition for a writ of mandamus to require the child to be reunified and to remove the relative caregivers from their status as parties to the case.

As an initial matter, the Supreme Court discussed the requirements of West Virginia Code § 49-4-605 as it related to DHHR's duty to request termination. The Supreme Court noted that there are three statutory exceptions to the requirement to request termination and that the DHHR had documented the case-specific reasons for not requesting termination in the child's case plan, court summary, and in arguments before the circuit court. The Supreme Court also observed that the child had not met the fifteen-month threshold at the time of the first disposition hearing. The Court further pointed out that the foster care stay reached the fifteen-month limit during the time the case was transferred to the second circuit judge. Finally, the Supreme Court reviewed the record and found that there was no evidentiary basis to deny reunification, given the parents' participation in the case.

The Supreme Court also addressed the circuit court's decision to grant party status to the relative caregivers when they had not filed a motion to intervene. The Supreme Court noted that a person must file a motion to intervene, as is required by Rule 24 of the West Virginia Rules of Civil Procedure. The Supreme Court identified the persons who are required to be made parties to a case under West Virginia Code § 49-4-601(h) and found that the relative caregivers did not fall into this category. Therefore, the Court

concluded that the intervention of the caregivers would be permissive, rather than a matter of right. Based upon the record, the Court granted the writ of mandamus and required that the caregivers be removed from party status in the case.

### B. Reunification with One Parent

*In re L.W.*, 245 W. Va. 703, 865 S.E.2d 105 (2021)

*Note: For a complete discussion of this case, see Section XII.E.*

A petition was based upon allegations that the father was incarcerated and that he had failed to provide for the child both emotionally and financially. The allegations against the mother involved inadequate supervision, a significant criminal history, and exposure of the child to violent men. The child's stepfather also had a significant criminal history.

After an improvement period, the mother was to be reunified with her son. However, the father's participation in his improvement period was minimal. During the case, the father obtained housing and remained employed. However, he did not participate in drug screens, and he did not attend his psychological evaluation. Nor did he visit with his son.

As one basis for his appeal, the father asserted that he should have been granted disposition pursuant to West Virginia Code § 49-4-604(c)(5) since the child, at the time of disposition, was reunified with his mother. The Supreme Court, however, reasoned that the mother's success did not automatically entitle him to a "disposition 5." Reviewing the record, the Court concluded that there was no showing that the conditions of abuse or neglect could be substantially corrected in the near future because of the father's minimal participation in his improvement period. The Court noted that one parent's success would not automatically entitle the second parent to retain his or her parental rights.

While the father's appeal was pending, a subsequent abuse and neglect petition was filed against the mother. She ultimately relinquished her parental rights to her son.

### C. Placement with a Nonoffending Parent

*In re Frances J.A.S.*, 213 W.Va. 636, 584 S.E.2d 492 (2003)

In this case, there were four children named in the petition. In addition, there were three adult respondents: Melissa R. -- the mother of all four children; David R. -- the biological father of the two younger children; and Darrell S. -- the biological father of the two older children. Darrell S. had been previously married to Melissa R. Although Darrell S. did not have custody of his children prior to this case, he had maintained contact with them.

During a post-adjudicatory improvement period, the circuit court placed the two older children with their biological father, Darrell S. At the conclusion of this improvement period, Melissa R. and David R. were granted a dispositional improvement period, and

physical custody of the two older children was returned to them. The circuit court ordered this custody transfer even though one of the two older children testified that she wanted to remain with her father.

On appeal, the Supreme Court reversed the ruling concerning the custody change because the circuit court had failed to make explicit findings concerning the best interests of the children. The Supreme Court noted that "simple reunification" might not be in the children's best interests and that the minor child's stated preference should be considered. The Court further instructed that the principles set forth in the opinion should be applied to the permanent placement of the children.

*In the Matter of Bryanna H.*, 225 W. Va. 659, 695 S.E.2d 889 (2010)

This case involved a ruling by the circuit court in which it returned two children to their mother and stepfather after successful completion of improvement periods. Also successfully completing an improvement period, the biological father requested custody of the children, but the circuit court did not consider him as a possible placement. Rather, the circuit court simply restored the children to their last custodial placement before the DHHR filed an abuse and neglect petition. While the appeal was pending, one of the children returned to live with her father.

After reviewing the record, the Supreme Court concluded that the circuit court erred because it failed to consider placement of the children with their father. The Court remanded the case to the circuit court with directions to consider placement with the father and to review any updated information.

*In re N.A.*, 227 W. Va. 458, 711 S.E.2d 280 (2011)

During the course of an abuse and neglect case, the appellant father was identified as the biological father of one of the four children in this case. Another man, the father of the other three children, had been originally named as the child's father on the birth certificate. Although there had been no allegations advanced against the biological father and he had been cooperative with services, the circuit court found that it was in the child's best interests to remain with his siblings and in the care of his maternal grandparents who had been identified as "psychological parents" of all four children. During the case, the circuit court had adjudicated the grandparents as abusive or neglectful caretakers of the children.

The Supreme Court held that the circuit court erred in its ruling because the appellant father, as a non-abusing, non-neglectful parent, had a right to custody of his child. Not only were there no allegations of abuse or neglect advanced against him, he and his wife were approved foster parents. Although there had been minimal evidence that he had not attended all visitations with his child, the record showed that the child's maternal grandfather had intimidated him as a means to prevent him from exercising his visitation rights. On remand, the circuit court was directed to consider whether sibling visitation or visitation with the grandparents should be established.

*In re B.H.*, 233 W. Va. 57, 754 S.E.2d 743 (2014)

An abuse and neglect petition was filed against a mother because she had entered into a relationship with a registered sex offender who sexually abused her children. The children's father had not had contact with the children for an extended period of time because of the mother's interference with the relationship and the mother's transient lifestyle. During the case, the mother began a relationship with another sex offender and, initially, believed that the sex offender was innocent. Although the mother ultimately was successful in completing her improvement period, the circuit court named the father as the primary residential parent and granted the mother unsupervised visitation as a final disposition.

On appeal, the mother argued that she had substantially complied with the terms of her improvement period. The Supreme Court, however, found that the pivotal question at disposition is not whether a parent has completed assigned tasks, but whether the disposition is in the child's best interests. With regard to the facts of the case, the Court noted that the children's school attendance had improved, they were living in a more stable home and there were no safety concerns with the father's home. In a new syllabus point, the Court held that:

> In making the final disposition in a child abuse and neglect proceeding, the level of a parent's compliance with the terms and conditions of an improvement period is just one factor to be considered. The controlling standard that governs any dispositional decision remains the best interests of the child. Syl. Pt. 4, *B.H.*, 754 S.E.2d 743.

As an alternative, the mother argued that she had not been granted enough unsupervised visitations to demonstrate that she had improved. The Court, however, rejected this argument because the mother, through her own actions, had caused the delay in obtaining unsupervised visitation.

## D. Factors for Custody Decisions

Syl. Pt. 5, *In re T.M.,* 242 W. Va. 268, 835 S.E.2d 132 (2019)

A circuit court is obligated to apply the factors and considerations set forth in West Virginia Code §§ 48-9-206 and - 207 in allocating custodial and decision-making responsibilities when reunifying children subject to abuse and neglect proceedings with parents, guardians, or custodians who are no longer cohabitating at the close of the proceedings. Where findings of abuse and/or neglect have been established, the circuit court must further employ the mandatory considerations and procedures set forth in West Virginia Code § 48-9-209, in order to protect the children from further abuse and/or neglect.

An abuse and neglect petition was filed against a father after an incident in which he overdosed on pills and also threated to shoot anyone who came near his house. His two children, then ages 10 and 13, wrestled him to get a rifle away from him, and one of

the children jumped on his back to prevent him from going to the house to get a pistol. The father was distraught because the mother had started a relationship with another man.

When the petition was filed, primary physical custody of the children was placed with the children's mother, and she was named as a non-offending parent in the case. Initially, she moved in with her mother and later moved in with her sister. During the abuse and neglect case, the parents divorced in family court. In the property settlement agreement, the mother gave up her right to the marital home in exchange for other items of personal property. After living with her sister, the mother moved in with a boyfriend who was charged with soliciting a minor through the internet. She separated from her boyfriend and later began living with another boyfriend. Ultimately, the father successfully completed his improvement period.

At the end of the father's improvement period, both parents sought primary custody of the children. The circuit court retained jurisdiction of the custody matter pursuant to Rule 6 of the Rules of Procedure for Child Abuse and Neglect Proceedings. At the conclusion of the hearing on the children's permanent placement, the circuit court awarded primary custody of the children to the father and established parenting time for the mother. In turn, the mother appealed based upon the assertion that the children's express preferences were not "firm and reasonable" as required by West Virginia Code § 48-9-206(a)(2).

Before the Supreme Court addressed the merits of the mother's argument, it explained that Rule 6 of the Rules of Procedure for Child Abuse and Neglect Proceedings requires a circuit court to establish permanent placements for children and any subsequent modifications unless the case falls into two narrow types. Those types include cases when a petition is dismissed for failure to state a claim or when a child is returned to cohabitating parents. Only in these two situations may parents seek future relief in family court to establish a parenting plan or child support. In its opinion, the Supreme Court adopted two syllabus points that spell out the continuing jurisdiction of a circuit court to make future custody decisions unless the two exceptions set forth in Rule 6 apply. See Section I.C. for further discussion of this issue.

After discussing the jurisdiction of a circuit court to make custody decisions, the Court examined, in detail, the factors set forth in Chapter 48, specifically West Virginia Code §§ 48-9-206, -207 and -209, that govern custody decisions. On appeal, the DHHR had argued that the circuit court should be guided by the children's best interests in general, not the specific factors set forth in the statutes. However, the Court concluded that "the statutory factors dovetail with the remedial goals of abuse and neglect proceedings by requiring the court to acknowledge and address abuse and neglect findings in formulating a custodial allocation." *T.M.*, 835 S.E.2d at 144. Therefore, the Court held in Syllabus Point 5, that a circuit court must apply the factors set forth in West Virginia Code §§ 48-9-206 and -207 when it makes a custody decision. Further, it held that a circuit court must apply the procedures and considerations included in West Virginia Code § 48-9-209 if there has been a finding of abuse or neglect.

In the instant case, the Court noted that there had been no discussion of or references to the factors set forth in West Virginia Code §§ 48-9-206 and -207 in the case below. The Court further noted that the circuit court had not made the mandatory findings required by West Virginia Code § 48-9-209 after a court has found that a parent has abused or neglected a child. It should be noted that there are findings in West Virginia Code § 48-9-209 in addition to abuse and neglect that may provide a basis for imposing limiting factors in a parenting plan. The Court further pointed out that the preferences of a child should not be considered "binding" on the court. See *In re J.A.*, 833 S.E.2d 487 (W. Va. 2019). Therefore, the Court remanded the case for further proceedings consistent with the guidance set forth in the opinion.

## XI. DISPOSITION PURSUANT TO WEST VIRGINIA CODE § 49-4-604(c)(5)

### A. Circumstances That Warrant a "Disposition 5"

*In re S.C.*, 245 W. Va. 677, 865 S.E.2d 79 (2021)

When S.C. was born, her parents were teenagers, and they both developed substance abuse problems. The father moved to Florida for employment when S.C. was approximately four years old. In Florida, the father developed a more stable lifestyle, but he did not maintain regular contact with S.C. During this time, the child's mother developed an addiction to methamphetamine, and S.C. began living with her great-grandparents. After the father's circumstances had improved, he sought custody of S.C. in family court. When the mother tested positive for multiple substances during a family court hearing, the case was transferred to circuit court.

After adjudication, the father was granted a post-adjudicatory improvement period, and he began re-establishing his relationship with S.C. His efforts were successful, and he visited with S.C. on a regular basis.

At disposition, the father began seeking custody of S.C. so that she could live in Florida with him. Before disposition, the MDT, with the exception of the father, had recommended a disposition 5. Before the disposition hearing, the DHHR requested dismissal of the petition and transfer of S.C.'s custody to her father. At the disposition hearing, the circuit court, however, terminated the father's parental rights and ordered that the father should have post-termination visitation.

On appeal, the father challenged the termination of his parental rights. First, the Supreme Court found that it was in S.C.'s best interests to remain in the custody of her great-grandparents and that they should have been named as S.C.'s custodians. However, it also found that there was insufficient evidence to warrant the termination of the father's parental rights. Therefore, the Supreme Court concluded that: "A guardianship under disposition 5 is the only dispositional alternative that lends itself to leaving Petitioner's parental rights intact while recognizing the paramount best interest of the child." 865 S.E.2d at 92. It remanded the case with directions to consider whether S.C. should be placed in a guardianship or in placement with the great-grandparents as

fit and willing relatives. See W. Va. Code § 49-4-604(c)(5)(E). It also directed the MDT to establish a visitation schedule for S.C. and her father.

*In re H.D.*, --- W. Va. ---, 888 S.E.2d 419 (2023) (Walker, J. dissenting, joined by Wooton, J.)

*Note: For a discussion of other issues in this case, see Section VI.K. and O. and Section XII.L.*

The issues in this case primarily addressed whether the mother should have been entitled to a dispositional improvement period after she tested positive for methamphetamine twice while she was in a post-adjudicatory improvement period. The circuit court denied her motion for a second improvement period and terminated her parental rights. In the dissenting opinion, Justice Walker opined that the circuit court should have considered other dispositional alternatives under either West Virginia Code § 49-4-604(c)(4) or (5), instead of terminating the mother's parental rights.

## B. Error to Impose a Disposition 5

*In re Kristin Y.*, 227 W. Va. 558, 712 S.E.2d 55 (2011)

This case involved a circuit court ruling that terminated a mother's custodial and visitation rights but did not terminate her parental rights. The father had committed severe domestic violence against the mother and had sexually and emotionally abused the children. Living conditions in the home were deplorable, and the children were not attending school regularly. In addition, the mother was aware that the father had sexually abused the children and had been present.

At best, the mother's participation in her improvement period was sporadic. The circuit court specifically found that the children suffered abuse and neglect at the hands of both parents. Yet, the circuit court found that a disposition 5 was appropriate because the mother had been a victim and had committed herself to a course of treatment.

However, the Supreme Court concluded that the mother had not remedied the circumstances of abuse or neglect. The Supreme Court explained that the residual rights that the mother had retained would prevent the children from being adopted and that this result was contrary to the Court's own precedent—that is, "that children are entitled to permanency to the greatest degree possible." 712 S.E.2d at 68. The Court remanded the case with instructions to terminate the mother's parental rights.

*In re K.S.*, 246 W. Va. 517, 874 S.E.2d 319 (2022), n. 13

This case involved a disposition in which three children were placed with each of their biological fathers. Before the hearing, the guardian *ad litem* and the DHHR had recommended a disposition 5 that would only terminate the mother's custodial rights. The circuit court, however, terminated the mother's parental rights. Reviewing the record

below, the Supreme Court reversed the circuit court. On the issue of the characterization of the appropriate disposition, the Supreme Court noted that placement with one parent, but not both, is not a disposition pursuant to West Virginia Code § 49-4-604(c)(5), but rather is disposition pursuant to (c)(6), which involves placement of the child in the sole custody of a non-abusing, non-neglecting parent.

## XII. GROUNDS FOR TERMINATION OF PARENTAL RIGHTS

### A. Prior Acts of Violence Against Other Children are Relevant

Syl. Pt. 8, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991); Syl. Pt. 7, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997)

Prior acts of violence, physical abuse, or emotional abuse toward other children are relevant in a termination of parental rights proceeding, are not violative of W.Va.R.Evid. 404(b), and a decision regarding the admissibility thereof shall be within the sound discretion of the trial court.

### B. Other Children in Abusive Home

Syl. Pt. 2, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995); Syl. Pt. 8, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997); Syl. Pt. 4, *W. Va. DHHR v. Scott C.*, 200 W. Va. 304, 489 S.E.2d 281 (1997); Syl. Pt. 5, *In re Amber Leigh J.*, 216 W. Va. 266, 607 S.E.2d 372 (2004); Syl. Pt. 4, *State ex rel. DHHR v. Fox*, 218 W. Va. 397, 624 S.E.2d 834 (2005)

*W. Va. Code § 49-1-201*

Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W. Va. Code § 49-1-3(a).

However, the Court has refused to adopt a blanket rule that parental rights must be terminated to all the children residing in the home based merely on the finding that one child has been abused. Instead, there must be clear and convincing evidence that the child's "health or welfare is harmed or threatened" by the conditions existing in the home. The circuit court must make a specific and independent finding of fact or conclusion of law that the other siblings were abused or would be at risk of being abused in order to terminate parental rights based upon the abuse of another child in the home. Of course, evidence of the abuse of one child is certainly relevant and probative to the issue of a parent's capacity to protect other siblings from abuse or the capacity of a parent not to abuse the other children in the home.

In making its ultimate determination as to disposition of a child whose sibling has been abused, the circuit court should take into consideration both the evidence of the abuse of the other child, the possible reluctance of the sibling if returned home to notify anyone of abuse; and, the likelihood that a parent would not defend the sibling from further

abuse and whether the parent is so deficient in the basic parental instinct to protect the child that determination of rights to siblings can be justified on that basis alone.

### C. To Knowingly Allow Abusive Conduct

*Note: This type of abuse is commonly referred to as "failure to protect," and the parent is referred to as a "nonprotecting parent." These common terms, however, do not accurately paraphrase the statutory definition. West Virginia Code § 49-1-201 defines this type of abuse as occurring when a parent, guardian or custodian "knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home . . .." The cases listed below indicate that this type of abuse involves more than a failure to protect. Rather, this type of abuse involves a scenario in which the parent knows of the abuse and allows it by either failing to take any protective action or by aiding or protecting the abuser. One of these cases, In the Interest of Betty J.W., addresses the application of this definition in a case involving domestic violence. Chapter 49 of the West Virginia Code has established a definition of a "battered parent" and expressly allows the court to consider the effect of domestic violence in abuse and neglect cases. For a discussion of this issue, see Special Procedures Section I. Principal Abuse and Neglect Definitions.*

Syl. Pt. 2, *In the Matter of Scottie D.*, 185 W. Va. 191, 406 S.E.2d 214 (1991); Syl. Pt. 6, *In the Matter of Taylor B.*, 201 W. Va. 60, 491 S.E.2d 607(1997); Syl. Pt. 5, *W. Va. DHHR v. Doris S.*, 197 W. Va. 489, 475 S.E.2d 865 (1996); Syl. Pt. 4, *In re Brianna Elizabeth M.*, 192 W. Va. 363, 452 S.E.2d 454 (1994); Syl. Pt. 4, *In re Amber Leigh J.*, 216 W. Va. 266, 607 S.E.2d 372 (2004)

*W. Va. Code §§ 49-4-601, et seq.*

Termination of parental rights of a parent of an abused child is authorized under W. Va. Code §§ 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under W. Va. Code §§ 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence.

Syl. Pt. 3, *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993); Syl. Pt. 5, *In the Matter of Taylor B.*, 201 W. Va. 60, 491 S.E.2d 607 (1997); Syl. Pt. 3, *W. Va. DHHR v. Billy Lee C.*, 199 W. Va. 541, 485 S.E.2d 710 (1997); Syl. Pt. 2, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996); Syl. Pt. 4, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996)

Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and

the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser.

*In the Matter of Taylor B.*, 201 W. Va. 60, 491 S.E.2d 607 (1997)

Where there is clear and convincing proof that (1) these injuries occurred in the sole presence of a parent, and (2) the explanations of both parents are contrary to the medical evidence, and (3) both parents fail to acknowledge that any abuse and neglect occurred, the circuit court is in error for failing to terminate the parental rights.

Syl. Pt. 8, *W. Va. DHHR v. Doris S.*, 197 W. Va. 489, 475 S.E.2d 865 (1996)

A parent's parental rights to his/her child(ren) may be terminated: 1) where there is clear and convincing evidence that the parent knowingly allowed another person to inflict extensive physical injury upon another child residing in the same home as the parent and his/er child(ren), even though the injured child is not the parent's natural or adopted child; and 2) where there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parent, even in the face of knowledge of the abuse, has taken no action to identify the abuser.

Syl. Pt. 3, *In the Interest of Betty J.W.*, 179 W. Va. 605, 371 S.E.2d 326 (1988)

*W. Va. Code § 49-1-201*

W. Va. Code § 49-1-3(a), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent.

The circuit court terminated the parental rights of a father for sexually abusing his 17-year-old daughter. It also terminated the mother's rights for failure to protect. The Supreme Court, however, reversed the circuit court because the record did not support the conclusion that the mother had knowingly allowed the sexual abuse. The Supreme Court relied on the fact that the mother, a domestic violence victim, had reported the abuse as soon as she could get away from her husband and had requested services, including another residence. The Supreme Court further relied on the fact that the mother had intervened when her husband attempted to sexually abuse his daughter, and her husband had beaten her and threatened her with a knife.

*In re B.V.*, --- W. Va. ---, 886 S.E.2d 364 (2023)

*Note: The primary legal issue addressed in this case involved subject matter jurisdiction of the children who had been placed in legal guardianships before this case was filed. See Section I.A.*

In this case, the circuit court adjudicated the father for his physical abuse of one of the children, domestic violence and substance abuse. It adjudicated the mother for her

"failure to protect the children" from the father's domestic violence. As support for her position, the mother relied on two of the children's statements in forensic interviews -- that she had locked the father out of the home and that she packed items with the intention of leaving the home with the children. On appeal, the mother argued that she had presented sufficient evidence to show that she had taken steps to protect the children. Reviewing the record, the Supreme Court concluded that the circuit court did not err when it found that this evidence was insufficient to overcome other evidence that the mother knew that abuse was occurring and did not take steps to prevent it.

## D. Where Abandonment of the Child by Either or Both Biological Parents is Alleged and Proven

Syl. Pt. 3, *State ex rel. W. Va. DHHR and Chastity D. v. Hill*, 207 W. Va. 358, 532 S.E.2d 358 (2000)

*W. Va. Code § 49-4-604*

In a child abuse and neglect proceeding where abandonment of the child by either or both biological parents is alleged and proven, the circuit court should decide in the dispositional phase of the proceeding whether to terminate any or all parental rights to the child. Before making that decision, even where there are written relinquishments of parental rights, the circuit court is required to conduct a disposition hearing, pursuant to West Virginia Code § 49-6-5 and Rules 33 and 35 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, at which the issue of such termination is specifically and thoroughly addressed.

## E. Failure to Follow Through With a Reasonable Family Case Plan

*In re L.W.*, 245 W. Va. 703, 865 S.E.2d 105 (2021)

A petition was based upon allegations that the father was incarcerated and that he had failed to provide for the child both emotionally and financially. The allegations against the mother involved inadequate supervision, a significant criminal history, and exposure of the child to violent men. The child's stepfather also had a significant criminal history.

After an improvement period, the mother was to be reunified with her son. However, the father's participation in his improvement period was minimal. During the case, the father obtained housing and remained employed. However, he did not participate in drug screens, he did not attend his psychological evaluation, and he did not visit with his son.

As one basis for his appeal, the father claimed that the DHHR was biased against medication assisted treatment because it had encouraged him to use vivitrol, which is administered in a monthly shot, as opposed to buprenorphine which is taken daily. See W. Va. Code § 49-4-604 (f). The caseworker had suggested the use of vivitrol because the father had not been taking buprenorphine while he was incarcerated. The Supreme Court, however, found that the circuit court had terminated the father's parental rights, not because the father was taking buprenorphine, but because of his lack of participation in

the case. The Court found that the encouragement to use vivitrol did not constitute bias against medication assisted treatment.

As another basis for his appeal, the father asserted that he should have been granted disposition pursuant to West Virginia Code § 49-4-604(c)(5) since the child, at the time of disposition, would be reunified with his mother. The Supreme Court, however, reasoned that the mother's success did not automatically entitle him to a "disposition 5." Therefore, the Court concluded that there was no showing that the conditions of abuse or neglect could be substantially corrected in the near future because the father's participation had been so minimal. Therefore, it affirmed the circuit court ruling.

A subsequent abuse and neglect petition was filed against the mother while the father's appeal was pending, and she ultimately relinquished her parental rights to her son. The permanency plan for the child was adoption in a relative placement.

### F. First Degree Murder of Child's Parent

Syl. Pt. 2, *Nancy Viola R. v. Randolph W.*, 177 W. Va. 710, 356 S.E.2d 464 (1987); Syl. Pt. 2, *Kenneth B. v. Elmer Jimmy S.*, 184 W. Va. 49, 399 S.E.2d 192 (1990)

A conviction of . . . murder of a child's mother by his father and the father's prolonged incarceration in a penal institution for that conviction are significant factors to be considered in ascertaining the father's fitness and in determining whether the father's parental rights should be terminated.

### G. Intellectual Incapacity of Parents

Syl. Pt. 4, *In re Billy Joe M.*, 206 W. Va. 1, 521 S.E.2d 173 (1999)

Where allegations of neglect are made against parents based on intellectual incapacity of such parent(s) and their consequent inability to adequately care for their children, termination of rights should occur only after the social services system makes a thorough effort to determine whether the parent(s) can adequately care for the children with intensive long-term assistance. In such case, however, the determination of whether the parents can function with such assistance should be made as soon as possible in order to maximize the child(ren)'s chances for a permanent placement. Where the charge is abuse as opposed to neglect, the obligation to provide remedial services is far less substantial.

*In re Maranda T.*, 223 W. Va. 512, 678 S.E.2d 18 (2009)

After 14 months of services, the parental rights of the respondent mother were terminated and her request for a dispositional improvement period was denied based upon a finding that there was "no reasonable likelihood that the conditions of neglect can be substantially corrected in the near future." Evidence elicited at the final hearing showed that the mother who had a full-scale IQ of 50 did not make sufficient improvements to her parenting skills. Further, the sum of the evidence received

supported DHHR's position that the mother would need twenty-four hour a day services to make reunification between her and her special needs child possible. Finally, there was a credible concern that the mother would not protect the child from her sexually abusive father. The mother failed to acknowledge the previous instances of sexual abuse and did not appear to recognize the risk the father continued to pose to the child.

The Supreme Court found that *Billy Joe M.* does not require the DHHR to provide permanent, round the clock services to a respondent parent. Further, the Court reiterated that when there is evidence of abuse as opposed to neglect, "the obligation to provide remedial services is far less substantial."

## H. Parents with Terminal Illness

Syl. Pt. 2, *In the Interest of Micah Alyn R.*, 202 W. Va. 400, 504 S.E.2d 635 (1998)

When a parent is unable to properly care for a child due to the parent's terminal illness, so that conditions which would constitute neglect of the child occur and continue to be threatened, termination of parental rights, without consent, is contrary to public policy, even though there is no reasonable likelihood that the conditions of neglect will be substantially corrected in the future. In such circumstances, a circuit court should ordinarily postpone or defer any decision on termination of parental rights. However, such deference on the parental rights termination issue does not require a circuit court to postpone or defer decisions on custody or other issues properly before the court. In fact, efforts towards locating prospective adoptive parents shall be made so long as every measure is taken to foster and maintain the bond and ongoing relationship between the parent and child.

## I. Parents - Failure to Acknowledge Problem

*In the Matter of Taylor B.*, 201 W. Va. 60, 491 S.E.2d 607 (1997)

"In *Doris S.*, this Court stated that, for a parent to remedy the problem of abuse and neglect, 'the problem must first be acknowledged.'" *Taylor B.*, 491 S.E.2d at 615 (quoting *Doris S.*, 475 S.E.2d at 874). Here, the medical evidence notwithstanding, the respondents deny that any abuse or neglect occurred and have refused to sign the family case plan because of its indication that there may have been "conditions and circumstances" in the home adverse to the safety and well-being of Taylor B. Such conduct on the part of the parents, however, renders those conditions and circumstances untreatable. Even if the respondents go through parenting classes and counseling, in the absence of recognition by a parent that child abuse has occurred, the child remains at risk, and it is not safe to return the child. Where the respondents do not acknowledge that any abuse or neglect has occurred, it is reversible error to fail to terminate parental rights.

*W. Va. DHHR v. Doris S.*, 197 W. Va. 489, 475 S.E.2d 865 (1996)

Silence goes to the heart of the treatability question essential in these cases. In order to remedy a problem, it must first be acknowledged and failure to admit allegations makes the problem untreatable. It makes an improvement period an exercise in futility at child's expense.

*In re Jonathan Michael D.*, 194 W. Va. 20, 459 S.E.2d 131 (1995)

Where a parent fails to acknowledge responsibility for the child's injuries or neglect, then the issue cannot be addressed and worked on during an improvement period. Accordingly, the parent is unable to demonstrate that a level of functioning has been improved to the point that the safety of the child could be insured. 459 S.E.2d at 135-36, 138.

*In re Tonjia M.*, 212 W. Va. 443, 573 S.E.2d 354 (2002) (per curiam)

In a case involving sexual abuse allegations, the circuit court denied the respondent father's motion for an improvement period because he failed to admit to the sexual abuse of his daughter. The circuit court noted that counseling without an admission would be ineffective. Relying on *W. Va. DHHR v. Doris S.*, the Court affirmed the denial of the improvement period and subsequent termination of parental rights.

*In re Timber M.*, 231 W. Va. 44, 743 S.E.2d 352 (2013) (per curiam)

An eight-year-old girl told her mother that her stepfather was showing her pornographic movies, that he exposed himself to her and that he attempted to make her watch him masturbate. In response, the mother taught the girl now to make an audio recording with a cell phone and encouraged the girl to be alone with her stepfather in the hopes that she would be able to record another incident of sexual abuse. The mother and her children continued to live with the stepfather for a period of four months, during which time the mother convinced the stepfather to convey his farm to her. The facts also indicate that the mother had left the children alone with him during this time. After four months, the mother contacted law enforcement to report the sexual abuse and to report that she could not get the stepfather to leave the home. The stepfather confessed to the abuse, and the eight-year-old also disclosed the abuse during a forensic interview. In turn, the DHHR filed an abuse and neglect petition against the mother based upon her actions -- sending her daughter to record an additional incident of abuse and leaving her children alone with their stepfather after knowing of the abuse.

The mother originally planned to stipulate to the petition but refused to do so on the day of the adjudicatory hearing. After conducting a contested adjudicatory hearing, the circuit court denied the mother's motion for a post-adjudicatory improvement period because the mother had failed to admit to any problem. In fact, a forensic psychiatrist testified that she did not believe that her actions constituted abuse and that she actually believed that she was justified in her actions. After denying the motion for an improvement period, the court conducted a disposition hearing and terminated the

mother's parental rights because she failed to recognize that she did not protect her children and that she did not have the capacity to recognize and remedy this failure. Affirming the circuit court ruling, the Supreme Court held that the mother "demonstrated an intractable unwillingness and inability to acknowledge her culpability in this matter, to accept the services offered by the Department, and to protect her children in the future." 743 S.E.2d at 365.

*In re S.W.*, 233 W. Va. 91, 755 S.E.2d 8 (2014) (per curiam)

*See W. Va. Code § 49-4-604(c)(7)*

*See W. Va. Code § 49-4-605*

The respondent father had been previously convicted of the manslaughter of his infant daughter in Maryland. Throughout the criminal and abuse and neglect cases, the father's wife, Jamie W., remained married to him.

When their second child, S.W., was born, the DHHR filed an aggravated circumstances petition based upon the prior conviction. Although the father had confessed to the offense, pled guilty in the criminal case, and served time for the offense, he did not acknowledge his responsibility in the older child's death in the course of the abuse and neglect case. Rather, he claimed that the child's death was caused by mistakes made by hospital personnel. The respondent mother also attributed the child's death to mistakes made by hospital personnel. Although the circuit court originally denied the respondent father's motion for an improvement period, the circuit court ultimately ordered the DHHR to implement a visitation plan that would result in the reunification of S.W. with his father. The circuit court relied on the fact that there was no evidence of present unfitness. During the course of the case, the circuit court also found the mother to be a nonoffending parent at the request of counsel for the DHHR and the respondent mother. The guardian *ad litem* did not object to this finding.

On an appeal filed by the DHHR and the guardian *ad litem*, the Supreme Court held that the circuit court committed reversible error when it did not terminate the father's parental rights. The Supreme Court relied upon both the death of the older child and the father's refusal to acknowledge the abuse that caused the death.

The Supreme Court further noted its deep concern about S.W.'s mother because she did not appear to be committed to preventing the father from having contact with the younger child, S.W. Consequently, the Court directed the DHHR to continue to monitor the case to ensure S.W.'s safety upon remand.

### J. Incarcerated Parents

Syl. Pt. 7, *In re Emily B.*, 208 W. Va. 325, 540 S.E.2d 542 (2000); Syl. Pt. 2, *In re Brian James D.*, 209 W. Va. 537, 550 S.E.2d 73 (2001)

A natural parent of an infant child does not forfeit his or her parental right to the custody of the child merely by reason of having been convicted of one or more charges of criminal offenses.

Syl. Pt. 3, *In re Cecil T.*, 228 W. Va. 89, 717 S.E.2d 873 (2011)

When no factors and circumstances other than incarceration are raised at a disposition hearing in a child abuse and neglect proceeding with regard to a parent's ability to remedy the condition of abuse and neglect in the near future, the circuit court shall evaluate whether the best interests of a child are served by terminating the rights of the biological parent in light of the evidence before it. This would necessarily include but not be limited to consideration of the nature of the offense for which the parent is incarcerated, the terms of the confinement, and the length of the incarceration in light of the abused or neglected child's best interests and paramount need for permanency, security, stability and continuity.

In this case, the mother's parental rights had been terminated in a previous abuse and neglect case. The father was incarcerated for a federal firearms violation, possession of a firearm by a convicted felon. Except for a very brief period in which he had resided with his father, the child had lived with his foster parents throughout his young life. At disposition, the circuit court declined to terminate the father's parental rights and instead ordered the less restrictive alternative afforded by the relevant statute which involved placing or maintaining the child in the temporary custody of the DHHR. The circuit court did so because it would allow the father to regain custody if he could demonstrate the fitness to exercise his parental rights in the future. The circuit court also named the foster parents as guardians of the child. Both the guardian *ad litem* and the foster parents who had been granted intervenor status joined the DHHR in this appeal.

*See W. Va. Code § 49-4-604(c)(5)*

In its opinion, the Supreme Court reversed the circuit court and held that the incarceration of a parent could serve as a basis for the termination of parental rights and consideration should be given to the nature of the offense, the terms of confinement and the length of the incarceration. In addition, the Court noted that dicta from *In re Brian James D.*, 550 S.E.2d 73 (W. Va. 2001) was unsound because it had incorrectly summarized the holding of *State ex rel. Acton v. Flowers*, 174 S.E.2d 742 (W. Va. 1970). The Court went on to clarify that incarceration may serve as a basis to terminate parental rights and that the factors set forth in Syllabus Point Three should be considered when a circuit court determines whether to do so.

*In re A.P.-1*, 241 W. Va. 688, 827 S.E.2d 830 (2019)

An abuse and neglect case was initiated against a mother, T.W., and the father of three of the mother's children, D.P., who was serving a sentence of life with mercy for first degree murder. D.P. will not be eligible for parole until 2029. At the adjudicatory hearing, the DHHR alleged that the father had abandoned the children because of his lengthy incarceration. The father, however, presented evidence that he had provided financial and emotional support for the children before his incarceration. Additionally, the father testified that he kept in contact with his children via twice-weekly telephone calls and by sending them cards. Further, his prison wages were directed to his sister for support of his children. At the adjudicatory hearing, the State conceded that it could not support a

finding of abandonment. At the conclusion of the hearing, the circuit court did find that the father had abandoned his children.

During the case, the mother was adjudicated as an abusive or neglectful parent, and ultimately the circuit court terminated the mother's parental rights to D.P.'s three children and a fourth child who had another father. At a disposition hearing, the father argued that, under *State v. T.C.*, his rights could not be terminated because he had not been adjudicated. Relying on *In re Cecil T.*, the guardian *ad litem* argued that the father's parental rights could be terminated. The circuit court adopted the guardian *ad litem's* position and terminated the father's parental rights so that the DHHR would be able to develop permanent placements for the children.

In its opinion, the Supreme Court emphasized that a finding of abuse or neglect must occur during the first phase of the case, the adjudicatory phase, before the circuit court can proceed to the disposition phase. The Court distinguished *Cecil T.* from the instant case because the father in *Cecil T.* had been adjudicated. The Court further explained that the circuit court could have found that the children were neglected, as defined by West Virginia Code § 49-1-201,[27] and after so finding could have proceeded to disposition. The Court, therefore, reversed the circuit court order that terminated the father's parental rights. The Court further stated that the circuit court lacked jurisdiction to proceed to disposition once it found that the father had not abandoned the children. The Court stated that the DHHR could file an amended petition.

In a separate opinion, Justice Workman concurred in part and dissented in part. She concurred that the adjudication and disposition findings should have been made in separate hearings. However, she dissented with regard to several points in the majority opinion. First, she asserted that the case should have been remanded for further proceedings, as opposed to allowing, but not requiring the DHHR to file a new petition. She reasoned that the children would be left without a permanent placement if the DHHR did not proceed with a new or amended petition. Secondly, she pointed out that the majority should have clarified that long-term incarceration is a form of neglect. Third, she asserted that the factors set forth in *Cecil T.* could be properly considered at either the adjudicatory or dispositional phase of the case. She concluded her separate opinion by stating that the circuit court should consider financial assistance that could be provided to the relative placement, the type of placement that would be appropriate, and whether post-termination visitation should be allowed.

[27] In relevant part, West Virginia Code § 49-1-201 states that: "Neglected child" means a child: (A) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care, or education, when that refusal, failure, or inability is not due primarily to a lack of financial means on the part of the parent, guardian, or custodian;
(B) Who is presently without necessary food, clothing, shelter, medical care, education, or supervision because of the disappearance or absence of the child's parent or custodian….

*In re A.F.*, 256 W. Va. 49, 866 S.E.2d 114 (2021)

The mother of A.F. overdosed while the child was in her care, and she had also tested positive for various substances. At the time the petition was filed, the father was subject to pretrial incarceration on charges of being a felon in possession of a firearm and escape. The abuse and neglect allegations involved the father's inability to provide a home for the child because of his incarceration and the inability to protect the child from the mother's drug use. After his adjudication, the father requested an improvement period. At the time that the father asked for an improvement period, the mother was making progress in her improvement period.

At his disposition hearing, the father asserted his Fifth Amendment privilege when he was questioned about his current charges. In response to questions about his criminal record, he indicated that he had served time for manslaughter and arson convictions. At this hearing, counsel for the father argued that the father's improvement period was linked to the mother's success in her improvement period. At the conclusion of the hearing, the circuit court denied the father's motion and terminated his parental rights, primarily because of his incarceration. On appeal, the father argued that it was plain error to deny his motion for an improvement period.

In its analysis, the Supreme Court found that the factual circumstances had changed since the disposition hearing because the father, after the disposition hearing, had been sentenced to 78-months of incarceration and the mother's parental rights had been involuntarily terminated. The Supreme Court noted that the circuit court had relied upon the uncertain length of incarceration when it terminated the father's parental rights, but that it did not analyze the factors required by syllabus point three of *In re Cecil T.*, 7171 S.E.2d 873 (W. Va. 2011), that is, the length of the incarceration or the substance of the underlying criminal charges. The Supreme Court also noted that the circuit court did not substantively address the child's best interests and the need for permanency, security, stability, and continuity, factors that are also required by *Cecil T*. The Supreme Court, therefore, concluded that the circuit court's analysis was erroneous.

Despite the conclusion that the circuit court erred, the Supreme Court found that it could affirm the circuit court for any of the reasons relied upon by the lower court. See *Barnett v. Wolfolk,* 140 S.E.2d 466 (W. Va. 1965). The Court found that the Rule 11(j) updates provided it with sufficient information to conduct a *Cecil T.* analysis. On this issue, the Supreme Court noted that the father had prior convictions for violent offenses and knew that he was prohibited from possessing a firearm. In addition, the Court found that the father did not act responsibly when he possessed the firearm that resulted in his 78-month incarceration. Further, the Court found that termination of the father's parental rights would be in the two-year old child's best interests because it would allow the grandparents to adopt the child. Finally, the Court pointed out that a parent is not unconditionally entitled to an improvement period. See *e.g. In re Emily B.*, 540 S.E.2d 542 (W. Va. 2000). For these reasons, the Court affirmed the termination of the father's parental rights.

In his separate opinion, Justice Wooton agreed with the majority as to the circuit court's faulty application of *Cecil T*. However, he dissented as to the majority's decision to conduct its own *Cecil T.* analysis. He opined that the circuit court was the appropriate court to address the changed circumstances under *Cecil T.* and the termination of the mother's parental rights.

## K. Prior Involuntary Termination of Parental Rights to a Sibling

*In the Matter of George Glen B., Jr.*, 205 W. Va. 435, 518 S.E.2d 863 (1999)

Syl. Pt. 2: Where there has been a prior involuntary termination of parental rights to a sibling, the issue of whether the parent has remedied the problems which led to the prior involuntary termination sufficient to parent a subsequently born child must, at minimum, be reviewed by a court, and such review should be initiated on a petition pursuant to the statutory provisions governing the procedure in cases of child neglect or abuse set forth in West Virginia Code §§ 49-6-1 to -12. Although the requirement that such a petition be filed does not mandate termination in all circumstances, the legislature has reduced the minimum threshold of evidence necessary for termination where one of the factors outlined in West Virginia Code § 49-6-5b(a) is present.

Syl. Pt. 4: When an abuse and neglect petition is brought based solely upon a previous involuntary termination of parental rights to a sibling pursuant to West Virginia Code § 49-6-5b(a)(3); prior to the lower court's making any disposition regarding the petition, it must allow the development of evidence surrounding the prior involuntary termination(s) and what actions, if any, the parent(s) have taken to remedy the circumstances which led to the prior termination(s). See Syl. Pt. 2, *In re J.C.*, 232 W. Va. 81, 750 S.E.2d 634 (2013).

*W. Va. Code §§ 49-4-601, et seq.*

*W. Va. Code § 49-4-605(a)(3)*

Syl. Pt. 5: Where an abuse and neglect petition is filed based on prior involuntary termination(s) of parental rights to a sibling, if such prior involuntary termination(s) involved neglect or non-aggravated abuse, the parent(s) may meet the statutory standard for receiving an improvement period with appropriate conditions, and the court may direct the Department of Health and Human Resources to make reasonable efforts to reunify the parent(s) and child. Under these circumstances, the court should give due consideration to the types of remedial measures in which the parent(s) participated or are currently participating and whether the circumstances leading to the prior involuntary termination(s) have been remedied.

Where there was aggravated abuse, however, such as the murder or serious injury of a sibling, the court may be justified in ordering termination without the use of intervening less restrictive alternatives. See Syl. Pt. 2, *In re R.J.M.*, 266 S.E.2d 114 (W. Va. 1980).

*In re George Glen B., Jr.*, 207 W. Va. 346, 532 S.E.2d 64 (2000)

Syl. Pt. 1: When the parental rights of a parent to a child have been involuntarily terminated, W. Va. Code § 49-6-5b(a)(3) requires the Department of Health and Human Resources to file a petition, to join in a petition, or to

*W. Va. Code § 49-4-605(a)(3)*

otherwise seek a ruling in any pending proceeding, to terminate parental rights as to any sibling(s) of that child.

Syl. Pt. 2: While the Department of Health and Human Resources has a duty to file, join or participate in proceedings to terminate parental rights in the circumstances listed in W. Va. Code § 49-6-5b(a)(3), the Department must still comply with the evidentiary standards established by the Legislature in W. Va. Code § 49-6-2 before a court may terminate parental rights to a child, and must comply with the evidentiary standards established in W. Va. Code § 49-6-3 before a court may grant the Department the authority to take emergency, temporary custody of a child.

*W. Va. Code § 49-4-601*

*W. Va. Code § 49-4-602*

*W. Va. Code § 49-4-601(i)*

Syl. Pt. 5: The presence of one of the factors outlined in W. Va. Code § 49-6-5b(a)(3) merely lowers the threshold of evidence necessary for the termination of parental rights. W. Va. Code § 49-6-5b(a)(3) does not mandate that a circuit court terminate parental rights merely upon the filing of a petition filed pursuant to the statute, and the Department of Health and Human Resources continues to bear the burden of proving that the subject child is abused or neglected pursuant to W. Va. Code § 49-6-2.

*In re Rebecca K.C.*, 213 W. Va. 230, 579 S.E.2d 718 (2003)

In this case involving a prior involuntary termination, the Supreme Court affirmed the denial of the respondent mother's motion for an improvement period and the termination of her parental rights, under the particular facts. However, the Court noted: "We emphatically reiterate that a prior termination does not mean that a parent does not have the right to 'another chance' in the form of an improvement period or otherwise." 579 S.E.2d at 723.

*In re J.C.*, 232 W. Va. 81, 750 S.E.2d 634 (2013)

This *per curiam* opinion addressed whether a mother had remedied the circumstances which had led to the prior involuntary termination of her parental rights to three older children. As a beginning point for its analysis, the Court observed that the DHHR is not required to make reasonable efforts to preserve the family in cases involving the prior termination of parental rights. The Court also noted that the lower court had conducted two evidentiary hearings and had found that the prior circumstances had not been remedied. Specifically, the circuit court had expressed concern about the mother's lack of income. Apparently, the mother had sent her older children out to beg, and one of them was sexually assaulted. The circuit court had also found that the mother had not resolved her drug issues, and had not participated in significant substance abuse counseling, even though the mother had presented evidence of several weeks of clean drug screens. After reviewing the record, the Supreme Court affirmed the ruling that denied the mother's request for an improvement period and terminated her parental rights because deference should be given to the circuit court findings and conclusions and because the evidence "must be

*See W. Va. Code § 49-4-604(b)(7)*

examined under a reduced minimum threshold given the mother's prior involuntary termination." *J.C.*, 750 S.E.2d at 643.

## L. Substance Abuse

*In re Aaron Thomas M.*, 212 W. Va. 604, 575 S.E.2d 214 (2002)

The Supreme Court affirmed the termination of the respondent mother's parental rights because of her substance abuse and failure to comply with a reasonable family case plan and rehabilitative efforts.

*In re Dejah Rose P.*, 216 W. Va. 514, 607 S.E.2d 843 (2004)

In this *per curiam* opinion, the Supreme Court affirmed the termination of parental rights because the respondent mother had failed to respond to treatment at least three times and the completion of her current drug treatment program was uncertain. The Court noted that "In terms of drug abuse or drug addiction, W. Va. Code § 49-6-5, contemplates an inquiry into the parent's past conduct as well as the parent's prognosis." 607 S.E.2d at 848.

*W. Va. Code § 49-4-604*

*In re M.O.*, 245 W. Va. 486, 859 S.E.2d 429 (2021)

In a case involving substance abuse, the father had originally shown substantial progress that warranted the return of his child to his home. The father asked for dismissal of the case, but the circuit court, at the request of the DHHR, found that trial reunification was appropriate and required the father to participate with reunification services. The father relapsed shortly after the child had been returned home, and he was not compliant with drug screens and other services. Ultimately, the child was removed from his home during the trial period. The father failed to attend the disposition hearing, and the circuit court terminated his rights based upon his lack of participation in the services and his relapse. On appeal, the Supreme Court affirmed the termination of the father's parental rights.

*In re H.D.*, --- W. Va. ---, 888 S.E.2d 419 (2023)

This case involved a mother's substance abuse and the complicating factor of her tuberculosis diagnosis. After the mother tested positive for methamphetamine during a post-adjudicatory improvement period, the circuit court denied her motion for a post-dispositional improvement period and terminated her parental rights. On appeal, the Supreme Court affirmed the circuit court decision but noted that the circuit court characterization of the facts in the record was unduly harsh. 888 S.E.2d 419, n. 8. In the dissenting opinion, Justice Walker pointed out the facts that would have supported an alternate disposition under West Virginia Code § 49-4-604(c)(4) & (5).

## M. Domestic Violence

*In re N.R.*, 242 W. Va. 581, 836 S.E.2d 799 (2019)

This case arose after a three-month old child was examined at a hospital, and the child had a bucket handle fracture, which was indicative of abuse. The child also had an older left clavicle fracture. The DHHR filed a petition based upon allegations of child abuse and domestic violence between the mother and father. At the adjudicatory hearing, the father admitted to both the physical abuse of the child and to lying to the DHHR about the nature of the injuries. At adjudication, the mother admitted that incidents of domestic violence had occurred in the presence of the children. The mother initially separated from the father, and the children were returned to the mother's care on a trial basis. After the mother successfully completed an improvement period, the petition against the mother was dismissed and the children were placed in her care.

The father's improvement period continued. During the father's improvement period, the father, while intoxicated, got into a car with the mother and the children. He tore off a door handle of the car and then went into the mother's apartment and damaged property. The mother refused to provide a statement to law enforcement about the incident and would not apply for a protective order. The following day, after receiving advice from her lawyer, the mother obtained a protective order. However, at a subsequent MDT, the mother accused law enforcement of misrepresenting the facts of the incident. In response, the DHHR moved to modify the dispositional order and to add the mother as an adult respondent. Before the mother's second adjudicatory hearing, a review of the mother's cell phone records indicated that she had an ongoing relationship with the father and that she had allowed the children to visit with him unsupervised. At her second adjudicatory hearing, the mother stipulated to the amended petition and the earlier incidents of domestic violence. The father also became involved in a fight at a bar, and the mother attempted to intervene to prevent his arrest.

Before disposition, the DHHR required the parents to undergo psychological examinations. During his evaluation, the father claimed that he had successfully completed all treatment programs, denied that alcohol was a factor in the domestic violence incidents, and stated that he had inflated his alcohol use so that he could obtain treatment at a VA hospital. Further, he indicated that his admissions about his child's injuries were not true and that he was discriminated against because he is a Native American. The psychologist recommended the termination of his parental rights because he had not benefitted from services and treatment.

The psychologist who examined the mother reached a similar conclusion. The mother denied the abuse and claimed that she had only admitted to fear of her husband because she was forced to do so. The psychologist concluded that further services would not improve the mother's ability to safely parent her children.

After a thorough dispositional hearing, the circuit court terminated the custodial rights of the adult respondents, but it did not terminate their parental rights. The DHHR

and the GAL appealed this disposition. On appeal, the parents challenged the abuse and neglect proceedings based upon alleged violations of the ICWA.

With regard to disposition, the parents first alleged that the DHHR did not make "active efforts" to preserve their family as is required by 25 US.C. § 1912(d) and that the DHHR only provided the typical types of services involved under a "reasonable efforts" analysis. The parents also argued that they should have been provided "culturally sensitive" services. Discussing cases from other states, the Court noted that the ICWA does not define the term, "active efforts," but noted that other courts have found that the term implies a more active, as opposed to a passive approach. However, the Court also noted that other courts have found that the ICWA does not require nonproductive or futile attempts to reunify or preserve a family. After detailing the extensive services that were provided to this family, the Court concluded that the "active efforts" requirement had been met. With regard to the parents' second argument, that they should have been provided "culturally sensitive" services, the Court found that the ICWA does not require the provisions of these types of services. The respondent parents had relied upon the guidelines promulgated by the BIA, but the Court noted that the guidelines were not in effect during the case. Further, the Court noted that the applicable regulation, 25 C.F.R. § 23.2, allowed services to be provided based upon the circumstances of a case and to the extent possible. For this additional reason, the Court concluded that the active efforts requirement had been met.

As another basis for their appeal, the respondent parents alleged error with regard to the testimony of the expert witnesses because they did not have knowledge of the social and cultural standards of the tribe. Reviewing the applicable regulation, 25 C.F.R. § 23.122, the Court found that a qualified expert must testify that it would be likely that the children would experience serious emotional or physical damage if parental rights were restored, and this requirement was satisfied by the testimony of two psychologists. The parents had alleged that the experts were not qualified because they did not have knowledge of the social and cultural standards of the particular tribe. The Court, however, reviewed the rule and found that it was discretionary as to whether an expert witness would need to have knowledge of the particular tribe's social and cultural standards. The Court concluded that cultural bias was not an issue in the case because the basis for termination was the serious physical abuse of the children and domestic violence, not cultural bias.

Although the Court did not find error under the ICWA, it did address the DHHR and GAL's assignment of error, that the circuit court should have terminated parental rights, as opposed to terminating only the parents' custodial rights. The Court noted that the circuit court's findings of fact warranted the termination of parental rights, but the lower court had only terminated their custodial rights. Based upon well-established principles, the Court, therefore, concluded that the evidence showed that there was no reasonable likelihood that the conditions could be rectified in the near future, that the parents had not fully acknowledged the circumstances of abuse and that they had been provided ample opportunity to improve over several years. For these reasons, the Court reversed the disposition order that only terminated the parents' custodial rights and remanded the case for the entry of an order that also terminated their parental rights.

*W. Va. DHS v. Tammy B.*, 180 W. Va. 295, 376 S.E.2d 309 (1988) (per curiam)

In an appeal of a termination of parental rights, the Supreme Court noted that the children's exposure to domestic violence, as well as other factors such as sexual abuse, constituted sufficient grounds to terminate parental rights.

## N. Medication-Assisted Treatment

*In re M.M.*, 244 W. Va. 316, 853 S.E.2d 556 (2020)

Syl. Pt. 4: Pursuant to West Virginia Code § 49-4-604(f) , in an abuse and neglect case "[t]he court may not terminate the parental rights of a parent on the sole basis that the parent is participating in a medication-assisted treatment program, as regulated in [W. Va. Code] § 16-5Y-1 *et seq.*, for substance use disorder, as long as the parent is successfully fulfilling his or her treatment obligations in the medication-assisted treatment program."

Syl. Pt. 5: The use of medication-assisted treatment is authorized by the Medication-Assisted Treatment Program Licensing Act, West Virginia Code §§ 16-5Y-1 to 16-5Y-13, and the Act's supporting regulations. Medication-assisted treatment will not be appropriate or beneficial for all persons suffering from opioid use disorder. However, when medication-assisted treatment is appropriate and potentially beneficial, any bias against its use is contrary to the public policy of this State as announced by the Legislature.

During an improvement period, the respondent mother was participating in a medication-assisted treatment program that was paid for by a special medical card. There was no dispute that the mother's progress, while in the program, was good. When the card expired, treatment stopped abruptly, and the mother was given no opportunity to titrate off the mediation. Not surprisingly, the mother relapsed. Although the mother's counsel requested that the court order the DHHR to renew the special medical card, the court did not do so. Ultimately, the mother started using methamphetamine and stopped participating in visits and services. At disposition, the court concluded that the mother's parental rights should be terminated.

In its opinion, the Court noted that the mother's treatment in a medication-assisted program was a requirement of the case plan and that the DHHR was funding the treatment through a special medical card as part of its responsibility under the case plan. Addressing the facts of this case and this type of treatment generally, the Court discussed the Medication-Assisted Treatment Program Licensing Act, West Virginia Code §§ 16-5Y-1 to 16-5Y-13, and the research supporting these types of programs. It noted that the legislative rules recognize and provide for maintenance doses of this type of medication.

Further, the Court noted the bias against medication-assisted treatment, but it pointed out that the Legislature established that a parent's rights may not be terminated *solely* on the parent's compliant use of this type of treatment. W. Va. Code § 49-4-604(e).

In Syllabus Point 5, it held that "when medication-assisted treatment is appropriate and potentially beneficial, any bias against its use is contrary to the public policy of this State as announced by the Legislature."

On appeal, the Supreme Court found that the DHHR's initial funding of the treatment and the abrupt termination of the special medical card indicated that the DHHR had not made reasonable efforts to preserve the family. The Court held that the DHHR should have continued to pay for the treatment through the end of the extension of the mother's improvement period. It further found that the circuit court abused its discretion when it did not order the DHHR to renew the special medical card. On remand, the circuit court was instructed to reinstate the mother's improvement period.

*In re L.W.*, 245 W. Va. 703, 865 S.E.2d 105 (2021)

*Note: For a complete discussion of this case, see Section XII.E.*

A petition was based upon allegations that the father was incarcerated and that he had failed to provide for the child both emotionally and financially. The allegations against the mother involved inadequate supervision, a significant criminal history, and exposure of the child to violent men. The child's stepfather also had a significant criminal history.

After an improvement period, the mother was to be reunified with her son. However, the father's participation in his improvement period was minimal. During the case, the father obtained housing and remained employed. However, he did not participate in drug screens, he did not attend his psychological evaluation, and he did not visit with his son.

As one basis for his appeal, the father claimed that the DHHR was biased against medication-assisted treatment because it had encouraged him to use vivitrol, which is administered in a monthly shot, as opposed to buprenorphine which is taken daily. See W. Va. Code § 49-4-604(f). The DHHR had suggested the use of vivitrol because the father had not been taking buprenorphine while he was incarcerated. The Supreme Court, however, found that the circuit court had terminated the father's parental rights, not because the father was taking buprenorphine, but because of his lack of participation in the case. The Court concluded that the encouragement to use vivitrol did not constitute bias against medication assisted treatment.

## O. Child Deceased at Disposition

*In re A.P.*, 245 W. Va. 248, 858 S.E.2d 873 (2021)

Syl. Pt. 7: West Virginia Code § 49-4-604(c)(6) does not permit the termination of parental, guardianship, or custodial rights to a child who is deceased at the time of disposition.

A mother had a valid prescription for buprenorphine, and the child, at birth, was born with this drug in his system. In the hospital, the child stopped breathing while he

was sleeping on the father's chest. A subsequent search of the hospital room turned up drug paraphernalia that tested positive for buprenorphine, morphine, and heroin. At this point, an abuse and neglect case was filed. After adjudication but before disposition, the baby passed away. The cause of death was considered "unknown." The mother had lost her custodial rights to an older child who had been placed in a guardianship with the grandmother.

At disposition, the mother moved to dismiss the proceedings because, as argued by counsel, none of the dispositional alternatives found in West Virginia Code § 49-4-604(c)(6) would apply. The circuit court denied the motion to dismiss based upon the opinion of *I.M.K.*, 815 S.E.2d 490 (W. Va. 2018) which allows for adjudication even though a child has passed away. At disposition, the circuit court terminated the mother's parental rights.

The Court noted that this issue was a matter of first impression, and it proceeded to examine the language of the dispositional statute, West Virginia Code § 49-4-604(c). The Court concluded that the language in the subsection referred to the child (or children) who were subject to the petition. Based upon a close reading of the statute, the Court concluded that there are two requirements for termination. The first condition, that the conditions of abuse and neglect cannot be substantially corrected, refers to the parent's circumstances. The second condition, that termination is necessary for the child's welfare, refers to the child's physical and emotional well-being. After reviewing the statute, the Court concluded that: "Simply put, West Virginia Code § 49-4-604(c) has nothing to offer other living or future children as they are not within the control of the court and therefore evade the effects of application of any of the dispositional alternatives." 858 S.E.2d at 884. Although the DHHR argued that the older child could be at risk, the Court found that the older child's placement or well-being had not been put in jeopardy by the mother's conduct and the DHHR had not sought any relief or change to the older child's status. Therefore, the Court held, in the syllabus point cited above, that the applicable statute does not permit the termination of parental, guardianship, or custodial rights to a child who is deceased at the time of disposition.

## XIII. RELINQUISHMENT OF PARENTAL RIGHTS

### A. Relinquishment Associated with Adoption, Not Abandonment

Syl. Pt. 4, *State ex rel. Paul B. v. Hill*, 201 W. Va. 248, 496 S.E.2d 198 (1997)

A parent's relinquishment of his/her parental rights either in anticipation of future adoption proceedings or as a part of previously initiated adoption proceedings does not constitute abandonment for abuse and neglect purposes.

## B. No Adoption During Pendency of Proceedings

*Alonzo v. Jacqueline F.*, 191 W. Va. 248, 445 S.E.2d 189 (1994)

*W. Va. Code § 49-4-604(c)(6)*

Syl. Pt. 1: W. Va. Code § 49-6-5(a)(6), which deals with the disposition by a court of a case involving a neglected or abused child, provides, in part: "no adoption of a child shall take place until all proceedings for termination of parental rights under this article and appeals thereof are final."

Syl. Pt. 2: Where a child abuse and neglect proceeding has been filed against a parent, such parent may not confer any rights on a third party by executing a consent to adopt during the pendency of the proceeding.

*In re G.S.*, 244 W. Va. 614, 855 S.E.2d 922 (2021)

*Note: For a complete discussion of this case, see Sections II.E. and XV.D.*

Syl. Pt. 2: When a writing signed by both parents purports to transfer custody of a child to a third person, and that child later becomes the subject of an abuse and neglect petition against the child's parents, the person with purported custody of the child has a right to be heard at the preliminary phase of the proceedings to determine: (a) whether the writing is authentic, (b) whether he or she is a responsible person for purposes of West Virginia Code § 49-4-602, and (c) whether temporary placement with such person is in the child's best interest.

## C. Voluntary Relinquishment of Parental Rights

*In re James G.*, 211 W. Va. 339, 566 S.E.2d 226 (2002)

During a dispositional hearing, a mother attempted to voluntarily relinquish her rights to her children. The circuit court refused to accept the voluntary termination over DHHR's objection because it would force DHHR to accept a settlement, not because an involuntary termination was in the best interests of the children. Reversing the circuit court, the Supreme Court held:

*W. Va. Code § 49-4-607*

Syl. Pt. 3: In the context of an abuse and neglect proceeding, a court may accept a parent's voluntary relinquishment of parental rights without the consent of the West Virginia Department of Health and Human Resources, provided that the agreement meets the requirements of W. Va. Code § 49-6-7, where applicable, and the relevant provisions of the Rules of Procedure for Abuse and Neglect Proceedings.

Syl. Pt. 4: A circuit court has discretion in an abuse and neglect proceeding to accept a proffered voluntary termination of parental rights, or to reject it and proceed to a decision on involuntary termination. Such discretion must be exercised after an independent review of all relevant factors, and the court is not obliged to adopt any position advocated by the Department of Health and Human Resources.

*In re Cesar L.*, 221 W. Va. 249, 654 S.E.2d 373 (2007)

*Note: For a complete discussion of this case and the modification of dispositional orders, see Section IX.I.*

Seven months after a mother had voluntarily relinquished her rights to her son, she sought reunification by moving to modify the dispositional order. The circuit court held that she lacked standing to modify the dispositional order because she could no longer be considered the child's parent. She then moved to withdraw the relinquishment, but the circuit court concluded that she had failed to prove that she had been subject to fraud or duress. On appeal, the Supreme Court affirmed the circuit court and held that the mother lacked standing because she had lost her status as a parent through the voluntary relinquishment. With regard to the legal effect of a voluntary relinquishment on parental rights, the Court adopted the following syllabus points:

Syl. Pt. 3: W. Va. Code § 49-6-7 permits a parent to voluntarily relinquish his/her parental rights. Such voluntary relinquishment is valid pursuant to W. Va. Code § 49-6-7 if the relinquishment is made by "a duly acknowledged writing" and is "entered into under circumstances free from duress and fraud."

Syl. Pt. 5: A valid voluntary relinquishment of parental rights, effectuated in accordance with W. Va. Code § 49-6-7, includes a relinquishment of "rights to participate in the decisions affecting a minor child," W. Va. Code § 49-1-3(o), and causes the person relinquishing his/her parental rights to lose his/her status as a parent of that child.

*W. Va. Code § 49-1-204*

Syl. Pt. 9, *In re T.W.*, 230 W. Va. 172, 737 S.E.2d 69 (2012); Syl. Pt. 2, *In re Marley M.*, 231 W. Va. 534, 745 S.E.2d 572 (2013)

In an abuse and neglect case, the offer of a voluntary relinquishment of parental rights does not obviate the statutory requirements regarding the necessity for proceeding with the adjudicatory and dispositional phases of the abuse and neglect case. Prior to accepting an offer of voluntary termination of parental rights, a reviewing court must conduct the hearings required by West Virginia Code §§ 49-6-2 and 49-6-5.

*W. Va. Code § 49-4-601(i)*

*W. Va. Code § 49-4-604*

Syl. Pt. 4, *In re Marley M.*, 231 W. Va. 534, 745 S.E.2d 572 (2013)

Where during the pendency of an abuse and neglect proceeding, a parent offers to voluntarily relinquish his or her parental rights and such relinquishment is accepted by the circuit court, such relinquishment may, without further evidence, be used as the basis of an order of adjudication of abuse and neglect by that parent of his or her children.

At the outset of an adjudicatory hearing, a respondent mother tendered a voluntary relinquishment of her parental rights. The circuit court, therefore, did not conduct an adjudicatory or disposition hearing. On appeal, the Supreme Court addressed the effects of a voluntary relinquishment in light of the holding of *In re T.W.*, 737 S.E.2d 69 (W. Va.

2012), a case which requires a court to conduct adjudicatory and disposition hearings before accepting a voluntary relinquishment of parental rights. The Court observed that an adult respondent's silence as a response to a civil abuse and neglect petition may properly be considered as evidence of culpability. See *W. Va. DHHR v. Doris S.*, 475 S.E.2d 865 (W. Va. 1996); *In re Daniel D.*, 562 S.E.2d 147 (W. Va. 2002). Based upon this precedent, the Court held that a parent's voluntary relinquishment may serve as a basis for an adjudication order. The Court explained that its ruling "preserve[s] the utility of voluntary relinquishments during an abuse and neglect proceeding for both an accused parent and the State. All options are still on the table for an accused parent; he or she now simply faces the import of his choices." 745 S.E.2d at 581. A court may, therefore, use a voluntary relinquishment as a basis for an adjudication order without requiring the presentation of additional evidence.

## D. Oral Relinquishments

*In re Tessla N.M.*, 211 W. Va. 334, 566 S.E.2d 221 (2002)

*W. Va. Code § 49-4-607*

At a review hearing, a mother *orally* relinquished her parental rights and never submitted a written relinquishment. On appeal, the mother challenged the validity of the oral relinquishment because it failed to meet the requirement that a relinquishment be written as established by West Virginia Code § 49-6-7. Reconciling West Virginia Code § 49-6-7 and Rule 35(a)(1) of West Virginia Rules of Procedure for Child Abuse and Neglect, the West Virginia Supreme Court held:

Syl. Pt. 1: Pursuant to Rule 35(a)(1) of the West Virginia Rules of Procedure for Child Abuse and Neglect, an oral voluntary relinquishment of parental rights is valid if the parent who chooses to relinquish is present in court and the court determines that the parent understands the consequences of a termination of parental rights, is aware of less drastic alternatives than termination, and is informed of the right to a hearing and to representation by counsel.

Syl. Pt. 2: An oral voluntary relinquishment of parental rights made on the record in open court is valid regardless of whether the parent who chooses to terminate his or her rights executes and submits a duly acknowledged writing pursuant to W. Va. § 49-6-7.

## E. Parents' Right to Revoke Relinquishment

*W. Va. DHHR v. La Rea Ann C.L.*, 175 W. Va. 330, 332 S.E.2d 632 (1985)

Where child has spent substantial period of time at the home of foster parents, pending a ruling by trial court on whether to approve minor parent's relinquishment of custody to licensed private child welfare agency or to DHS, best interest of child must be given primary importance by trial court; in such case, minor parent's right to revoke relinquishment ceases to be absolute, due to passage of unreasonable period of time.

Syl. Pt. 3, *State ex rel. Rose L. v. Pancake*, 209 W. Va. 188, 544 S.E.2d 403 (2001)

Under the provisions of W. Va. Code § 49-6-7, a circuit court may conduct a hearing to determine whether the signing by a parent of an agreement relinquishing parental rights was free from duress and fraud.

## XIV. ACHIEVEMENT OF PERMANENCY

### A. Permanency Hearing

*Kristopher O. v. Mazzone*, 227 W. Va. 184, 706 S.E.2d 381 (2011)

Issuing a writ of prohibition, the Supreme Court held that the circuit court exceeded its legitimate powers when it refused to allow foster parents to participate in a permanency hearing for a child who had resided with them for 22 months. The Court pointed out that the notice and an opportunity to be heard at the permanency hearing to foster parents, pre-adoptive parents and relatives who are providing care for a child are entitled to notice and the opportunity to be heard with respect to the permanency hearing. See W. Va. Code § 49-4-608.

### B. Time Period for Achievement of Permanency

Syl. Pt. 6, *In re Cecil T.*, 228 W. Va. 89, 717 S.E.2d 873 (2011)

*Note: Amended after the decision in Cecil T., Rule 43 provides that permanent placement of a child must be achieved within 12 months of the entry of the final disposition order unless there are extraordinary reasons justifying the delay.*

The 18-month period provided in Rule 43 of the West Virginia Rules of Procedures for Child Abuse and Neglect Proceedings for permanent placement of an abused and neglected child following the final dispositional order must be strictly followed except in the most extraordinary circumstances which are fully substantiated in the record.

Although a father was incarcerated for a conviction of a federal firearms offense, the circuit court did not terminate his parental rights and instead ordered that the father could, at an unspecified time in the future, regain custody upon a showing of parental fitness. The circuit court named the child's foster parents as his guardians and left legal custody with the DHHR. The circuit court found that it should impose a less restrictive alternative to the termination of parental rights. The DHHR, the guardian *ad litem* and the foster parents who had been granted intervenor status all appealed this ruling.

In Syllabus Point Three, the Supreme Court held that incarceration could, in fact, serve as a basis to terminate parental rights and that the nature of the offense, the terms of confinement and the length of the sentence should be considered "in light of the abused or neglected child's best interests and paramount need for permanency, security, stability and continuity." It, therefore, reversed the circuit court.

As an additional basis for overruling the circuit court, the Supreme Court noted that the circuit court had created the same type of timeliness problems that had been proscribed by *In re Emily B.*, 540 S.E.2d 542 (W. Va. 2000), a case in which the circuit court had delayed the onset of improvement periods until the mother completed a lengthy drug rehabilitation program and the father was released from incarceration. The Court expressly stated that it found "no provision anywhere in the abuse and neglect statutes giving courts discretion to create what the lower court termed a 'limbo period' where a permanency plan for an abused or neglected child may be placed on hold indefinitely." The Court further stated that the 18-month period for achieving permanency established by Rule 43 of the Rules of Procedure for Child Abuse and Neglect Proceedings is "not a mere suggestion, but a standard to which courts should faithfully and routinely adhere except in the most extraordinary or unusual circumstances." This reasoning served as the basis for the adoption of Syllabus Point 6, quoted above.

*In re Kristin Y.*, 227 W. Va. 558, 712 S.E.2d 55 (2011)

The Supreme Court overturned a circuit court order that declined to terminate the mother's parental rights and, instead, ordered an unspecified period of temporary custody with the DHHR. With regard to the importance of permanency, the Court expressly stated that:

> These children are entitled to and deserve permanent placements and the opportunity to grow up in loving homes, free from the abuses heaped on them during their short lives. The circuit court's order deprives the children of the permanency they need, want, deserve and are entitled to have. 712 S.E.2d at 68.

### C. Adoptive Home - Preferred Permanent Placement

*State v. Michael M.*, 202 W. Va. 350, 504 S.E.2d 177 (1998)

Syl. Pt. 2: Where parental rights have been terminated pursuant to W. Va. Code § 49-6-5(a)(6), and it is necessary to remove the abused and/or neglected child from his or her family, an adoptive home is the preferred permanent out-of-home placement of the child.

*W. Va. Code § 49-4-604(c)(6)*

Syl. Pt. 3: In determining the appropriate permanent out-of-home placement of a child under W. Va. Code § 49-6-5(a)(6), the circuit court shall give priority to securing a suitable adoptive home for the child and shall consider other placement alternatives, including permanent foster care, only where the court finds that adoption would not provide custody, care, commitment, nurturing and discipline consistent with the child's best interests or where a suitable adoptive home can not be found.

*In re Michael S., Jr.*, 218 W. Va. 1, 620 S.E.2d 141 (2005)

In this *per curiam* opinion, the Supreme Court affirmed the dismissal of an intervenor who sought to be considered as an adoptive parent. The Supreme Court noted

the intervenor's failure to complete a home study and a psychological evaluation, her lack of participation in the court proceedings, and the lack of a bond between her and the child.

## D. Adoption By Unmarried Persons

*State ex rel. Kutil v. Blake*, 223 W. Va. 711, 679 S.E.2d 130 (2009)

Following the termination of the rights of both biological parents, the circuit court held a permanency review hearing to discuss the permanency plan for 11-month-old B.G.C. The child's guardian *ad litem* renewed his "Motion to Order DHHR to Remove Child from Physical Placement in Homosexual Home and Other Injunctive Relief." DHHR, who had previously supported adoption by one or both foster parents, changed its recommendation and asked the court to remove the child because the foster parents' home was over capacity. The circuit court ordered that the child should be placed in a "traditional home" with a mother and a father. The foster parents sought a writ of prohibition in the Supreme Court to prevent the removal of B.G.C. from their home.

Addressing the respondent and guardian *ad litem*'s assertion that there is a legislative preference in the adoption statute, the Supreme Court stated:

> Although Respondent recognized that each Petitioner may individually petition to adopt under the statute, he asserts in his brief that the "statutes indicate a preference for adoption by married couples." No statutory citation was supplied to support this position and our research reveals no such stated preference. Nor were we able to locate any legislatively assigned preference for adoption into a traditional home or any statutory definition of a traditional home for adoption purposes. As is evident from the clear language of West Virginia Code § 48-22-201, there is no prioritization among the three classifications of those eligible to adopt a child in this state. "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 2, *State v. Epperly,* 65 S.E.2d 488 (W. Va. 1951).
>
> Notwithstanding Respondent's and GAL's suggestions to the contrary, there simply is no legislative differentiation between categories of eligible candidates for adoption under the terms of West Virginia Code § 48-22-201. Such policy determination is clearly a legislative prerogative, outside of the purview of the courts. The primary concern of courts in adoption cases is whether there is evidence that the recommended adoptive home possesses the necessary attributes to meet the individual and specific needs of the child both at present and in the future. 679 S.E.2d at 320.

## E. Preferred Placement - With Siblings

Syl. Pt. 4, *In re Shanee Carol B.*, 209 W. Va. 658, 550 S.E.2d 636 (2001); Syl. Pt. 2, *In re B.A.*, 243 W. Va. 650, 849 S.E.2d 650 (2020)

*W. Va. Code § 49-4-111(e)*

W. Va. Code § 49-2-14(e) provides for a "sibling preference" wherein the West Virginia Department of Health and Human Resources is to place a child who is in the department's custody with the foster or adoptive parent(s) of the child's sibling or siblings, where the foster or adoptive parents seek the care and custody of the child, and the department determines (1) the fitness of the persons seeking to enter into a foster care or adoption arrangement which would unite or reunite the siblings, and (2) placement of the child with his or her siblings is in the best interests of the children. In any proceedings brought by the department to maintain separation of siblings, such separation may be ordered only if the circuit court determines that clear and convincing evidence supports the department's determination. Upon review by the circuit court of the department's determination to unite a child with his or her siblings, such determination shall be disregarded only where the circuit court finds, by clear and convincing evidence, that the persons with whom the department seeks to place the child are unfit or that placement of the child with his or her siblings is not in the best interests of one or all of the children.

*In re B.A.*, 243 W. Va. 650, 849 S.E.2d 650 (2020)

This case involved foster parents who had previously adopted a sibling of a foster child. During the case, the guardian *ad litem* discovered that the foster parents had substantial debt for unpaid child support and other matters. In addition, the child support arrearages remained outstanding, even though the foster parents had substantial income from gambling in a recent year. The foster parents countered that they had been subject to unusual scrutiny. In addition, they filed a disciplinary complaint against the guardian *ad litem* that was later withdrawn.

When the issue arose, the foster parents filed a motion to continue the placement of the foster child with them.[28] However, the guardian *ad litem* opposed the motion because she concluded that the foster parents would not meet the requirement of good moral character, necessary for an adoption to be finalized. W. Va. Code § 48-22-701(d). Ruling on the placement, the circuit court agreed with the guardian *ad litem* and ordered the removal of the child from the foster parents.

On appeal, the Supreme Court found that the circuit court had properly considered the financial circumstances of the foster parents. However, it found that the circuit court erred because it failed to place any weight on the sibling preference found in West Virginia Code § 49-4-111(e). Specifically, it noted that the circuit court had not considered the bond between the siblings and how that affected the best interests of the child. Therefore, the Court remanded the case to conduct a hearing on whether the child's best interests would be advanced by continued placement with the foster parents.

[28] Although the foster parents filed a motion and were represented by counsel, the foster parents had not intervened in the case. In the circuit court, the foster parents' counsel agreed that the foster parents had the right to be heard, but they did not have the right to present and cross-examine witnesses. *B.A.*, 243 W. Va. 650, 849 S.E.2d 650, n. 6.

In his dissent, Justice Armstead pointed out that the foster parents could not meet the good moral character requirement for adoptive parents. He concluded that the application of the sibling preference would not change the conclusion about the requirement of good moral character and that he would not have remanded the case.

*In re R.S.*, 244 W. Va. 564, 855 S.E.2d 355 (2021)

Syl. Pt. 11: W. Va. Code § 49-2-126(a)(6) requires a circuit court to conduct a best interest of the child analysis by considering a child's needs, and a family's ability to meet those needs. One factor that may be included in this analysis is a child's ability to remain with his or her siblings. A circuit court considering this factor should conduct its analysis in conformity with W. Va. Code § 49-4-111(e).

This case involved a dispute between two foster families as to which family should have permanent placement of R.S. At the time the dispute arose, the child, R.S., had four older biological siblings who has been placed in a home together. R.S. had been placed in a separate foster home at removal and had developed a relationship with the foster parents and two other children in the home.

The foster parents for R.S. moved to intervene, and the circuit court granted their motion. The circuit court also ordered that a bonding assessment be conducted to determine the risk to the child if he were to be moved to the home with his biological siblings. Throughout the case and on appeal, the guardian *ad litem* advocated for placement of R.S. with his siblings.

Although an evidentiary hearing on the bonding assessment was scheduled, it was not conducted once the circuit court reviewed West Virginia Code §§ 49-2-126 and -127, the *Foster Child Bill of Rights* and the *Foster and Kinship Bill of Rights*. The circuit court concluded that it had no authority to consider the child's best interests because of the legislation. Even though the circuit court found that the child should be moved, it found that R.S. should remain with his foster parents. However, the guardian *ad litem*, in an emergency motion, requested that R.S. be moved to the home with his siblings based upon allegations that the foster family for R.S. had fabricated allegations of physical abuse by the second foster family. The court granted the motion, and R.S. was moved without affording R.S.'s foster parents the opportunity to respond to the allegations in the guardian *ad litem*'s motion.

After reviewing the language of West Virginia Code § 49-2-126, the Supreme Court concluded that the circuit court erred when it found that the statute mandated placement of R.S. with his siblings and when it concluded that a best interests analysis for R.S. was not allowed. The Court also noted that the statute must be considered along with the previously established legislation on the sibling preference found in West Virginia Code § 49-4-111(e). Further, the Court explained that well-established caselaw requires a best interests analysis. See, e.g., *In re K.L.*, 826 S.E.2d 671 (W. Va. 2019).

Remanding the case, the Court instructed that the circuit court must conduct an evidentiary hearing on the best interests of R.S. The Court also instructed the circuit court

to consider the appointment of a separate guardian *ad litem* because R.S.'s bonds with his original foster family had not been sufficiently analyzed or considered by the guardian *ad litem*. Finally, the Court found that the circuit court should address whether R.S. should have visits with the foster family.

## F. Psychological Parents

Syl. Pt. 6, *In re N.A.,* 227 W. Va. 458, 711 S.E.2d 280 (2011)

A psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent, or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian. To the extent that this holding is inconsistent with our prior decision of *In re Brandon L.E.,* 183 W. Va. 113, 394 S.E.2d 515 (1990), that case is expressly modified." Syl. Pt. 3, *In re Clifford K.,* 217 W. Va. 625, 619 S.E.2d 138 (2005).

In addition to the mother, the maternal grandparents of the four children were subject to abuse and neglect proceedings related to their caretaking of the children. When the initial petition was filed, the circuit court only found probable cause of abuse and neglect with regard to the mother and not the grandparents. Accordingly, the circuit court placed the children in the grandparents' custody. As the case progressed, the DHHR discovered that the grandparents were allowing the mother to visit with the children at unauthorized times. Additionally, the grandparents were experiencing fairly significant health problems. Based on these facts, the circuit court ordered the removal of the children from the grandparents' home and placed them in foster care.

Approximately two months later, the grandparents requested the return of the children. The court conducted an evidentiary hearing, in part, to consider this request. It also considered testimony related to the death of a child in the home that had occurred well before the abuse and neglect proceeding had been initiated. At the hearing, the medical examiner testified that the deceased child's injuries were inconsistent with the mother's explanations but concluded that the cause of death was undetermined. Additionally, a DHHR worker testified that the grandparents had repeatedly cancelled appointments for the completion of a home study. Ultimately the home study was not approved. The DHHR worker also heard the grandfather threaten the children with a belt. The criminal background check revealed both a battery conviction and a fairly recent domestic violence conviction. Further, the children soiled their underwear regularly, and one child disclosed that his grandfather had beaten him with a broomstick. Despite this testimony, the circuit court found that the grandparents were the children's psychological parents and that they should receive an improvement period. The order further provided that the children would be returned to the grandparents' home after four weekend visitations, provided that there were no violations of the terms of the improvement period.

On appeal, the Supreme Court held that the circuit court erred because it had not considered the best interests of the children when it entered an order that would allow the children to be returned to the grandparents' custody. The Court expressly noted that: "Simply because a person is found to be a child's psychological parent, however, does not translate into the psychological parent getting custody of the child." 711 S.E.2d at 291. The Court concluded that: "Custody determinations regarding a child or children are still controlled by what is in the best interests of the child." *Id.* Based upon the facts in the record, the Supreme Court found that the circuit court had overlooked the children's best interests in reaching its decision. The Supreme Court, however, indicated that the circuit court, on remand, could consider whether visitation between the children and their grandparents should continue.

## G. Relative Placements

*Note: West Virginia Code § 49-4-601a has established a statutory preference for placement of children with relatives or fictive kin in a case. In addition, it established procedural guidelines for notifying the court and the parties of a child's relatives or fictive kin early in a case. For a discussion of this procedure, see Chapter 3, Section V.G.*

*In re G.G.*, Case No. 22-0365, 2023 W. Va. Lexis 208

Syl. Pt. 5: West Virginia Code § 49-2-126(a)(5) requires a circuit court to conduct a best-interest-of-the-child analysis before removing a foster child from his or her foster family home and placing that child in a kinship placement.

Syl. Pt. 6: As written, West Virginia Code § 49-2-126(a)(5) simply provides a right to a foster child, not an adoptive placement preference for the child's relatives.

The facts of this case involved a placement dispute between foster parents and the child's maternal aunt and uncle that arose after the termination of parental rights. Approximately two months after the termination, the foster parents moved to intervene and sought permanent placement of the child, G.G. Shortly thereafter, the maternal aunt and uncle, who lived in Georgia, also moved to intervene and asked for permanent placement. Since they lived in another state, the DHHR was required to conduct a homestudy through the Interstate Compact on the Placement of Children. In the interim, the aunt and uncle participated in video visits with the child and had three in-person visits. G.G. continued to live with the foster parents.

Approximately four months later, the circuit court conducted a multi-day hearing on the parties' motions. At the time that the circuit court ruled upon placement, G.G. had lived in the foster parents' home for nine months. After hearing the evidence, the circuit court found that both homes were suitable adoptive homes, but that the determinative factor was the best interests of G.G. The circuit court concluded that it was in G.G.'s best interests to continue placement with her foster parents because she had developed a significant bond with them. It then granted the foster parents' motion to intervene and for placement, and it denied the aunt and uncle's motion. In the opinion, the Supreme Court noted that both parties had been allowed to fully and equally participate in the circuit court hearing.

In their first argument, the aunt and uncle ("petitioners") asserted that the circuit court erred by not following the preference for adoption with a relative, and they relied upon the Foster Child Bill of Rights, specifically West Virginia Code § 49-2-126(a)(5). They also argued that the circuit court erred in concluding that the determinative factor was G.G.'s best interests. Further, they asserted, pursuant to West Virginia Code § 49-4-111(b), that the child's bonds with the foster parents should have only been considered after the child had been placed with them for 18 months.

Addressing this first assignment of error, the Supreme Court reviewed its prior cases of *State ex rel. Kristopher O. v. Mazzone*, 706 S.E.2d 381 (W. Va. 2011) and *In re K.L.*, 826 S.E.2d 671 (W. Va. 2019) in which it had found that the only two adoptive preferences are with grandparents and with siblings. Noting that these cases were decided before the enactment of West Virginia Code § 49-2-126, the Court discussed the language of the statute and next addressed the case of *In re R.S.*, 855 S.E.2d 355 (W. Va. 2021) which was decided after the enactment of the Foster Child Bill of Rights. The Court observed that it, in *R.S.*, had decided that a court must conduct a best-interests-of-the-child analysis when it determines whether a child should be placed with siblings pursuant to West Virginia Code § 49-2-126(a)(6). The Court concluded, therefore, that the same reasoning applies to the subsection at issue, subsection (a)(5), which refers to a foster child's right to a kinship placement. Simply stated, a circuit court must consider a child's best interests when it determines whether a child should be placed with relatives or fictive kin.

Next, the Court addressed the petitioners' contention, that the child had not lived with the foster parents for a long enough time to develop a bond and that the child would not remember the foster parents. The Court observed that: "it is well-established that significant bonds are formed between a child and his or her caregivers at this young age, and, critically, any disruption of those bonds has the potential to severely impact the child's growth and development." 2023 W. Va. Lexis 208, *19. The Court cited to two secondary sources: J. Goldstein, A. Freud & J. Solnit, *Beyond the Best Interests of the Child* 32-33 (1973) and Burton L. White, Ph.D., *The First Three Years of Life* (1985) as support. As for the facts of the instant case, the Court summarized specific facts in the record, such as the child referring to the foster parents as "Mommy" and "Daddy" and the treatment coordinator's observations concerning their relationship.

The final error that the Court addressed was the inevitable delay in placement caused by the DHHR's compliance with the Interstate Compact on the Placement of Children. The petitioners argued that had the DHHR complied with West Virginia Code § 49-4-601a at the beginning of the case, the outcome would have been different. However, the Court expressly stated that: "bureaucratic errors and delays cannot dictate the outcome of a case where a child's future is at stake." 2023 W. Va. Lexis 208, *25. For all of these reasons, the Court affirmed the lower court ruling.

In his concurring opinion, Justice Wooton agreed with the majority's conclusion, that there is no adoptive preference for relatives. He pointed out that the Legislature

would have to enact a preference as it has done with both the grandparent and sibling preferences. Concurring with the majority opinion, Justice Bunn expressed her frustration with the delays of the case that precluded a child from developing a relationship with her biological relatives. She also indicated her hope that the DHHR, in the future, would be vigilant in the development of relative placements in individual cases.

*In re R.S.*, 244 W. Va. 564, 855 S.E.2d 355 (2021)

*Note: For a complete discussion of this opinion, see Section XIV.E.*

Syl. Pt. 11: W. Va. Code § 49-2-126(a)(6) requires a circuit court to conduct a best interest of the child analysis by considering a child's needs, and a family's ability to meet those needs. One factor that may be included in this analysis is a child's ability to remain with his or her siblings. A circuit court considering this factor should conduct its analysis in conformity with W. Va. Code § 49-4-111(e).

The dispute involved whether the child, R.S., should remain with one set of foster parents or whether he should be moved to a second foster home with his four older biological siblings. When the circuit court reviewed the applicable statute, West Virginia Code § 49-2-126(a)(6), it concluded that the statute mandated placement of R.S. with his older siblings and that it should not incorporate a best interests analysis for R.S. After reviewing the statute and other legal authority, the Supreme Court concluded that a best interests analysis is required when a circuit court is considering whether to move a child from one placement to a second placement with siblings. Therefore, it can be concluded that a best interests analysis must be considered when placement with a relative is at issue.

*Kristopher O. v. Mazzone*, 227 W. Va. 184, 706 S.E.2d 381 (2011)

This case involved a dispute about a permanency plan between the child's paternal aunt and the foster parents with whom the child had lived for 22 months. After a permanency hearing in which the foster parents were not allowed to participate, the circuit court ordered the immediate placement of the child with her paternal aunt. The DHHR relied on its adoption policy that required the placement of a child with a relative with an approved home study over a non-relative home.

The Supreme Court observed that, in West Virginia law, the only statutory preferences for placement are grandparents and the reunification of siblings, subject to a child's best interests. With regard to federal law, the Court determined that federal law does not require placement with a blood relative. Rather, federal law only requires that such placements be considered. With regard to relative placements, the Court noted that the DHHR should pursue them early in a case. The Court remanded the case and directed the circuit court to conduct another permanency hearing and to allow the foster parents to participate.

Syl. Pt. 2, *In re K.L.*, 241 W. Va. 546, 826 S.E.2d 671 (2019)

Only two statutory familial preferences applicable to the adoption of a child are recognized in this State: (1) a preference for adoptive placement with the child's grandparents set forth in W. Va. Code § 49-4-114(a)(3) and (2) a preference for placing siblings into the same adoptive home pursuant to W. Va. Code § 49-4-111. Apart from the grandparent and the sibling preferences, there does not exist an adoptive placement preference for a child's blood relatives, generally.

In this case, two families sought custody of the children, R.L. and K.L., the foster parents and the children's parental aunt and uncle. Upon the children's initial removal from their parents, the aunt and uncle were not considered for temporary placement because they lived 15 hours away. The children were instead placed with the foster parents, with whom they lived with for 11 months prior to the hearing in which the circuit court addressed their permanent placement. During the case, the court terminated the parental rights of the biological mother and father.

Although they were relatives, the paternal aunt and uncle did not have an established relationship with the children. Rather, they had only met the children during the course of the case. In addition, the older child, R.L., had significant special needs, but showed great improvement after she received intensive services in the foster home. R.L. also had attachment issues if the foster mother was away from her even for a short period of time. Despite this evidence, the circuit court ruled that the children should be placed with their relatives and concluded that there was a general policy that favored the placement of children with relatives. The circuit court relied on West Virginia Code § 49-4-604, which allows placement with a fit and willing relative, when it concluded that the children should be placed with their paternal aunt and uncle. The court ordered that there should be a transition period of 90 days to transfer custody of the children to their aunt and uncle. After the circuit court refused to grant a stay, the Supreme Court did so upon the guardian *ad litem's* motion.

Although the circuit court concluded that there is a general statutory preference for placing children with "blood" relatives, the Supreme Court found that the statute and policy relied upon by the circuit court do not, in fact, support a statutory preference for placing children with relatives. Rather, the Court noted that there are only two such preferences -- placement with grandparents (West Virginia Code § 49-4-114(a)(3)) or with siblings (West Virginia Code § 49-4-111). See *Kristopher O. v. Mazzone*, 706 S.E.2d 381 (W. Va. 2011). Based upon this reasoning, R.L.'s special needs and attachment issues, and K.L.'s young age, the Court concluded that it was in the children's best interests to place the children permanently with their foster parents. The Court, therefore, reversed the circuit court ruling and remanded the case.

*State ex rel. D.B. v. Bedell*, 246 W. Va. 570, 874 S.E.2d 682 (2022)[29]

Syl. Pt. 4: A prospective foster or adoptive parent has the right to appeal a decision of the West Virginia Department of Health and Human Resources denying him or her an approved home study as set forth in West Virginia Code § 49-2-105.

Syl. Pt. 5: An approved home study showing that a grandparent would be a suitable adoptive parent is a mandatory requirement for application of the grandparent preference as set forth in West Virginia Code § 49-4-114(a)(3). When a grandparent has not received an approved home study from the West Virginia Department of Health and Human Resources, a circuit court does not have the authority to disregard the absence of an approved home study and proceed to apply the grandparent preference.

When an abuse and neglect case was filed, the DHHR did not take custody of R.L. or his three siblings because the children were living with other individuals, not with their parents. R.L. and one of his siblings were living with the maternal grandparents. Early in the case, the mother took R.L. and his sibling from the grandparents' home. To safeguard the children, the DHHR removed the children from the mother's custody. At this point, the DHHR informed the grandparents that they would not be approved for placement because the grandfather had two 1992 convictions for sexual battery. It should be noted that, according to DHHR policy, that the offenses are considered to be non-waivable. Consequently, R.L. was placed with a maternal aunt, and he lived with her for approximately one year. During the case, the mother's parental rights were terminated. After the maternal aunt informed the DHHR that she did not wish to adopt R.L., the DHHR placed R.L. with his foster parents.

One day after placement of R.L. with the foster parents, the grandparents filed a motion to intervene and a motion for an expedited home study. The grandparents also filed a motion in which they requested placement of R.L., both temporarily and permanently. The foster parents did not receive notice of the motions or notice of a hearing on the motions. The foster parents of R.L.'s siblings had learned of the grandparents' efforts and informed R.L.'s foster parents. In turn, they contacted the guardian *ad litem* who informed them of the upcoming placement hearing. The foster parents appeared at the placement hearing, but they were not represented by counsel. The guardian *ad litem* presented the testimony of D.B., one of the foster parents, and one of them made a brief proffer. However, the circuit court did not discuss the foster parent's testimony or the proffer in its written order. In its opinion, the Supreme Court noted that the primary focus of the placement hearing had been on the grandfather's sexual battery conviction, the circumstances of offenses, and the grandfather's remorse for his actions. Ultimately, the circuit court found that the best interests of R.L. would be served by placement with his grandparents, even though the DHHR home study was not approved.

[29] A 2023 amendment to the grandparent preference statute, West Virginia Code § 49-4-114(a)(3), expressly authorizes circuit court judges to determine whether it is in a child's best interests to be adopted by grandparents even when the grandparents have not completed or passed a home study. The holding of this case has been, at the least, called into question by this statutory amendment.

To challenge the placement order, the foster parents filed a petition for a writ of prohibition.

As an initial matter, the Supreme Court found that the foster parents satisfied the first two factors of syllabus point four of *State ex rel. Hoover v. Berger*, 483 S.E.2d 12 (W. Va. 1996), that is, that they had no other adequate means of redress and that they would prejudiced in a way that could not be corrected on appeal. To oppose the petition, the grandparents argued that the foster parents should have intervened below and requested reconsideration of the circuit court ruling. The Supreme Court, however, rejected this argument because the record below indicated that the permanency plan for R.L. had been adoption by the foster parents and that, therefore, the foster parents would have had no reason to believe that they needed to intervene any earlier. Additionally, the Supreme Court noted that the circuit court had already granted the motion to intervene and had scheduled a placement hearing when the foster parents first became aware that the grandparents had obtained counsel and were seeking placement.

To challenge the placement order, the foster parents argued that circuit court exceeded its legitimate authority when it applied the grandparent preference found in West Virginia Code § 49-4-114(a), even though the home study was not approved. Relying on syllabus points four and five of *Napoleon S. v. Walker*, 617 S.E.2d 801 (W. Va. 2005), they argued that an approved DHHR home study is a necessary prerequisite to applying the grandparent preference.

To resolve the issue before it, the Supreme Court first addressed the provisions that allow a prospective foster or adoptive parent to appeal a decision by the DHHR if a home study is not approved. Specifically, the Court outlined the grievance procedure set forth in the "Common Chapters Manual," and the right to seek judicial review of an adverse decision by the DHHR. See W. Va. Code §§ 29A-5-1 to -5; W. Va. Code § 49-2-105. In a new syllabus point, the Supreme Court held that any prospective foster or adoptive parent may seek judicial review if he or she does not receive an approved home study.

The next issue addressed by the Supreme Court is the application of the grandparent preference if the DHHR does not approve a home study. In a second new syllabus point, the Court held that the grandparent preference may not be applied unless the grandparent has an approved home study. In its opinion, the Supreme Court found that the grandfather had not been informed of the DHHR grievance procedure for challenging a failed home study. In footnote 10 of the majority opinion, the Supreme Court stated that whether the grandfather could grieve the DHHR's decision was not an issue before it, and it, therefore, would not address whether the grandfather could ever receive an approved home study.

The final issue addressed by the Court was the best interests of R.L. The Supreme Court found that the circuit court did not address the proffer of the foster parents, nor did it discuss the testimony of D.B. in its written decision. Therefore, it concluded it could not determine the weight that the circuit court had given to the foster parent's testimony or

proffer. It further observed that the circuit court must consider R.L.'s current placement and the effect on him should he be moved to the grandparents' home.

Justice Armstead, joined by Justice Walker, concurred in part and dissented in part. They concurred that the writ of prohibition was warranted because of multiple errors below. However, Justice Armstead dissented with regard to the majority opinion that indicated that the grandfather should have been informed of his right to grieve the DHHR decision. He first discussed the DHHR grievance procedure which is found in the "Common Chapters Manual." Next, he summarized the provisions of the DHHR Homefinding Policy[30] that establish certain convictions as non-waivable, including convictions for sexual offenses. He pointed out that circuit court review of a grievance such as the grandfather's would be limited to whether the grandfather had been convicted of a non-waivable offense. Since the grandfather had admitted to his conviction, Justice Armstead pointed out that the grandfather would never be able to obtain a favorable home study and any error arising from lack of notice of the grievance procedure was moot.

## H. Custody Changes

Syl. Pt. 3, *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991); Syl. Pt. 8, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996); Syl. Pt. 3, *Robert Darrell O. v. Theresa Ann O.*, 192 W. Va. 461, 452 S.E.2d 919 (1994)

It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives.

Syl. Pt. 7, *In re George Glen B., Jr.*, 207 W. Va. 346, 532 S.E.2d 64 (2000)

When a circuit court determines that a gradual change in permanent custodians is necessary, the circuit court may not delegate to a private institution its duty to develop and monitor any plan for the gradual transition of custody of the child(ren).

*In re N.A.*, 227 W. Va. 458, 711 S.E.2d 280 (2011)

Although the Court noted that gradual transition periods should generally be used to implement a change in custody, it observed that the grandparents' repeated violations of prior orders and the grandfather's use of fear and intimidation may well indicate that a gradual transition period would not be suitable.

[30] As set forth in Justice Armstead's separate opinion, the DHHR Homefinding Policy and West Virginia Code § 49-2-114 provide that an individual may not have a criminal conviction for a non-waivable offense or abuse and neglect history to receive an approved homestudy.

*Kristopher O. v. Mazzone*, 227 W. Va. 184, 706 S.E.2d 381 (2011)

When the custody of a child was abruptly changed after she had resided with her foster parents for 22 months, the Court stated that: "A child should not be treated like a sack full of potatoes picked up from a local grocery store. The law requires that there must be a gradual transition in cases such as the one before us." 706 S.E.2d at 392.

## I. Subsidized Adoption and Legal Guardianship

*State ex rel. Treadway v. McCoy*, 189 W. Va. 210, 429 S.E.2d 492 (1993)

*W. Va. Code § 49-4-112*

In this case involving a custody dispute between foster parents and the child's half-sister, the Court recognized that "The Legislature has expressly encouraged foster parents who develop emotional ties to the children for whom they care to adopt these children. W. Va. Code § 49-2-17." 429 S.E.2d at 495. The Court further recognized that adoption subsidies established by West Virginia Code § 49-2-17 encourage foster parents to adopt their foster children. Although the Court expressly referred to adoption by foster parents, this statute, as amended, governs subsidies for both adoption and legal guardianships. It also establishes the conditions for a subsidy that include, but are not limited to, a significant bond between a child and his or her foster parents.

*In re Adoption of Jamison Nicholas C.*, 219 W. Va. 729, 639 S.E.2d 821 (2006)

After his mother died, Jamison was placed in the emergency custody of the DHHR. Subsequently, he was placed in the custody of his maternal grandparents who later adopted him. While the adoption was pending, Jamison was diagnosed with ADHD and a depressive disorder. After the adoption was final, Jamison was diagnosed with Asperger's Syndrome. For over five years, he received medical assistance from the DHHR based upon the income of his adoptive parents. Once their income increased, Jamison was no longer eligible for this assistance. The adoptive parents moved the circuit court to amend the adoption order so that Jamison would receive a medical card. The circuit court granted the motion and ordered the DHHR to enter into an adoption assistance agreement with the adoptive parents.

*W. Va. Code § 49-4-112*

On appeal, the Supreme Court found that the DHHR had a duty to notify the adoptive parents of available assistance, that DHHR knew or should have known that the child was a special needs child as described by West Virginia Code § 49-2-17. Holding that the child was eligible for a medical card, the Court adopted the following new syllabus point:

Syl. Pt. 2: Under the Federal Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 670-679b, and W. Va. Code § 49-2-17, the West Virginia Department of Health and Human Resources has an affirmative duty to notify prospective adoptive parents and prospective legal guardians of the availability of assistance for the care of a potentially special needs child in instances where the Department has responsibility for placement and care of the child or is otherwise aware of the child.

### J. Modification of Permanent Placements

J.S. v. Facemire, Nos. 21-0627, 21-0857 (W. Va. May 27, 2022)(memorandum decision), 2022 W. Va. Lexis 445

This case involved adoptive parents who relinquished their parental rights to their adopted child because of his dangerous behaviors, that included setting fire to the family's home. In his concurring opinion, Justice Hutchison pointed out that a modification of a permanent placement should be addressed by a motion pursuant to West Virginia Code § 49-4-606(b) in the circuit court of origin.

## XV. PLACEMENT WITH GRANDPARENTS

*Note: The discussion of placement with grandparents is addressed in a separate section from the discussions of other preferred placements because it is lengthy.*

### A. Statutory Preference Subject to Child's Best Interests

Syl. Pt. 4, Napoleon S. v. Walker, 217 W. Va. 254, 617 S.E.2d 801 (2005); Syl. Pt. 2, In re Aaron H., 229 W. Va. 677, 735 S.E.2d 274 (2012); Syl. Pt. 2, In re Elizabeth F., 225 W. Va. 780, 696 S.E.2d 296 (2010)

*W. Va. Code § 49-4-114(a)(3)*

West Virginia Code § 49-3-1(a) provides for grandparent preference in determining adoptive placement for a child where parental rights have been terminated and also incorporates a best interests analysis within that determination by including the requirement that the Department find that the grandparents would be suitable adoptive parents prior to granting custody to the grandparents. The statute contemplates that placement with grandparents is presumptively in the best interests of the child, and the preference for grandparent placement may be overcome only where the record reviewed in its entirety establishes that such placement is not in the best interests of the child.

Napoleon S. v. Walker, 217 W. Va. 254, 617 S.E.2d 801 (2005)

In this case, a two-month-old child was physically abused by his father. Subsequent to the termination of parental rights, the paternal grandparents attempted to be considered as adoptive parents. In an administrative proceeding, the DHHR found that the grandparents were not suitable adoptive parents because they had difficulty acknowledging their son's culpability. The grandparents appealed to the Kanawha Circuit Court which affirmed the DHHR's decision. The Supreme Court, however, reversed the circuit court, and recognized the statutory preference for grandparents. With regard to this statutory preference, the Court further held that an analysis of the best interests of the child is implicitly included when the statutory preference is applied.

In re Elizabeth F., 225 W. Va. 780, 696 S.E.2d 296 (2010)

In this *per curiam* opinion, the Supreme Court explained the parameters on the legislative grandparent preference for an adoptive placement. The Court expressly stated

that: "[T]he adoptive placement of the subject child with his/her grandparents must serve the child's best interests. Absent such a finding, adoptive placement with the child's grandparents is not proper." 696 S.E.2d at 302. Based upon this reasoning, the Court concluded that the statutory preference is not absolute. Because the record in the case indicated that the circuit court may have treated the preference as absolute, the case was remanded for reconsideration and for a determination as to whether the proposed adoptive placement with the grandparents would serve the children's best interests.

## B. The Role of a Home Study

Syl. Pt. 5, *Napoleon S. v. Walker*, 217 W. Va. 254, 617 S.E.2d 801 (2005); Syl. Pt. 3, *In re Aaron H.*, 229 W. Va. 677, 735 S.E.2d 274 (2012); Syl. Pt. 3, *In re Elizabeth F.*, 225 W. Va. 780, 696 S.E.2d 296 (2010)

*W. Va. Code § 49-4-114(a)(3)*

By specifying in West Virginia Code § 49-3-1(a)(3) that the home study must show that the grandparents "would be suitable adoptive parents," the Legislature has implicitly included the requirement for an analysis by the Department of Health and Human Resources and circuit courts of the best interests of the child, given all circumstances of the case.

*In re Hunter H.*, 227 W. Va. 699, 715 S.E.2d 397 (2011)

*W. Va. Code § 49-4-114(a)(3)*

This case involved a dispute between a young child's foster parents with whom he had been placed for three years and a maternal grandmother who had an approved home study. The child had been removed from his mother's care when he was 17 months old because of her illegal drug use and the child's exposure to domestic violence. When the DHHR first became aware of the mother's drug use, the child was placed with his maternal grandmother. After this initial placement, the DHHR learned that the grandmother's husband regularly used marijuana and alcohol and engaged in acts of domestic violence against the grandmother. To provide for the child's safety, the DHHR filed an abuse and neglect petition and named the child's biological parents, the maternal grandmother and her husband as adult respondents. At this point, the child was placed with his foster parents and remained there until the circuit court placed him with his maternal grandmother once she obtained a favorable home study.

After he was removed from her care, the child's grandmother requested a home study. She was not, however, approved because of her husband's substance abuse and acts of domestic violence. She and her husband were dismissed as respondents to the abuse and neglect case because they were no longer considered a possible placement for the child. While the abuse and neglect case was pending, the child's biological parents both relinquished their parental rights.

In response to the failed home study, the grandmother divorced her husband and ultimately requested another home study. This time, the grandmother's home study was approved.

After the home study was approved, the DHHR requested that the circuit court place Hunter H. with his maternal grandmother based upon the statutory grandparent preference. The circuit court granted this request over the objections of the guardian *ad litem* and the foster parents who had been allowed to intervene. Although they requested a stay, the circuit court ordered the child to be placed immediately with his grandmother.

Holding that the circuit court erred, the Supreme Court found that the circuit court "elevated the grandparent preference over the best interests of the child." The Supreme Court noted that the child was part of a stable, loving home and had been for three years. Also, the Court noted that an approved home study alone should not determine what is in a child's best interests. The Court further ruled that the immediate change in custody from the foster parents to the maternal grandmother was contrary to case law. Citing cases that provide for a gradual transition of custody, the Supreme Court directed the circuit court to conduct a full hearing to determine how the child should be returned to his foster parents' home.

*In re Aaron H.*, 229 W. Va. 677, 735 S.E.2d 274 (2012)

In this *per curiam* opinion, the child's paternal grandfather claimed that the court erred by placing the child for adoption with his foster parents instead of with him in view of the statutory preference for grandparent placement. Affirming the circuit court, the Supreme Court noted that the child was 18 months old when the petition was filed and, at the time of the appeal, was almost five years old. Additionally, the Supreme Court pointed out that the grandfather had extremely limited contact with the child both before the case and while it was pending. Finally, the Court noted that the grandfather was partially at fault for the failure to complete the home study.

The Court concluded that:

> [T]he grandparent preference must be tempered by a court's consideration of the child's best interests. If on balance, the grandparent placement fails to serve the best interests of the child, the child may be placed elsewhere. 735 S.E.2d at 280.

*In re L.M.*, 235 W. Va. 436, 774 S.E.2d 517 (2015)

This case began when a three-year old boy, L.M., was removed from his parents' custody as a result of chronic substance abuse, which included exposure to drug paraphernalia and a clandestine methamphetamine lab. The meth lab was located in the mother's trailer, a home that her parents had bought for her. Originally, L.M. was placed in foster care, but the maternal grandparents moved to intervene and also requested that he be placed in their home. Over the DHHR's objection, the court placed L.M. in the physical custody of his grandparents. The court did not, however, grant the grandparents' motion to intervene.

Shortly thereafter, L.M.'s sister, L.S., was born, and she had substantial amounts of alcohol in her system and trace amounts of controlled substances. She was also

placed in the physical custody of her grandparents. On an unannounced visit, the DHHR took photographs and discovered that the grandparents had baby items, a bassinet and baby swing, from the meth-contaminated home. The DHHR requested and was granted emergency custody of the two children and placed them in foster care. The court conducted a full evidentiary hearing and found that the grandparents were using items from the meth-contaminated home. Testimony at the hearing indicated that meth residue on household items could result in adverse health effects. The court found that the foster care placement should continue.

During the course of the case, the court terminated the adult respondents' parental rights, and permanent placement of the children became the contested issue. The grandparents had requested a home study, which the DHHR began. Approximately seven months after the court conducted the initial hearing on the removal of the children from the grandparents' home, the court conducted another evidentiary hearing on the grandparents' motion to intervene and motion for placement of the children. Denying both motions, the circuit court based its findings on the presence of the meth-contaminated items in the grandparents' home, the grandparents' support of their adult children, who have issues with drugs and crime, and the failure to prevent interaction between the children and their biological mother. The circuit court also considered the children's need for the continuity of care and caretakers. The court ruled on the placement of the children before the grandparents' home study had been completed.

*W. Va. Code § 49-4-114(a)(3)*

One of the grandparents' assignments of error involved the application of the grandparent preference statute. Specifically, the grandparents argued that the court failed to apply the statutory presumption that favors placement with grandparents, and they also argued that the court erred by deciding on placement of the children before the home study had been completed.

After analyzing the language of the grandparent preference statute, the Court concluded that it imposes a mandatory duty on the DHHR to conduct a home study when a grandparent expresses interest in placement. In a new syllabus point, the Court held that:

> The mandatory language of W. Va. Code § 49–3–1(a)(3) requires that a home study evaluation be conducted by the West Virginia Department of Health and Human Resources to determine if any interested grandparent would be a suitable adoptive parent. Syl. Pt. 9, *In re L.M.*, 774 S.E.2d 517 (W. Va. 2015).

Although the grandparent preference statute requires the DHHR to conduct a home study, the Court observed that the interpretation of the statute would not control the resolution of the case. Rather, the Court found that the best interests of the children should determine their permanent placement. Despite the statutory language requiring the DHHR to conduct a home study, the Court determined that the statute would not require completion of a home study if a grandparent is found to be unsuitable adoptive placement. In a second new syllabus point, the Court held that:

> While the grandparent preference statute, at W. Va. Code § 49-3-1(a)(3), places a mandatory duty on the West Virginia Department of Health and Human Resources to complete a home study before a child may be placed for adoption with an interested grandparent, "the department shall first consider the [grandparent's] suitability and willingness ... to adopt the child." There is no statutory requirement that a home study be completed in the event that the interested grandparent is found to be an unsuitable adoptive placement and that placement with such grandparent is not in the best interests of the child. Syl. Pt. 10, *In re L.M.*, 774 S.E.2d 517.

*In re J.P.*, 243 W. Va. 394, 844 S.E.2d 165 (2020)

This case involved a dispute between a paternal grandfather and foster parents over the permanent placement of a child. An initial abuse and neglect case arose because of the biological parents' substance abuse. The mother was successful in an improvement period, and the child was returned to her custody. The circuit court, however, terminated the father's parental rights.

Less than a year after the mother had regained custody of her child, the child was again placed in foster care because the mother was arrested for selling drugs. One day after the removal of the child, the paternal grandfather and maternal grandmother, who both lived in Philadelphia, moved to intervene and requested custody of the child. At an MDT early in the case, it was determined that the maternal grandmother's home was not suitable. In turn, the paternal grandfather began completing ICPC paperwork to seek approval for the placement of his grandchild.

Approximately five months after the filing of the petition, the circuit court granted the grandparents' motion to intervene and terminated the mother's parental rights. What next ensued were significant delays in the completion of the ICPC paperwork necessary to place the child in Philadelphia. It was undisputed that the delays were not caused by the grandparents and that the paternal grandfather was considered an appropriate placement. Approximately 11 months after the petition was filed, the foster parents were granted intervenor status, and they also requested permanent placement of the child.

To determine the permanent placement of the child, the court conducted a series of hearings. At one of the hearings, the foster parents presented the testimony of a licensed psychologist who testified that the child was developing an attachment with them. The same psychologist also testified that the child did not have as strong of a bond with the grandfather, but that the child was able to interact well with the grandfather. The psychologist further testified that both parties were appropriate placements for the child. The psychologist did testify that the child would be at risk for attachment issues, including reactive attachment disorder, if the child were placed permanently with the grandfather. Further, the court heard testimony that there had been bureaucratic delays in the completion of the grandfather's home study. Ultimately the circuit court found that the child should be placed with the foster parents based upon the testimony of the psychologist. The court further noted that the grandfather's age, which was 52 at the

time, factored in the grandfather's long-term ability to parent the child. Given these factors and the length of time that the child was in the foster home, the circuit court found that the best interest of the child outweighed the statutory grandparent preference.

Addressing the matter, the Supreme Court first noted that the delays were caused by the DHHR and the counterpart agency in Pennsylvania. Secondly, the Court found that the circuit court did not adequately consider or give credence to the grandparent preference. The Court additionally noted that the grandfather was found to be fit. Therefore, the Court concluded that the grandfather should have been granted permanent placement of the child. The Court further relied upon the opinion of the guardian *ad litem* who advocated for placement with the grandfather. Specifically, she addressed the potential disappointment that the child may experience in the future if the child were not placed in his biological family.

In his dissenting opinion, Justice Hutchison asserted that the majority had elevated the grandfather's rights over the rights of the child. Additionally, he stated that the majority opinion ignored critical expert testimony, and he included detailed quotations from the testimony in his separate opinion. He indicated that the child should remain with the foster parents, but further discussed that the child should be allowed to maintain a relationship with his grandparents under the guidance found in *Murrell B. v. Clarence R.*, 836 S.E.2d 9 (W. Va. 2019). Apparently, the parties were all amenable to such a continued relationship in the event that the foster parents were allowed to adopt the child. For all of these reasons, Justice Hutchison dissented.

*In re A.A.*, 246 W. Va. 596, 874 S.E.2d 708 (2022)

*Note: The threshold issue addressed in this opinion involved the Supreme Court's finding that the circuit court had "significant connection" jurisdiction under the UCCJEA to adjudicate the custody of a child. See Section I.B.*

In 2019, the DHHR took custody of A.A. after her father was arrested during a high-speed chase and the child had been left in a hotel room with an unrelated individual. Both drugs and drug paraphernalia were found in the hotel room. Apparently, the father had brought the child to West Virginia three days earlier. During the removal, the CPS worker contacted the paternal grandmother in South Carolina about placement of the child, but she declined placement because one of her adult sons who had a felony record was living with her and she would not pass a home study. The DHHR placed A.A. with the foster parents who had cared for A.A. for two weeks in 2018 during an earlier abuse and neglect case.

Approximately ten months into the instant case, it became apparent that the father's rights would be terminated. In response, the grandmother moved to intervene in the case and also sought placement of A.A. In turn, the foster parents intervened in the case. While the placement motion was pending, the grandmother moved to Moundsville, not to the county where A.A. was living. A.A.'s father lived close to the grandmother's home. The DHHR approved the grandmother's home study. Another issue in the case involved A.A.'s developmental delays. Apparently, she was autistic, but she had greatly

improved while she was in the care of the foster parents. After hearing the evidence, the circuit court found that it was in the child's best interests to remain with the foster parents and denied the grandmother's motion for custody.

After finding that the circuit court had jurisdiction under the "significant connection" test in the UCCJEA, the Supreme Court addressed the merits of the grandmother's claims of error. First, the grandmother argued that the circuit court erred because it did not order an immediate home study of her residence. The Supreme Court, however, pointed out that the grandmother had declined placement at removal and that the grandparent preference statute only applies when a grandparent is both a suitable and willing placement. See W. Va. Code § 49-4-114(a)(3).

The grandmother also argued that the delay in the completion of the home study was unreasonable. However, the Supreme Court noted that home study was completed within a month of the grandmother's intervention and that the grandmother caused the delay because she had not been willing to serve as a placement at removal. The Supreme Court distinguished the instant case from that of *In re J.P.*, 844 S.E.2d 165 (W. Va. 2020) in which the delay in the completion of the home study was attributable to the DHHR.

Further, the Supreme Court found that the circuit court did not err when it found that the child would suffer undue stress if custody were transferred to the grandmother. Specifically, it noted the circuit court findings that the child was severely autistic, that her condition worsened while living with the grandmother before the case was filed, and that her condition had improved in the foster home.

Finally, the Supreme Court found that the circuit court did not err in declining placement with the grandmother because the father lived nearby to her residence. The circuit court had concluded that placing the child with the grandmother would invariably expose her to her biological father who exhibited criminal propensities. The Supreme Court noted that the child, who was stable in her current placement, would suffer stress if she were transitioned to another placement. Therefore, the Supreme Court affirmed the circuit court.

### C. Grandparent's Continued Contact with Adult Children

*In re Elizabeth F.*, 225 W. Va. 780, 696 S.E.2d 296 (2010)

In this *per curiam* opinion, the Supreme Court explained the parameters on the legislative grandparent preference for an adoptive placement. The Court expressly stated that: "[T]he adoptive placement of the subject child with his/her grandparents must serve the child's best interests. Absent such a finding, adoptive placement with the child's grandparents is not proper." 696 S.E.2d at 302. Based upon this reasoning, the Court concluded that the statutory preference is not absolute. Because the record in the case indicated that the circuit court may have treated the preference as absolute, the case was remanded for reconsideration and for a determination as to whether the proposed adoptive placement with the grandparents would serve the children's best interests.

*In re K.E.*, 240 W. Va. 220, 809 S.E.2d 531 (2018)

The DHHR initiated this case when twin boys were born drug dependent, and the children were initially placed with foster parents. After the circuit court terminated the parents' rights because of their failure to remedy their substance abuse problems, a dispute arose as to whether permanent placement of the twins should be with their foster parents or paternal grandparents. Throughout the case, the guardian *ad litem* had recommended continued placement with the foster parents. After conducting a permanency hearing, the circuit court ordered that permanent placement of the children would be with their paternal grandparents, even though the grandparents had not developed a relationship with the twins. To reach its decision, the circuit court had referred to the fact that the grandparents were "blood relatives" of the children.

On appeal, the issue was whether the circuit court had correctly applied the grandparent preference found in West Virginia Code § 49-4-114(a)(3). During the appeal, the guardian *ad litem* continued to advocate for placement of the twins with their foster parents, and the DHHR argued that the circuit court had acted within its discretion in its application of the statutory grandparent preference. With regard to the foster parents, the Supreme Court noted that the foster parents had adopted the twins' older half-brother, had remained with the twins after they had been hospitalized at birth, had intervened early in the abuse and neglect case, and had cared for the twins since their birth.

In contrast, the Court noted the paternal grandparents waited to seek custody, dependent on whether the twins were, in fact, their biological grandchildren. Of further concern was that the paternal grandparents lived two doors from the biological parents, and they owned the house where the biological parents were living. The biological parents appeared to have ready access to the grandparents' residence as well. Although the Court noted that the grandparents were also certified foster parents and had guardianship of the twins' half-sister, the Court found that the circuit court erred when it had placed the twins with their grandparents based upon the misapplication of the grandparent preference.

The Court observed that the circuit court's deference to placement with the grandparents appeared to be a misapplication or misinterpretation of the statutory grandparent preference. The Court expressly stated that: "The preference is just that -- a preference. It is not absolute. As this Court has emphasized, the child's best interest remains paramount." 409 S.E.2d at 536. The Court instructed the circuit court to develop a gradual transition plan upon remand to return the children to their foster parents.

## D. Pre-Petition Transfer of Custody to Third Party

*In re G.S.*, 244 W. Va. 614, 855 S.E.2d 922 (2021)

Syl. Pt. 2: When a writing signed by both parents purports to transfer custody of a child to a third person, and that child later becomes the subject of an abuse and neglect petition against the child's parents, the person with purported custody of the child has a right to be heard at the preliminary phase of the proceedings to determine: (a) whether

the writing is authentic, (b) whether he or she is a responsible person for purposes of West Virginia Code § 49-4-602, and (c) whether temporary placement with such person is in the child's best interest.

A child was born prematurely, had been exposed to addictive drugs, and remained hospitalized for a lengthy period. A day after the child's birth, both parents signed a written agreement transferring custody of the child to the paternal grandparents, and the paternal grandparents filed a guardianship petition the following day. On the same day that the guardianship petition was filed, the DHHR applied for emergency custody, and the magistrate ratified the emergency custody order. Once the DHHR obtained custody of the child, the circuit court dismissed the guardianship petition without a hearing and without providing any rationale in the order. After the abuse and neglect petition was filed, the grandparents moved to intervene in the abuse and neglect case, requested placement, and sought to be named as co-petitioners.

At the preliminary hearing, the circuit court heard argument on the motion to intervene. It denied the motion to intervene, but it indicated that the paternal grandparents should be considered for placement. The circuit court did not, however, address whether the child should be placed with the grandparents and whether placement with them was in the child's best interests. Opposing the grandparents' placement motion, the DHHR indicated its intent to place the infant with half-siblings who had been previously adopted. The paternal grandparents filed an appeal of the denial of their motion to intervene. Later in the abuse and neglect case, the circuit court granted the motion to intervene, but it did not address whether the child should be placed temporarily with the grandparents.

On appeal, the grandparents relied on upon the grandparents' preference found in West Virginia Code § 49-4-114(a)(3), and they argued that placement of the child with her half-siblings was an abuse of discretion. Reviewing the record, the Supreme Court noted that the circuit court had not made any findings about whether the grandparents should serve as a temporary placement for the child. The Court went on to note that a child may be placed with a "responsible relative" or "responsible person" on a temporary basis pursuant West Virginia Code § 49-4-602(a) & (b). Based upon this reasoning, the Court, in Syllabus Point 2, held that a court, when faced with facts involving a transfer of custody to a third person and the child becomes subject to an abuse and neglect case, the third person has a right to be heard at the preliminary phase of the case. When addressing such a situation, the court must determine whether the writing is authentic and whether the third person is a "responsible person." Finally, the court must determine whether temporary placement is in the child's best interests.

The Supreme Court remanded the instant case for an expedited hearing to determine whether the grandparents should serve as a temporary placement. The Court further noted that, if ordered by the circuit court, any transition from the foster parents to the paternal grandparents should take place gradually.

### E. Development of Evidentiary Record

*In re P.F.*, 243 W. Va. 569, 848 S.E.2d 826 (2020)

After an infant was placed in foster care, the grandmother sought placement of the child and moved to intervene. After the guardian *ad litem* and DHHR opposed the motion, the circuit court did not conduct an evidentiary hearing and denied the grandmother's motion.

As an initial allegation of error, the grandmother argued that she had been denied a meaningful opportunity to be heard. However, the grandmother acknowledged that she was not a party, nor was she a foster parent or relative caregiver. See W. Va. Code § 49-4-601(h). Therefore, the Court concluded that circuit court did not deny the grandmother "a meaningful opportunity to be heard."

On appeal, it became apparent that the guardian *ad litem*'s factual basis for opposing the placement had not been addressed on the record and certain factual disputes that would be relevant to the suitability of the grandmother's home had not been resolved. Therefore, the Court remanded the case with instructions to conduct an evidentiary hearing to determine whether the grandparent preference had, in fact, been overcome and whether placement with the grandmother was not in the child's best interests. The Court noted that it would not be necessary to conduct an evidentiary hearing in all cases, but the factual disputes required a hearing in this case.

## XVI. CHILDREN'S RIGHT TO CONTINUED ASSOCIATION

### A. Post-Termination Visitation with Parents

Syl. Pt. 5, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995); Syl. Pt. 7, *In the Matter of Taylor B.*, 201 W. Va. 60, 491 S.E.2d 607 (1997); Syl. Pt. 3, *In re William John R.*, 200 W. Va. 627, 490 S.E.2d 714, (1997); Syl. Pt. 10, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996); Syl. Pt. 8, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996); Syl. Pt. 8, *In re Emily B.*, 208 W. Va. 325, 540 S.E.2d 542 (2000); Syl. Pt. 11, *In re Daniel D.*, 211 W. Va. 79, 562 S.E.2d 147 (2002); Syl. Pt. 8, *In re Charity H.*, 215 W. Va. 208, 599 S.E.2d 631 (2004); Syllabus, *In re Alyssa W.*, 217 W. Va. 707, 619 S.E.2d 220 (2005); Syl. Pt. 8, *In re Isaiah A.*, 228 W. Va. 176, 718 S.E.2d 775 (2010)

When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well-being and would be in the child's best interest.

*In re Alyssa W.*, 217 W. Va. 707, 619 S.E.2d 220 (2005)

In this case, the circuit court awarded post-termination visitation to a father with his daughter named Sierra H. who was 14 months old at the time of removal. His parental rights were terminated because he had sexually abused his daughter's half-sister. Both girls continued to live with their mother.

Addressing whether a close emotional bond justified an award of post-termination visitation, the Court noted that "a close emotional bond generally takes several years to develop. Thus, the possibility of post-termination visitation is usually considered in cases involving children significantly older than Sierra H." 619 S.E.2d at 224. The Court further reasoned that continued visitation would be disruptive to both children's permanent placement. For these reasons, the Supreme Court reversed the award of post-termination visitation.

*In re Austin G.*, 220 W. Va. 582, 648 S.E.2d 346 (2007)

The circuit court terminated the father's parental rights to his daughter and stepson and denied his request for post-termination visitation. Affirming the circuit court, the Supreme Court noted that the father had failed to visit either child in the two months prior to his parental rights being terminated, both children were very young, and both children had spent more time in the care of others than they had in the father's care. The Court concluded that the father did not have a bond with either child. Further, the Court concluded that the father's failure to meaningfully participate in any of the services offered by DHHR and his failure to comply with any of the circuit court's directives demonstrated that post-termination visitation would not be in the children's best interests.

Syl. Pt. 5, *In re Marley M.*, 231 W. Va. 534, 745 S.E.2d 572 (2013)

A parent whose rights have been terminated pursuant to an abuse and neglect petition may request post-termination visitation. Such request should be brought by written motion, properly noticed for hearing, whereupon the court should hear evidence and arguments of counsel in order to consider the factors established in Syllabus Point 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995), except in the event that the court concludes the nature of the underlying circumstances renders further evidence on the issue manifestly unnecessary.

Syl. Pt. 5, *In re S.L.*, 243 W. Va. 559, 848 S.E.2d 634 (2020)

Filing a post-termination visitation motion does not extend the timeframe in which to appeal a final disposition order entered in an abuse and neglect matter. The timeframe to appeal a final disposition order is set forth in Rule 49 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings and Rule 11 of the Rules of Appellate Procedure.

*In re K.S.*, 246 W. Va. 517, 874 S.E.2d 319 (2022)

*Note: For a more complete discussion of this case, see Section IX.C. and Chapter 6, Section IV.D.*

At disposition, the circuit court terminated the mother's parental rights and placed each of the three children in the sole custody of their respective fathers. The circuit court also allowed post-termination visitation between the mother and her children, but it placed the discretion for the visitation with each of the three fathers.

In addition to reversing the termination of the mother's parental rights, the Supreme Court found that the visitation order was not proper because visitation is the right of the child. The Court noted that the visitation with the mother should not have been subject to the control of the fathers, as it had been ordered in this case. The Supreme Court instructed that, should the circuit court terminate the mother's rights after a properly conducted disposition hearing, it should clearly outline a visitation plan between the mother and her children. The Supreme Court also noted that the visitation order was insufficient because there was no provision for continued sibling contact.

## B. Continued Association with Siblings

Syl. Pt. 4, *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991); Syl. Pt. 9, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996), Syl. Pt. 9, *In the Matter of Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995); Syl. Pt. 3, *Alonzo v. Jacqueline F.*, 191 W. Va. 248, 445 S.E.2d 189 (1994); Syl. Pt. 9, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991); Syl. Pt. 3, *In re Shanee Carol B.*, 209 W. Va. 658, 550 S.E.2d 636 (2001); Syl. Pt. 4, *In re N.A.*, 227 W. Va. 458, 711 S.E.2d 280 (2011)

In cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact.

*In re K.S.*, 246 W. Va. 517, 874 S.E.2d 319 (2022)

*Note: For a more complete discussion of this case, see Section IX.C. and Chapter 6, Section IV.D.*

At disposition, the circuit court terminated the mother's parental rights and placed each of the three children in the sole custody of their respective fathers. Any contact between the three siblings was left to the discretion of the fathers.

In addition to reversing the disposition order, the Supreme Court explained that the right of continued association between the siblings belonged to the children. It concluded that any visitation between the children should not have been left in the sole discretion of the fathers.

## C. Continued Association with Foster Parents

Syl. Pt. 11, *In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996); Syl. Pt. 1, *In the Matter of Zachary William R.*, 203 W. Va. 616, 509 S.E.2d 897 (1998); Syl. Pt. 5, *State ex rel. Kutil v. Blake*, 223 W. Va. 711, 679 S.E.2d 310 (2009)

A child has a right to continued association with individuals with whom he has formed a close emotional bond, including foster parents, provided that a determination is made that such continued contact is in the best interest of the child.

## D. Continued Association with Grandparents

### 1. Grandparent Visitation Statute, West Virginia Code §§ 48-10-101, *et seq.*

*In re Hunter H.*, 231 W. Va. 118, 744 S.E.2d 228 (2013)

Syl. Pt. 1: The Grandparent Visitation Act, W.Va. Code § 48-10-101 et seq., is the exclusive means through which a grandparent may seek visitation with a grandchild.

Syl. Pt. 2: The best interests of the child are expressly incorporated into the Grandparent Visitation Act in W.Va. Code §§ 48-10-101, 48-10-501, and 48-10-502.

*In re Samantha S.*, 222 W. Va. 517, 667 S.E.2d 573 (2008)

### 2. Preference of the Parents

*In re Grandparent Visitation of Cathy L.R.M. v. Mark Brent R.*, 217 W. Va. 319, 617 S.E.2d 866 (2005)

In this *per curiam* opinion, the West Virginia Supreme Court reversed an order that granted visitation to a child's grandparents because the lower court failed to give significant weight to the adoptive parents' preference concerning visitation, one of the statutory factors that must be considered by a court. *See* W. Va. Code § 48-10-502. Relying on *Troxel v. Granville*, 530 U.S. 57 (2000), the West Virginia Supreme Court concluded that "*Troxel* instructs that a judicial determination regarding whether grandparent visitation rights are appropriate may not be premised solely on the best interests of the child analysis. It must also consider and give significant weight to the parents' preference, thus precluding a court from intervening in a fit parent's decision making on a best interests basis." 617 S.E.2d at 874-75.

*In re Samantha S.*, 222 W. Va. 517, 667 S.E.2d 573 (2008)

In an abuse and neglect case, the biological parents' rights were terminated, and the children were ultimately placed in the physical custody of the paternal grandparents who initiated adoption proceedings. During the course of the abuse and neglect case, the maternal grandparents sought and were granted overnight, unsupervised visitation with the children over the objection of the DHHR, the guardian *ad litem* and the paternal grandparents. These parties opposed visitation because the children's psychologist

indicated that it was a stressor that increased the children's problem behaviors. Additionally, the maternal grandparents allowed the children to talk with their mother while she was incarcerated. Third, a grandson of the maternal grandparents exposed himself to one of the children, and the maternal grandparents would not sign a safety plan designed to protect the children. When their visitation was later terminated, the maternal grandparents did not appeal the circuit court ruling. Although the maternal grandparents' visitation was terminated after the paternal grandparents appealed the award of visitation, the Court found that the case had not been rendered moot.

Reversing the award of visitation, the Court concluded that the record established that visitation with the maternal grandparents was not in the children's best interests. Further, the Court found that the circuit court had failed to analyze any of the 13 statutory factors in West Virginia Code § 48-10-502 that are prerequisites for grandparent visitation. The Court specifically noted that the circuit court had failed to adequately consider the effect of the visitation on the children's relationship with their adoptive parents, and any abuse performed, procured, assisted or condoned by the maternal grandparents. The Court further noted that the preference of the pre-adoptive parents (the paternal grandparents) was not given adequate weight.

*In re Grandparent Visitation of A.P.*, 231 W. Va. 38, 743 S.E.2d 346 (2013)

This case involved a grandparent visitation dispute between a mother and a maternal grandmother. The facts indicated that the grandmother had been a significant caretaker for the first year of the child's life, but the mother terminated all visitation when the child was 11 months old. The family court awarded visitation, and the circuit court affirmed. On appeal, however, the Supreme Court noted that under *Troxel,* a fit parent's wishes must be given "special weight." The Court further noted that West Virginia Code § 48-10-702(b) creates a rebuttable presumption against awarding grandparent visitation when the parent through whom the grandparent is related has custody of the child, shares custody of the child or exercises visitation privileges with the child. Under the facts presented, the Court reversed the order that had awarded grandparent visitation.

*Meagan S. v. Terry S.,* 242 W. Va. 452, 836 S.E.2d 419 (2019)

In this case, the child's parents divorced, and the child's father passed away shortly thereafter. In turn, the paternal grandparents sought grandparent visitation in family court, and a guardian *ad litem* was appointed. After an investigation, the guardian *ad litem* recommended fairly limited visitation (four days per year) as opposed to the grandparent's request of every other weekend. The mother had requested no visitation or contact. At the final hearing, the family court did not hear any testimony, and it only considered the guardian *ad litem's* report. It issued an order that granted some limited visitation to the grandparents.

On appeal, the Supreme Court found that the family court had erred when it did not conduct an evidentiary hearing because there were significant factual disputes between the parties. In addition, the Court found that the family court had failed to include an analysis of the factors set forth in West Virginia Code § 48-10-502. See *Turley v.*

*Keesee*, 624 S.E.2d 578 (W. Va. 2005). Specifically, the Court found that the family court had not explained why maintaining the relationship between the child and the grandparents overrode the mother's preference, which must be accorded special weight since she is a fit parent. See *Troxel v. Granville*, 530 U.S. 57 (2000); *In re Grandparent Visitation of A.P.*, 743 S.E.2d 346 (W. Va. 2013). The Court remanded the case with instructions that an evidentiary hearing be conducted and that the final order include a specific analysis of the requisite factors and analysis of the special weight that must be afforded the mother's preference.

3. Termination of Parental Rights

Syl. Pt. 2, in relevant part, *Elmer Jimmy S. v. Kenneth B.*, 199 W. Va. 263, 483 S.E.2d 846 (1997)

*See W. Va. Code §§ 48-10-101, et seq.*

West Virginia Code §§ 48-2B-1, *et seq.* affords circuit courts jurisdiction to consider grandparent visitation under the limited circumstances provided therein, even though the parental rights of the parent for whom the grandparent is related to the grandchild or grandchildren have been terminated.

In this case, the Court referred to, but did not rely on, Rule 15 of RPCANP and its footnote. In its applicable part, Rule 15 states that "the effect of entry of an order of termination of parental rights shall be, *inter alia*, to prohibit all contact and visitation between the child who is the subject of the petition and the parent who is the subject of the order and the respective grandparents, unless the court finds that the child consents and it is in the best interest of the child to retain a right of visitation." It should be noted, however, that adoption by a non-relative will automatically vacate a previously entered grandparent visitation order. See Syl. Pt. 3, *In re Hunter H.*, 744 S.E.2d 228 (W. Va. 2013).

Amended in 2015, the footnote to Rule 15 indicates that it is not intended to alter the rights of grandparents set forth in West Virginia Code §§ 49-4-601, *et seq.* and West Virginia Code §§ 48-10-101, *et seq.*

4. The Effect of Adoption on Grandparent Visitation

Syl. Pt. 3, *In re Hunter H.*, 231 W. Va. 118, 744 S.E. 2d 228 (2013)

Pursuant to W.Va. Code § 48-10-902, the Grandparent Visitation Act automatically vacates a grandparent visitation order after a child is adopted by a non-relative. The Grandparent Visitation Act contains no provision allowing a grandparent to file a post-adoption visitation petition when the child is adopted by a non-relative.

This certified question case addressed whether a grandparent could continue to receive visitation after a child was adopted by non-relatives. In this case, the parental rights of an 18-month old child were terminated. Initially, the child was placed with his maternal grandmother but was removed because of concerns about the grandmother's then-husband. After the child had resided with his foster parents for three years, the

circuit court ordered immediate placement with the grandmother. This decision was reversed by the Supreme Court in *In re Hunter H.*, 715 S.E.2d 397 (W. Va. 2011), and the child was returned to the foster parents. During the six-month waiting period for the adoption, the circuit court entered an order that granted the grandmother visitation every other weekend. Subsequent to the adoption by non-relatives, the question arose as to whether the visitation should continue in light of the child's right to continued association with his biological grandmother.

As a starting basis for its analysis, the Court recognized that the Grandparent Visitation Statute, West Virginia Code §§ 48-10-101, *et seq.* is the exclusive means for seeking grandparent visitation. Based upon the express language of the statute, the Court recognized that the best interests of the child considerations are incorporated in Sections 101, 501 and 502 of the statute. Additionally, the Court observed that Section 902 "states that a grandparent's visitation rights are automatically vacated when a child is adopted by a non-relative." The Court further noted that the Grandparent Visitation Statute does not allow a grandparent to request visitation once a child has been adopted by a non-relative. Continuing its further explanation for its decision, the Court discussed West Virginia cases, as well as caselaw from other statutes that govern grandparent visitation.

Answering the certified question, the Court adopted Syllabus Point 3 and held that an order of adoption by a non-relative automatically vacates a grandparent visitation order. It also held that the Grandparent Visitation Statute does not provide or allow a biological grandparent to seek visitation after a child has been adopted by a non-relative.

*State ex rel. Brandon L. v. Moats*, 209 W. Va. 752, 551 S.E.2d 674 (2001)

In this case, a stepfather adopted his stepson, and subsequently, the paternal grandparents petitioned for visitation. The Court held that a grandparent is not limited to seeking visitation prior to an adoption if the adoption is either a step-parent or other family member. In so ruling, the Court noted that the legislature had distinguished between adoptions that occur within the family and those that occur outside of the family. When adoption occurs outside a family, any prior order of grandparent visitation is vacated in accordance with the applicable statutory subsection.

Additionally, the Court held that "the West Virginia Grandparent Visitation Act, West Virginia Code § 48-2B-1 to -12 by its terms, does not violate the substantive due process right of liberty extended to a parent in connection with his/her right to exercise care, custody, and control over his/her child[ren] without undue interference from the state." Syl. Pt. 3, in part, *Brandon L., supra.* (Currently, West Virginia §§ 48-10-101, *et seq.* controls grandparent visitation.)

## E. Post-Adoption Visitation By Third Parties

Syl. Pt. 5, *Murrell B. v. Clarence R.,* 242 W. Va. 358, 836 S.E.2d 9 (2019)

An "agreement" for purposes of West Virginia Code § 48-22-704(e) is a mutual manifestation of assent by the adoptive parent(s) and a third party as to visitation or communication with the adopted child that is either stated in full in the final adoption order or explicitly referenced in that order and made an exhibit to it. All parties to the agreement must endorse the final adoption order and any agreement incorporated by reference.

Linda B., the paternal grandmother of C.B., first became the child's guardian in 2012 in a guardianship case. She, along with her husband Murrell B., later adopted the child in 2014 when the child was five years old.

Sometime before Linda B. was appointed as the child's guardian, he had lived with Clarence and Nancy R., even though they were not related to the child. When Linda B. became the child's guardian, the family court granted Clarence and Nancy R. the right to visit with C.B., but it did not establish a schedule for the visits.

When Murrell and Linda B. filed their adoption petition, the circuit court required the biological father to be represented by a guardian *ad litem* because of his incarceration. It also required Clarence and Nancy R. to be notified of the adoption petition because they had visitation rights that had been established in the guardianship order. Clarence and Nancy R. attended the adoption hearing, but they were not represented by counsel. When questioned by the court, Clarence and Nancy R. indicated that they did not object to the adoption, but they wanted to continue visiting with the child. However, they stated that they believed that it was in the child's best interests to be adopted by Murrell and Linda B. The final adoption order did not establish that Clarence and Nancy R. would have continued visitation with the child, and the final order was not appealed.

After the adoption, the child continued to visit with Clarence and Nancy R. approximately two to three weekends per month for two years. After a dispute arose between the parties, the adoptive parents only afforded Clarence and Nancy R. limited, supervised visitation with the child.

In response, Clarence and Nancy R., by counsel, filed a petition to modify the order in the adoption case, and they requested the establishment of a schedule for visitation. The court appointed a guardian *ad litem* for the child with respect to the modification petition. During the case, the guardian *ad litem* recommended continued visitation and later asked the court to find that Clarence and Nancy R. were the psychological parents of C.B.

The circuit court conducted two evidentiary hearings, but it did not allow the adoptive parents to testify at either hearing. Ultimately, the circuit court established a liberal visitation schedule for Clarence and Nancy R. based upon a finding that they were the child's psychological parents, and that visitation was in the child's best interests. In turn, Murrell and Linda B. appealed to the Supreme Court.

The first question addressed by the Supreme Court was the applicability of the psychological parent doctrine and West Virginia Code § 48-9-103. This statute specifies who may become a party to a custody proceeding brought under Article 9, Chapter 48 of the West Virginia Code and governs disputes between parents who do not live together. In its analysis, the Court recognized that a psychological parent may, in certain instances, intervene in a custody proceeding as had been established by Syllabus Point 3 of *In re Clifford K.*, 619 S.E.2d 138 (W. Va. 2005). However, the Court distinguished a closed adoption proceeding from that of a contested custody proceeding brought under Article 9 of the West Virginia Code. The Court concluded, therefore, that the statute, West Virginia Code § 48-9-103 which is applicable to a different type of case, did not confer standing upon Clarence and Nancy R. to seek visitation in the adoption case based upon their claim that they were psychological parents.

The second issue addressed by the Court involves West Virginia Code § 48-22-703(a). The Court found that this statute divests any parent from both legal rights and obligations to a child once an adoption order is final. Next, the Court addressed West Virginia Code § 48-22-704(e), which allows a court to address a petition to enforce an agreement to visit or communicate with an adopted child. Because the term "agreement" is not defined by the statute, the Court found that it should apply the common, ordinary meaning, and determined that this term involves "mutual assent." 836 S.E.2d at 27. The Court also reviewed statutes from other states that address enforceable agreements between birth parents and adoptive parents. Specifically, the Court noted that, in general, these types of agreements must be in writing and must be signed. In addition, the agreement must be incorporated into the final adoption order. 836 S.E.2d at 28. Based on this analysis, the Court adopted Syllabus Point 5, which is set forth above, which requires a post-adoption agreement to be stated in the adoption order or to be referenced in the order and made an exhibit to the order. In addition, all parties to this type of agreement must sign the adoption order and any agreement incorporated by reference.

With regard to this case, the Court concluded that West Virginia Code § 48-22-703(a) divested Clarence and Nancy R. of any rights that they may have had under the psychological parent doctrine or that were established when Linda B. was appointed as the child's guardian. Since Clarence and Nancy R.'s pre-adoption visitation rights were divested, their only right to petition for visitation would have to be found in West Virginia Code § 48-22-704(e). However, the final adoption order did not include the agreement on which Clarence and Nancy R. relied. Therefore, the Court reversed the final order that found them to be psychological parents and granted them visitation.

*In re the Adoption of J.S.*, 245 W.Va. 164, 858 S.E.2d 214 (2021)

Syl. Pt. 5: Unless otherwise permitted by law, where a circuit court grants a petition for adoption of a child pursuant to the procedures set forth in West Virginia Code §§ 48-22-701 to - 704 (2015), the court may not include any provision in the final order of adoption that would limit, restrict, or otherwise interfere with the adoptive parent's right to make decisions concerning the care, custody, and control of the child.

During an abuse and neglect case, two children were placed in a pre-adoptive home, and the DHHR had consented to the adoption. However, the pre-adoptive father began using illegal substances, and the DHHR moved to revoke its consent. In turn, the pre-adoptive mother divorced the pre-adoptive father and adopted the two children on her own. In the final adoption order, the circuit court included a provision that barred all contact between the children and their pre-adoptive father. After the pre-adoptive father sought substance abuse treatment, the adoptive mother sought to modify the adoption order to allow contact between the pre-adoptive father and the children. The court heard extensive evidence concerning the pre-adoptive father's substance abuse treatment, but still denied the modification motion.

On appeal, the Supreme Court observed that the issue of restraining an adoptive parent's rights to make decisions about his or her children had constitutional implications. It concluded, therefore, that it would address the issue under the plain error doctrine even though the parties had not addressed the issue on appeal. As a starting point, the Supreme Court noted that the adoptive mother was a fit parent. Next, it observed that nothing in the adoption article, West Virginia Code §§ 48-22-101, *et seq.*, allowed a court to restrict an adoptive parent's rights or to impose such a restriction. Therefore, the Supreme Court found that the provision in the adoption order was *void ab initio*, and it remanded the case for the entry of an amended adoption order that eliminated the provision.

## XVII. APPEALS AND EXTRAORDINARY WRITS

### A. Standard of Review for Abuse and Neglect Cases

Syl. Pt. 1, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996); Syl. Pt. 4, *In the Matter of Taylor B.*, 201 W. Va. 60, 491 S.E.2d 607 (1997); Syl. Pt. 1, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997); Syl. Pt. 1, *W. Va. DHHR v. Scott C.*, 200 W. Va. 304, 489 S.E.2d 281 (1997); Syl. Pt. 1, *W. Va. DHHR v. Billy Lee C.*, 199 W. Va. 541, 485 S.E.2d 710 (1997); Syl. Pt. 1, *In re Brian James D.*, 209 W. Va. 537, 550 S.E.2d 73 (2001); Syl. Pt. 1, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001); Syl. Pt. 1, *State ex rel. DHHR v. Fox*, 218 W. Va. 397, 624 S.E.2d 834 (2005); Syl. Pt. 1, *In re B.S.*, 242 W. Va. 123, 829 S.E.2d 754 (2019)

Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

1. Two-Prong Deferential Standard

Syl. Pt. 1, *McCormick v. Allstate Insurance Company*, 197 W. Va. 415, 475 S.E.2d 507 (1996); Syl. Pt. 1, *In re William John R.*, 200 W. Va. 627, 490 S.E.2d 714 (1997); Syllabus, *In re Brandon Lee B.*, 211 W. Va. 587, 567 S.E.2d 597 (2001)

When this Court reviews challenges to the findings and conclusions of the circuit court, a two-prong deferential standard of review is applied. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard.

Syl. Pt. 1, *In the Interest of Jamie Nicole H.*, 205 W. Va. 176, 517 S.E.2d 41 (1999); Syl. Pt. 1, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996)

Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.

Syl. Pt. 2, *Walker v. West Virginia Ethics Com'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997); Syl. Pt. 1, *In re Shanee Carol B.*, 209 W. Va. 658, 550 S.E.2d 636 (2001)

In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

2. Questions of Law -- *De Novo* Review

Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995); Syl. Pt. 1, *In re Daniel D.*, 211 W. Va. 79, 562 S.E.2d 147 (2002)

Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.

3. Denial of Continuance -- Reviewed on *Ad Hoc* Basis

*In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996)

Again, we acknowledge that the determination as to whether a denial of a continuance constitutes an abuse of discretion must be made on an *ad hoc* basis. When confronted with a motion for a continuance, the trial court may have a variety of concerns. Obviously, the reasons that the movant contemporaneously adduces in support of the request are important. Then, too, the court is likely to take into account prior postponements. Thus, the test for deciding whether the circuit court abused its discretion is not mechanical; it depends on the reasons presented to the circuit court at the time the request was made. In other words, this issue must be decided in light of the circumstances presented, focusing upon the reasons for the continuance offered to the circuit court when the request was denied. As we discuss above, there are important interests implicated other than those of the parents. In addition to the sacred rights of the affected children, there is a societal interest in providing for speedy disposition of abuse and neglect cases which exists separate from, and at times in opposition to, the parents' interest. The inability of courts to bring these matters to a prompt disposition contributes immeasurably to large backlogs of abuse and neglect cases and often prevents the courts form doing what is in the best interest of the children. The older a child becomes while waiting in the judicial system, the more difficult quality permanent placement becomes. In this context, abuse can be found in the denial of a continuance only when it can be seen as "an unreasonable and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay[.]" *Morris v. Slappy*, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 1616, 75 L.Ed.2d 610, 620 (1983), *quoting Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S. Ct. 841, 849, 11 L.Ed.2d 921, 931 (1964). It is in the province of the circuit court to manage its docket, and within that province, to decide what constitutes a reasonable time to be prepared to defend these type allegations. 470 S.E.2d at 189-90.

4. Standard of Review for Motions for Permissive Intervention

*In re H.W.*, 247 W. Va. 109, 875 S.E.2d 247 (2022)

Syl. Pt. 1: A circuit court's decision on an individual's motion for permissive intervention in a child abuse and neglect proceeding pursuant to West Virginia Code § 49-4-601(h) (2019) is reviewed under a two-part standard of review. We review de novo whether the individual seeking permissive intervention was afforded "a meaningful opportunity to be heard" as required by West Virginia Code § 49-4-601(h), and we review for an abuse of discretion a circuit court's decision regarding the "level and type of participation" afforded to individuals seeking permissive intervention, i.e., foster parents, pre-adoptive parents, and relative caregivers, pursuant to Syllabus Point 4, in part, *State ex rel. C.H. v. Faircloth,* 240 W. Va. 729, 815 S.E.2d 540 (2018).

Before the abuse and neglect case was filed, the mother's parental rights to two older children had been involuntarily terminated. The two children were, in turn, adopted by their paternal grandparents, who have been designated as foster parents throughout this case. When H.W. was born, the DHHR filed a petition based upon the prior involuntary terminations and the mother's positive drug screens for methamphetamine during her pregnancy. H.W. was placed with the foster parents and her two siblings. The case was pending during the COVID-19 pandemic.

When the child had been in the foster parents' care for approximately 17 months, they moved to intervene. After a hearing, the circuit court held the foster parents' motion to intervene in abeyance, but it allowed the attorney for the foster parents to participate in the dispositional hearing. The circuit court conducted the hearing approximately two weeks later and found that the child should be reunified with the mother. The court also denied the foster parents' motion to intervene. The circuit court made a specific finding that the COVID-19 pandemic had affected the statutory timeframes because there had been lapses in services which were not the fault of the mother. See W. Va. Code § 49-4-111(b) and *State ex rel. C.H. v. Faircloth*, 815 S.E.2d 540, n. 12 (W. Va. 2018). At disposition, the DHHR, the guardian *ad litem*, and the respondent mother had supported reunification.

The first issue addressed by the Court involved whether the foster parents' motion was a permissive intervention motion or a motion for intervention as a matter of right. The Supreme Court reasoned that the timelines found in the two applicable statutes, West Virginia Code §§ 49-4-605 (b) and § 49-4-610(9), were not implicated because the circuit court had made specific findings concerning the exceptions to the timelines, that is, that the lapse of services was not the mother's fault. The Court concluded that the foster parents' intervention motion was permissive because the circumstances mandated by syllabus point seven of *Faircloth* were not implicated.

After distinguishing between the two types of intervention, the Court found that the standard of review for permissive motions to intervene should involve a hybrid analysis. An initial part of the review should involve whether the prospective intervenors were provided a meaningful opportunity to be heard, as prescribed by West Virginia Code § 49-4-601(h). Since this right is established by statute, the Court concluded that it should apply a *de novo* standard of review.

The Court noted that, pursuant to West Virginia Code § 49-4-601(h), a circuit court has discretion to decide the level and type of participation that a person may be afforded if such a person is a foster parent, pre-adoptive parent, or a relative caregiver. Syl. Pt. 4, *C.H.*, 815 S.E.2d 540 (W. Va. 2018). Since the statute grants circuit courts with discretion on this issue, the Court held that it should review these types of decisions for an abuse of discretion. The Court set forth the hybrid standard of review in the above-quoted syllabus point.

In addition to appealing the denial of their motion to intervene, the foster parents appealed the disposition order that found that H.W. should be reunified with her biological mother. The Court, however, found that the foster parents had no right to challenge the disposition order because they had not been made parties to the case. The Court expressly stated that: "Because the [f]oster [p]arents were not granted intervenor status, their ability to bring the instant appeal is limited to their role in the proceedings below as foster parents who requested, but were denied, intervenor status." 875 S.E.2d at 258.

Justice Walker filed a concurring opinion in which she commented that a separate standard of review was unnecessary. She also discussed the difference between foster

parents and relative caregivers insofar as timelines are concerned. She stated that the grandparents were relative caregivers, not foster parents, and that the timelines found in the above-referenced statutes applied only to foster parents.

## B. Timeframe for Filing Notice of Appeal

Syl. Pt. 5, *In re S.L.*, 243 W. Va. 559, 848 S.E.2d 634 (2020)

Filing a post-termination visitation motion does not extend the timeframe in which to appeal a final disposition order entered in an abuse and neglect matter. The timeframe to appeal a final disposition order is set forth in Rule 49 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings and Rule 11 of the Rules of Appellate Procedure.

## C. Writ of Mandamus Against DHHR

*State ex rel. S.C. v. Chafin*, 191 W. Va. 184, 444 S.E.2d 62 (1994)

The petitioner, S.C., a juvenile, sought a writ of habeas corpus and a writ of mandamus against the DHHR and the Director of Laurel Park Presley Ridge School to compel her release from the school and to require the DHHR to comply with West Virginia Code § 49-6-3, which allows the DHHR to maintain temporary custody of a child for no more than 60 days; W. Va. Code § 49-6-5(a), which requires the DHHR to file with the court the child's case plan, including the permanency plan for the child; West Virginia Code § 49-6-8(a), which requires the DHHR to file with the court a petition for review of order of disposition in accordance with the best interest of the child. The statute requires that the court retain continuing jurisdiction over cases reviewed under this section for as long as a child remains in temporary foster care.

*W. Va. Code § 49-4-602*

*W. Va. Code § 49-4-604(a)*

*W. Va. Code § 49-4-608(a)*

The Court held that the purpose of the child's case plan is the same as the family case plan, except that the focus of the child's case plan is on the child rather than the family unit. The child's case plan is to include, where applicable, the requirements of a family case plan as established by the relevant provisions of Chapter 49.

Finally, the Court held that West Virginia Code § 49-6-8(d) requires the DHHR to file a report with the circuit court in any case where any child in the temporary or permanent custody of the DHHR receives more than three placements in one year no later than 30 days after the third placement.

*W. Va. Code § 49-4-608(g)*

*State ex rel. Aaron M. v. DHHR*, 212 W. Va. 323, 571 S.E.2d 142 (2001)

The guardian *ad litem* sought a writ of mandamus to compel the DHHR to pay a therapist for an outstanding bill for the therapy of an abused and neglected child. The Court granted the writ but required the DHHR to pay the therapist at the Medicaid rate, not at the higher rate that was billed initially. Subsequent to this decision the Legislature

codified the holding of the case. In 2015, the provision was codified at West Virginia Code § 49-4-108.

*Hewitt v. DHHR*, 212 W. Va. 698, 575 S.E.2d 308 (2002)

Although the applicable statute allows the DHHR to pay for health services and expert witnesses in juvenile and abuse and neglect cases at the Medicaid rate, if available, the Court has not held that the DHHR has the "exclusive authority" to set expert witness fees. Rather, the Court has found that "a circuit court still remains the ultimate authority for entry of all orders directing payment of expert witness fees in abuse and neglect cases." 575 S.E.2d at 313. The applicable provision is codified at West Virginia Code § 49-4-108.

*In re Bobby Lee B.*, 218 W. Va. 689, 629 S.E.2d 748 (2006)

In this case, the Supreme Court reversed the circuit court because it did not apply the payment restrictions set forth in the relevant statute for professional services in a juvenile delinquency case. Referring to *Hewitt v. DHHR*, *supra*, the Court noted that the payment restrictions now found in West Virginia Code § 49-4-108 apply to both abuse and neglect cases and juvenile cases.

*In re Chevie V.*, 226 W. Va. 363, 700 S.E.2d 815 (2010)

*Note: For a complete discussion of this case, see Section II.K. For a discussion of the authority of the circuit court to set expert witness fees, see Special Procedures Section VIII. D.*

In this case involving a dispute over the payment of expert witness fees, the Court concluded that the relevant statutory provisions allowed the circuit court the discretion to require the DHHR to pay fees for an expert witness in an abuse and neglect or juvenile case. The Court noted that the statute states that the court "may" require the DHHR to pay for "professional services" that include "'evaluation, report preparation, consultation and preparation of expert testimony' by an expert witness." 700 S.E.2d at 824. Based upon this reasoning, the Court affirmed the order that required the DHHR to pay the fees for the expert witness.

The Court, however, reversed the circuit court insofar as its order required the DHHR to pay the expert witness fee according to the schedule established by the Public Defender Corporation. The Court concluded that the statute established that the DHHR has the sole authority to set the fee schedule for professional services provided in abuse and neglect and juvenile cases. The Court remanded the case to the circuit court, to allow the DHHR to establish the fee schedule for the payment of the expert. In two new syllabus points, the Court held that:

*W. Va. Code § 49-4-108*

Syl. Pt. 5: Pursuant to the plain language of W. Va. Code § 49-7-33, a circuit court "may ... order the West Virginia Department of Health and Human Resources to pay for professional services" incurred in a child abuse and

neglect proceeding. Such "professional services" include, but are not limited to, "evaluation, report preparation, consultation and preparation of expert testimony" by an expert witness. W. Va. Code § 49-7-33.

Syl. Pt. 6: When a circuit court orders the West Virginia Department of Health and Human Resources to pay for professional services, including those provided by an expert witness, pursuant to the provisions of W. Va. Code § 49-7-33, the Department of Health and Human Resources shall be permitted to establish the fee schedule by which the professional will be paid "in accordance with the Medicaid rate, if any, or the customary rate [with] adjust[ments to] the schedule as appropriate." W. Va. Code § 49-7-33.

*In re Joseph G.*, 214 W. Va. 365, 589 S.E.2d 507 (2003) (per curiam)

*Note: This case involves an appeal, rather than a writ of mandamus. It is included in this section, however, because the issues addressed in it are most similar to the issues raised in mandamus cases against the DHHR.*

This case involved a contractual dispute between the DHHR and a residential facility. The dispute concerned the payment for a child's placement once the services were determined to be no longer medically necessary and were, therefore, ineligible for Medicaid reimbursement. The child remained at the facility pursuant to a valid court order after the MDT recommended his continued placement at the facility.

The trial court ruled that the DHHR was liable for the outstanding payments because the facility was not contractually obligated to continue providing care for the child once the Medicaid eligibility for the services terminated. Affirming the trial court, the Supreme Court noted that the contract was silent concerning this situation, that a prior contract required the DHHR to pay for care in this situation, and that the facility was contractually prohibited from discharging the child without a planned alternate placement.

*State ex rel. DHHR v. Bloom*, 247 W. Va. 433, 880 S.E.2d 899 (2022)

This case arose when a guardian *ad litem* filed a contempt petition against DHHR in an abuse and neglect case because of the effects of inadequate staffing levels in the Kanawha County CPS. At an initial hearing, two guardians *ad litem* and the DHHR agreed to transfer the contempt petition to a separate mandamus action that addressed only the staffing issues in the Kanawha County CPS office. Over approximately two years, the circuit court conducted periodic hearings concerning the issues in Kanawha County, and it noted improvements that the DHHR had made. In 2020, the guardians *ad litem* moved to amend the mandamus action to expand the scope of the case to address staffing issues throughout the entire state and to include the adoption and foster care units. They also moved to amend the mandamus action to address the temporary housing of children in CPS offices and in hotels. After the circuit court expanded the scope of the mandamus action to include these issues throughout the State, the DHHR sought a writ of prohibition.

Initially, the Supreme Court reviewed the record of the original mandamus action and found that the DHHR had met its mandatory duty with respect to staffing issues in

Kanawha County. Accordingly, the Supreme Court granted the writ of prohibition to prevent the circuit court from continuing to enforce the mandamus action that addressed staffing in Kanawha County CPS offices. With respect to the expansion of the mandamus action, the Supreme Court found that the expansion of the action over the DHHR's objections was erroneous. For this additional reason, the Supreme Court granted the DHHR's petition for a writ of prohibition.

## D. Prohibition or Mandamus Available

Syl. Pt. 2, *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 470 S.E.2d 205 (1996)

*W. Va. Code § 49-4-604(e)*

Prohibition is available to abused and/or neglected children to restrain courts from granting improvement periods of a greater extent and duration than permitted under W. Va. Code §§ 49-6-2(b) and 49-6-5(c).

*W. Va. Code § 49-4-610(3)*

The State and the children's guardian *ad litem* sought relief from an order in which the circuit court ordered a post-adjudicatory improvement period for the respondent mother. The petitioners contended that an additional improvement period was not in the best interests of the child. The Supreme Court granted the petitioners' request and prohibited the circuit court from enforcing its order that awarded a post-adjudicatory improvement period. In granting the requested relief, the Court held that prohibition is available to abused and/or neglected children to restrain courts from granting improvement periods of a greater extent and duration than permitted under relevant statutes.

*W. Va. Code § 49-4-604*

*W. Va. Code § 49-4-604(a)*

Further, there is a clear legislative directive that guardians *ad litem* and counsel for both sides be given an opportunity to advocate for their clients in child abuse and neglect proceedings. West Virginia Code § 49-6-5(a) states that the circuit court shall give both the petitioner and respondents an opportunity to be heard when proceeding to the disposition of the case. This right must be understood to mean that the circuit court may not impose unreasonable limitations upon the function of guardians *ad litem* in representing their clients in accord with the traditions of the adversarial fact-finding process.

Syl. Pt. 1, *Hinkle v. Black,* 164 W. Va. 112, 262 S.E.2d 744 (1979); Syl. Pt. 2, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997); Syl. Pt. 2, *State ex rel. George B. W. v. Kaufman*, 199 W. Va. 269, 483 S.E.2d 852 (1997); Syl. Pt. 1, *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 470 S.E.2d 205 (1996)

In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

*State ex rel. P.G.-1 v. Wilson*, 247 W. Va. 235, 878 S.E.2d 730 (2021)

The guardian *ad litem* filed a petition for a writ of prohibition to prevent the circuit court from granting multiple extensions to the mother's post-adjudicatory improvement period because the children had been in foster care for approximately 25 months. Reviewing the circuit record, the Court noted that West Virginia Code § 49-4-610 only allows a six-month post-adjudicatory improvement period with a three-month extension. In the case below, however, the mother's improvement period had been in effect for more than 22 months, and it had far exceeded the allowable time periods. As for the extensions, the Court found that it was erroneous to grant multiple extensions without limiting the extensions to a single three-month period at the conclusion of a six-month improvement period. In its opinion, the Supreme Court commended the guardian ad litem for filing the petition. Additionally, it observed, in footnote 15, that the DHHR and the guardian ad litem should have filed the petition sooner.

*State ex rel. L.D. v. Cohee*, 247 W. Va. 695, 885 S.E.2d 633 (2022)

*Note: For a complete discussion of this case, see Section X.A.*

A petition was filed against respondent parents because of a child's excessive bruising. The child was placed with the father's cousin. During the case, the parents participated exceptionally well in their post-adjudicatory improvement period. At the disposition hearing, the parties all recommended reunification. However, the relative caregivers opposed reunification because the child had developed a bond with them. Because the disposition appeared that it would be contested, the judge recused himself, and a new judge was appointed.

At the next hearing before the new judge, the parties again recommended reunification. However, the circuit court questioned whether reunification was in the child's best interests because of the time that the child had been in foster care and whether DHHR could recommend reunification given the length of the child's foster care stay. W. Va. Code § 49-4-605. The court, without a pending motion to intervene, granted party status to the caregivers and appointed counsel for them. The court also ordered that respondent parents and relative caregivers should participate in a bonding assessment. In response, the guardian *ad litem* filed a petition for a writ of mandamus to require the child to be reunified and to remove the relative caregivers from their status as parties to the case.

As one basis to grant the writ of mandamus, the Supreme Court found that there was no evidentiary basis to deny reunification. Additionally, the Supreme Court found that the circuit court erred when it granted party status to the relative caregivers when they had not filed a motion to intervene. The Court also held that the matter of intervention was permissive as opposed to a matter of right. Therefore, the Supreme Court granted the writ of mandamus with regard to reunification and the removal of the relative caregivers from their status as parties.

## E. Appellate Actions Necessary to Protect Children

Syl. Pt. 6, *In re Timber M.*, 231 W. Va. 44, 743 S.E.2d 352 (2013); Syl. Pt. 5, *In re A.N.*, 241 W. Va. 275, 823 S.E.2d 713 (2019)

In cases involving the abuse and neglect of children, when it appears from this Court's review of the record on appeal that the health and welfare of a child may be at risk as a result of the child's custodial placement, regardless of whether that placement is an issue raised in the appeal, this Court will take such action as it deems appropriate and necessary to protect that child.

*In re Timber M.*, 231 W. Va. 44, 743 S.E.2d 352 (2013)

In response to a disclosure by her eight-year-old daughter, a mother taught her daughter how to make a recording with a cell phone in the hopes of recording another incident of sexual abuse by the stepfather. After the mother learned of the sexual abuse, she continued to live with the stepfather, and at times, left her children alone with him. The circuit court terminated the mother's parental rights for her refusal to admit any wrongdoing in her response to the stepfather's sexual abuse. As a permanency plan, the circuit court placed the children with their father.

On appeal, the Court was extremely troubled because there were substantiated allegations of the father sexually abusing a stepdaughter, and criminal charges had been filed against him as a result of the allegations. Apparently, the State dismissed the criminal case without specifying any substantive reason. Reviewing the record, the Court noted that there was no indication that the victim had retracted the allegations. In addition, the father minimized the mother's culpability with regard to her response to the sexual abuse by the stepfather. Further, the record failed to explain why the DHHR felt that the children's placement with their father was a good idea in light of the substantiated sexual abuse allegations. Finally, the record failed to indicate whether anyone had investigated the reason for the dismissal of the sexual abuse charges against the father. For those reasons, the Court held that it could take "appropriate and necessary" action to protect a child even if issues concerning the children's placement had not been raised on appeal. Accordingly, the Court remanded the case for a determination as to whether the placement of the children with their father was appropriate.

*In re J.P.*, 240 W. Va. 266, 810 S.E.2d 268 (2018)

At the conclusion of an abuse and neglect case, the circuit court reunified three of the children with the parents who had separated. The circuit court adopted the guardian *ad litem's* proposed parenting plan, which placed primary custody with the mother and granted the father limited visitation. The father appealed his adjudication, as well as the terms of the parenting plan. During the appeal, both parents had moved. In addition, the guardian *ad litem* recommended that the father's visitation be suspended because of his hostile and abusive behavior towards the mother and the guardian *ad litem*. Under Syllabus Point 6 of *In re Timber M.*, 743 S.E.2d 352 (W. Va. 2013), the Court remanded

the case because the parenting plan did not appear to be viable based upon the Appellate Rule 11(j) updates presented on appeal.

*In re A.N.*, 241 W. Va. 275, 823 S.E.2d 713 (2019)

A petition was filed when a mother, under the influence of drugs, wrecked her car, and her five-year old child was only in a seat belt, not in a car seat. A second child was also in the car. The father was named as a respondent because he knew about the mother's drug use and still let the mother care for and transport the children. After a post-adjudicatory improvement period, the children were returned to the father.

Within one week of the children's reunification, the children were removed from the father again because of unexplained bruising to A.N. Also, while in foster care for the second time, one of the children, C.N. was acting out sexually towards his sister A.N. and towards other children. C.N. also displayed significant behavioral problems. At disposition, the circuit court terminated the father's rights to A.N., but found that C.N. should be reunified with his father. On appeal, the father argued that he had not been found unfit and that the circuit court erred in terminating his rights to A.N. when his rights to C.N. remained intact.

With regard to the termination of the father's parental rights to A.N., the Supreme Court noted that the father's explanations for A.N.'s injuries were not credible and that he had failed to acknowledge the existence of the problem. Also, the Court observed that the father planned to have the children's mother, who had a substantiated CPS history, move into his home to care for the children. The Supreme Court, therefore, affirmed the termination of the father's parental rights to A.N.

On appeal, neither the DHHR, nor the guardian *ad litem* had addressed the incongruous order that terminated the father's parental rights to one child, A.N., but recommended reunification with regard to the second child, C.N. Relying on *In re Timber M.*, the Supreme Court addressed its concerns -- the lack of evidence with regard to the father's parental fitness and the lack of factual development about the child's sexualized behavior. It also observed that the psychologist testified that C.N.'s sexualized behavior was likely the result of sexual abuse or exposure to inappropriate sexual materials. Therefore, the Supreme Court reversed and remanded the case with instructions to re-examine the disposition, to establish a plan for therapy for C.N., and to monitor C.N.'s placement with his father.

## XVIII. CONTEMPT ACTIONS IN ABUSE AND NEGLECT CASES

### A. Standard of Review

Syl. Pt. 1, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996); Syl. Pt. 1, *In re Brandon Lee H.S.*, 218 W. Va. 724, 629 S.E.2d 783 (2006) (per curiam)

In reviewing the findings of fact and conclusions of law of a circuit court supporting a civil contempt order, we apply a three-pronged standard of review. We review the

contempt order under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a *de novo* review.

## B. Contempt Proceedings in Abuse and Neglect Cases

*In re Brandon Lee H.S.*, 218 W. Va. 724, 629 S.E.2d 783 (2006) (per curiam)

The guardian *ad litem* and counsel for the respondent father filed a contempt petition when a CPS worker was not assigned to a case. As a result, the DHHR failed to conduct visitations and provide drug-related services as ordered. At a hearing on the contempt petition, the circuit court found that the failure to assign a CPS worker was the result of severe staffing shortages in this eastern panhandle office, not the result of willful disobedience of local DHHR employees. The circuit court ordered the DHHR to take immediate steps to alleviate the staff shortage, including the use of geographic pay differentials for CPS workers.

On appeal, the DHHR argued that the circuit court erred when it addressed staff-related issues that were unrelated to the specific abuse and neglect case. The Supreme Court, however, held that: "the trial court had the authority, subject to the limitations required in this opinion, to compel the Department to act to remedy the serious effects of the significant staff shortage at issue, specifically, in this case, and generally, in other abuse and neglect proceedings before that court." 629 S.E.2d at 788. The Court further held that the circuit court did not err when it directed the DHHR to hire additional personnel. The Court, however, reversed the provisions in the circuit court order requiring the DHHR to implement geographical pay differentials because those provisions violated the Separation of Powers doctrine set forth in the West Virginia Constitution.

*In the Matter of Megan B.*, 224 W. Va. 450, 686 S.E.2d 590 (2006)

In this contempt proceeding, the circuit court found a sheriff in contempt when he did not assist in the removal of minor children from a home and did not serve the abuse and neglect petition and removal order at the time directed by a juvenile referee. Reversing the circuit court, the Supreme Court held that the sheriff's actions did not constitute contempt because the underlying order did not require the sheriff to serve the order and to assist in the removal. Further, the Court observed that the sheriff could have concluded that the problem was resolved because a state trooper had volunteered to serve the order. Finally, the Court found that a finding of contempt was unwarranted because the sheriff had not violated any of his statutory duties.

# CHAPTER 6: DETAILED PROCEDURES AND TOPICS

*Chapter Contents*

## I. GOVERNING RULES AND PROCEDURES

### A. Chapter 49 of the West Virginia Code

Syl. Pt. 2, *In the Matter of Lindsey C.*, 196 W. Va. 395, 473 S.E.2d 110 (1995)

*W. Va. Code §§ 49-1-101, et seq.*

The procedure in abuse and neglect cases is governed by provisions internal to W. Va. Code §§ 49-1-1, *et seq.*, and such other procedural requirements of the Code or general law as obtain. Except for Rules 5(b), 5(e) and 80, the West Virginia Rules of Civil Procedure for Trial Courts of Record are not applicable to such cases.

### B. Rules of Procedure for Child Abuse and Neglect Proceedings

*In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001)

"The Rules of Procedure for Child Abuse and Neglect Proceedings and the related statutes detailing fair, prompt, and thorough procedures for child abuse and neglect cases are not mere general guidance; rather, they are stated in mandatory terms and vest carefully described and circumscribed discretion in our courts, intended to protect the due process rights of the parents as well as the rights of the innocent children." 558 S.E.2d at 621.

### C. Rules of Evidence

*In the Matter of Jonathan P.*, 182 W. Va. 302, 387 S.E.2d 537, n. 6 (1989) (noting that it was not error for the Court to hear inadmissible evidence because a judge is "fully competent to disregard inadmissible evidence.")

Syl. Pt. 1, *In the Interest of S.C.*, 168 W. Va. 366, 284 S.E.2d 867 (1981)

*W. Va. Code § 49-4-601(i)*

W. Va. Code § 49-6-2(c), requires the State Department of Welfare, in a child abuse or neglect case, to prove "conditions existing at the time of the filing of the petition ... by clear and convincing proof." The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden.

Syl. Pt. 8, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991)

Prior acts of violence, physical abuse, or emotional abuse toward other children are relevant in a termination of parental rights proceeding, are not violative of W.Va.R.Evid. 404(b), and a decision regarding the admissibility thereof shall be within the sound discretion of the trial court.

## II. CHILD ABUSE AND NEGLECT: GENERAL PRINCIPLES AND DEFINITIONS

### A. Primary Goal in Abuse and Neglect Cases

Syl. Pt. 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996); Syl. Pt. 3, *In the Matter of Taylor B.*, 201 W. Va. 60, 491 S.E.2d 607 (1997); Syl. Pt. 2, *In re William John R.*, 200 W. Va. 627, 490 S.E.2d 714 (1997); Syl. Pt. 2, *W. Va. DHHR v. Scott C.*, 200 W. Va. 304, 489 S.E.2d 281 (1997); Syl. Pt. 4, *W. Va. DHHR v. Billy Lee C.*, 199 W. Va. 541, 485 S.E.2d 710 (1997); Syl. Pt. 1, *In re Tonjia M.*, 212 W. Va. 443, 573 S.E.2d 354 (2002); Syl. Pt. 1, *State ex rel. West Virginia Dept. of Health and Human Resources v. Pancake*, 224 W. Va. 39, 680 S.E.2d 54 (2009); Syl. Pt. 2, *In re Maranda T.*, 223 W. Va. 512, 678 S.E.2d 18 (2009); Syl. Pt. 3, *In re Isaiah A.*, 228 W. Va. 176, 718 S.E.2d 775 (2010)

Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.

### B. Pending Criminal Investigations and Proceedings

#### 1. Not Companion Cases

*In the Matter of Taylor B.*, 201 W. Va. 60, 491 S.E.2d 607 (1997)

"[C]ivil abuse and neglect proceedings focus directly upon the safety and well-being of the child and are not simply 'companion cases' to criminal prosecutions." 491 S.E.2d at 613.

*In re B.C.*, 233 W. Va. 130, 755 S.E.2d 664 (2014)

"[C]ivil abuse and neglect proceedings are to be treated as separate and apart from criminal proceedings arising from abuse and neglect." 755 S.E.2d at 673. The focus of an abuse and neglect case is the safety and well-being of child.

#### 2. Plea Bargain - No Dismissal of Petition

Syl. Pt. 2, *In the Matter of Taylor B.*, 201 W. Va. 60, 491 S.E.2d 607 (1997); Syl. Pt. 4, *State ex rel. Lowe v. Knight*, 209 W. Va. 134, 544 S.E.2d 61 (2000)

A civil child abuse and neglect petition instituted by the DHHR pursuant to W. Va. Code §§ 49-6-1, *et seq.*, is not subject to dismissal pursuant to the terms of a plea bargain between a county prosecutor and a criminal defendant in a related child abuse prosecution.

*W. Va. Code §§ 49-4-601, et seq.*

### C. Abused Child - Neglected Child Defined

Syl. Pt. 1, *State ex rel. Virginia M. v. Virgil Eugene S.*, 197 W. Va. 456, 475 S.E.2d 548 (1996) (per curiam); Syl. Pt. 1, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997)

An "abused child" is defined in W. Va. Code § 49-1-3, as a child who is harmed or threatened by "[a] parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home[.]" In addition, W. Va. Code § 49-1-3, defines a "neglected child" as a child who is harmed or threatened "by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian[.]"

*W. Va. Code § 49-1-201*

Syl. Pt. 1, *W. Va. DHHR v. Doris S.*, 197 W. Va. 489, 475 S.E.2d 865 (1996); Syl. Pt. 4, *In re Katelyn T.*, 225 W. Va. 264, 692 S.E.2d 307 (2010)

Implicit in the definition of an abused child under W. Va. Code § 49-1-3 is the child whose health or welfare is harmed or threatened by a parent or guardian who fails to cooperate in identifying the perpetrator of abuse, rather choosing to remain silent.

Syl. Pt. 3, *In the Interest of Betty J.W.*, 179 W. Va. 605, 371 S.E.2d 326 (1988); Syl. Pt. 1, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995); Syl. Pt. 2, *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993); Syl. Pt. 1, *In re Jonathan Michael D.*, 194 W. Va. 20, 459 S.E.2d 131 (1995); Syl. Pt. 1, *In the Matter of Scottie D.*, 185 W. Va. 191, 406 S.E.2d 214 (1991); Syl. Pt. 2, *In re Lilith H.*, 231 W. Va. 170, 744 S.E.2d 280 (2013)

W. Va. Code § 49-1-3(a), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent.

Syl. Pt. 2, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995)

Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W. Va. Code § 49-1-3(a).

*W. Va. Code § 49-1-201*

*In re Lilith H.*, 231 W. Va. 170, 744 S.E.2d 280 (2013)

In this case a physical altercation arose between two men -- the grandfather and the father of the children who were ultimately subject to the abuse and neglect petition. During the altercation, the children's mother intervened and struck the grandfather. The children also observed the altercation. Based on this single occurrence, the children were adjudicated as abused and neglected children. The father was adjudicated because he engaged in domestic violence, and the mother was adjudicated because she failed to protect her children. Reversing the circuit court, the Supreme Court found that the single occurrence of domestic violence and the fact that the children witnessed it was insufficient

to establish abuse and neglect under the provisions of West Virginia Code § 49-1-3(a) that define an "abused child" as one whose parent "knowingly allows another person" to inflict physical, mental or emotional injury to the child.

*In re C.S.*, 247 W. Va. 212, 875 S.E.2d 350 (2022)

Syl. Pt. 8: For a circuit court to have jurisdiction over a child in an abuse and neglect case, the child must be an "abused child" or a "neglected child" as those terms are defined in West Virginia Code § 49-1-201. Pursuant to West Virginia Code § § 49-4-601(i), a circuit court's finding that a child is an "abused child" or a "neglected child" must be based upon the conditions existing at the time of the filing of the abuse and neglect petition.

The respondent mother had two biological children: one who was a subject to a legal guardianship established approximately five years earlier and one who was placed in foster care when the petition was filed. The record indicated that the mother's problems with substance abuse and lack of participation continued throughout the beginning of the case. Later in the case, the mother showed progress in that she had passed her drug screens, had moved to a new apartment, and was participating in outpatient counseling. At the disposition hearing, the DHHR presented a minimal amount of evidence and relied primarily on the length of time that the younger child had been in foster care to request termination. After deciding to terminate the mother's parental rights, the circuit court noted that the mother's progress was not sufficient, but it did not include the required findings of fact or conclusions of law.

The focus at the disposition hearing was on the length of time that C.S. had been in foster care, 17 months, and the DHHR's responsibility to request termination pursuant to West Virginia Code § 49-4-605(a). The initial error addressed by the Supreme Court related to the lack of evidence presented by the DHHR and the circuit court's failure to make the findings that would warrant the termination of parental rights. W. Va. Code § 49-4-604(c)(6). For this reason, the Court reversed the termination of the mother's parental rights.

The jurisdictional issue addressed in the opinion involved the older child, B.S., who had been placed in a guardianship five years before the initiation of the abuse and neglect case. The Court found that West Virginia Code § 49-4-601(a) is unambiguous in that it only allows the filing of a petition when the petitioner is alleging that the child is abused or neglected as defined by West Virginia Code § 49-1-201. The Court also explained that the conditions constituting abuse and neglect must exist at the time of the filing of the petition. In the syllabus point quoted above, the Court set forth the requirements for assuming jurisdiction over a child.[31] To be subject to an abuse and neglect petition, the

[31] Although the Supreme Court did not discuss the statute that governs petitions, it should be noted that the applicable subpart states as follows:

> In a case *where there is more than one child in the home, or in the temporary care, custody or control of the alleged offending parent*, the petition shall so state. Notwithstanding the fact that the allegations of abuse or neglect may pertain to

child must be found to be an abused or neglected child under West Virginia Code § 49-1-201, and the conditions of abuse or neglect, pursuant to West Virginia Code § 49-4-601(i), must have existed at the time of the filing of the petition.

Applying this standard, the Supreme Court found that the child, B.S., did not meet the definition of an abused or neglected child because the child was not subject to the mother's substance abuse and because the mother could have only regained custody of B.S. by filing a petition to terminate the guardianship. In footnote 15, the Court noted that *In re G.S.*, 855 S.E.2d 922 (W. Va. 2021) did not control the question of jurisdiction because the facts of G.S. involved a legal guardianship that had *not* been established at the time that the abuse and neglect petition was filed. Since the evidence failed to show that the mother should have been adjudicated with respect to B.S., the Supreme Court held that the circuit court should not have proceeded to disposition with respect to the older child, who had been subject to a previously established guardianship.

### D. Meaning of Term "Knowingly"

Syl. Pt. 7, *W. Va. DHHR v. Doris S.*, 197 W. Va. 489, 475 S.E.2d 865 (1996)

The term "knowingly" as used in W. Va. Code § 49-1-3(a)(1) does not require that a parent actually be present at the time the abuse occurs, but rather that the parent was presented with sufficient facts from which he/she could have and should have recognized that abuse has occurred.

### E. "Imminent Danger" Defined

*In the Matter of Jonathan P.*, 182 W. Va. 302, 387 S.E.2d 537 (1989)

"Imminent danger" defined to include lack of cooperation to provide adequate food and shelter.

### F. Parental Rights and Limitations

Syl. Pt. 1, *In the Matter of Ronald Lee Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973); Syl. Pt. 6, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997); Syl. Pt. 2, *In re Carolyn Jean T.*, 181 W. Va. 383, 382 S.E.2d 577 (1989); Syl. Pt. 1, *W. Va. DHS v. Tammy B.*, 180 W. Va. 295, 376 S.E.2d 309 (1988); Syl. Pt. 1, *In the Interest of Betty J.W.*, 179 W. Va. 605, 371 S.E.2d 326 (1988)

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less than all of those children, *each child in the home for whom relief is sought shall be made a party to the proceeding*. Even though the acts of abuse or neglect alleged in the petition were not directed against a specific child who is named in the petition, the court shall order the removal of the child, pending final disposition, if it finds that there exists imminent danger to the physical well-being of the child and a lack of reasonable available alternatives to removal. W. Va. Code § 49-4-602(a)(3) (emphasis added).

In the law concerning custody of minor children, no rule is more firmly established than the right of a natural parent to the custody or his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the W. Va. and U.S. Constitutions.

Syl. Pt. 5, *In the Matter of Ronald Lee Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973); Syl. Pt. 1, *State v. Jessica M.*, 191 W. Va. 302, 445 S.E.2d 243 (1994); Syl. Pt. 3, *In re Carolyn Jean T.*, 181 W. Va. 383, 382 S.E.2d 577 (1989); Syl. Pt. 1, *State v. C.N.S.*, 173 W. Va. 651, 319 S.E.2d 775 (1984)

Though constitutionally protected, the right of the natural parent to the custody of minor children is not absolute and it may be limited or terminated by the State, as parens patriae, if the parent is proved unfit to be entrusted with childcare.

## III. DUTIES AND ROLES OF GUARDIANS AD LITEM

### A. Representation in Circuit Court

*Note: Appendix A of In re Jeffrey R.L.,* 190 W. Va. 24, 435 S.E.2d 162 (1993) *has been almost wholly incorporated, with additions, into Appendix A of Rules of Procedure for Child Abuse and Neglect Proceedings, which are the Guidelines for Children's Guardians Ad Litem in Child Abuse and Neglect Cases. However, Appendix A of Jeffrey R.L. remains as an important source of authority and guidance for the role of guardians ad litem in child abuse and neglect cases.*

Syl. Pt. 5, in part, *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993); Syl. Pt. 3, *W. Va. DHHR v. Scott C.*, 200 W. Va. 304, 489 S.E.2d 281 (1997); Syl. Pt. 4, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995)

*W. Va. Code § 49-4-601(f)*

Each child in an abuse and neglect case is entitled to effective representation of counsel. To further that goal, W. Va. Code § 49-6-2(a) mandates that a child has a right to be represented by counsel in every stage of abuse and neglect proceedings. . . .. (See WVRCAN Appendix A). Rules 1.1 and 1.3 of the W. Va. Rules of Professional Conduct, respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client.

n. 14, *In the Interest of Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991)

With regard to the appointment of attorneys to represent children in such actions, it is a better practice for courts to attempt to appoint attorneys who have demonstrated interest in such sensitive matters and who will be committed to achieving a result which will serve the best interest of the child. Furthermore, effectively representing children in abuse and neglect cases frequently requires far more than just legal ability. As courts have increasingly been thrust into the arena of social issues, it has become clear that lawyers and judges must deal with the human dimension of such problems. This requires

the willingness and ability to communicate with parents, social workers, physicians, psychiatrists, psychologists and counselors, teachers, and -- most importantly -- children.

*In re Elizabeth A.*, 217 W. Va. 197, 617 S.E.2d 547 (2005)

This *per curiam* opinion involved two successive abuse and neglect petitions in which it was alleged that the adult respondent sexually abused his stepdaughter. Since the stepdaughter turned 18 during the appeal, the opinion primarily addressed the effect of the proceedings on two younger children. The circuit court dismissed the first petition because of contradictory testimony between two witnesses. After the stepdaughter reported another incident of sexual abuse, a second petition was filed. The circuit court conducted an abbreviated hearing on the second petition and denied the guardian *ad litem's* motion for a forensic examination for the two younger children. It later dismissed the petition.

The Supreme Court reversed the dismissal of the second petition because the denial of the motion for the forensic examination prevented the guardian *ad litem* from developing evidence relevant to the allegations. The Supreme Court further held that the failure to conduct an adjudicatory hearing prevented the guardian *ad litem* from litigating the allegations of abuse and from articulating concerns about the welfare of the two younger children.

*In re Skyelan H.*, 219 W. Va. 661, 639 S.E.2d 753 (2006)

The circuit court entered a final order dismissing a petition because it found DHHR had failed to prove the children were abused or neglected by clear and convincing evidence. Following entry of the final order, the guardian *ad litem* for the children proffered new evidence to the circuit court in the form of medical records that suggested three of the respondent's four children may have been sexually abused. The guardian *ad litem* moved for a stay of the dismissal order based on this new evidence. The court denied the motion and the guardian *ad litem* appealed. In a *per curiam* opinion, the Supreme Court reversed and remanded the case with directions that the circuit court give full consideration to the allegations raised by the guardian *ad litem*.

*Burdette v. Lobban*, 174 W. Va. 120, 323 S.E.2d 601 (1984)

A child who is the alleged victim of sexual abuse may not be interrogated at any time during the abuse or neglect proceeding without the presence of his or her counsel unless counsel waives that right on behalf of the child. When an issue regarding a child's capacity to testify that he/she was a victim of abuse or neglect is presented, the Court should appoint a neutral child psychologist or psychiatrist to conduct a transcribed or otherwise recorded interview to inquire into the child's capacity to be a competent witness. "However, the Court may not force the child to be interviewed by the psychologist or psychiatrist alone unless both the court and the guardian ad litem agree that the interview is best conducted in that manner." Although the guardian *ad litem* must give permission for such an interview, the trial court may refuse to allow the child to be a witness in the

absence of an unimpeded interview with a child psychiatrist or psychologist who can then give some assurance of competency.

Syl. Pt. 5, *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991)

The guardian *ad litem*'s role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home.

Syl. Pt. 4, *In re I.M.K.*, 240 W. Va. 679, 815 S.E.2d 490 (2018)

If an infant child is born alive, becomes the subject of an abuse and neglect petition, and is appointed a guardian *ad litem* to represent him/her in such case, but the child dies during the pendency of the abuse and neglect proceedings, the guardian *ad litem* remains involved in the case to advocate for the child until the conclusion of such proceedings.

When a child died during an abuse and neglect case, and had no siblings, the circuit court certified two questions to the Supreme Court as to whether the case should proceed to adjudication and whether the guardian *ad litem* should continue to represent the child. After answering the first question affirmatively, the Court also held that the guardian *ad litem's* representation should continue. Explaining its reasoning, the Court noted that: "[t]he guardian *ad litem's* role as the child's advocate becomes even more essential for it is the child's representative who must speak for the child whose voice has been forever silenced." 815 S.E.2d at 502. The Court further noted that: "As the child's advocate and legal representative, the guardian ad litem is in the best position to speak to the circumstances leading to the child's death and to ensure that justice is achieved for the child." *Id.* Therefore, the Court held that the guardian *ad litem's* duties should continue until the case was concluded, even though the child had died and had no siblings.

*In re A.T.-1*, 243 W. Va. 435, 844 S.E.2d 470 (2020)

The appointed guardian *ad litem* did not submit the written report required by the Rules of Procedure for Child Abuse and Neglect Proceedings, and the respondent father included this as an assignment of error. The Supreme Court did not reverse the circuit court ruling on this basis, but, in a footnote, it admonished the guardian *ad litem* and stated that:

> Specifically, Rule 18a of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings provides for the appointment of a guardian *ad litem* to represent the interest of the affected children, and directs guardians to Appendix A of those rules for guidance on the general duties of the guardian *ad litem* at each stage of the proceedings. Appendix A, Section D, Subsections 7 and 8 provide that, at the adjudicatory and dispositional phases of the proceedings, the guardian *ad litem* must complete an investigation of the case and submit a written report, as well

as provide a copy to all parties, at least five days prior to disposition. *In re A.T.-1*, n. 11.

In its opinion, the Court noted that the guardian *ad litem* had argued that the father's new spouse did not have the responsibility to care for the children. Addressing this issue, the Court stated that the psychological evaluation had suggested that this type of assistance would be a benefit to the father. The Court further noted that the guardian *ad litem*, had he wanted to advance this position, should have conducted an investigation of the father's new spouse and the father's new home, but he had not done so. *In re A.T.-1*, n. 21.

## B. Ethics of Representation

*Note: The ethical duties of a guardian ad litem, including the guidance established by the case discussed below, are set forth in the Guidelines for Children's Guardians Ad Litem in Child Abuse and Neglect Cases in Subsection B of* Appendix A *of the Rules of Procedure for Child Abuse and Neglect Proceedings.*

*In re Christina W.*, 219 W. Va. 678, 639 S.E.2d 770 (2006)

This case presented the issue of whether or not a guardian *ad litem* owes a duty of confidentiality to the child he or she represents such that the guardian may not reveal the child's revelations of abuse to the court if the child has requested they remain confidential. In resolving this issue, the Court discussed the dual role of a guardian *ad litem* for children in abuse and neglect cases, which is reflected in the following syllabus points of the Court:

Syl. Pt. 3: Because many aspects of a guardian ad litem's representation of a child in an abuse and neglect proceeding comprise duties that are performed by a lawyer on behalf of a client, the rules of professional conduct generally apply to that representation.

Syl. Pt. 4: While a guardian ad litem owes a duty of confidentiality to the child[ren] he or she represents in child abuse and neglect proceedings, this duty is not absolute. Where honoring the duty of confidentiality would result in the child[ren]'s exposure to a high risk of probable harm, the guardian ad litem must make a disclosure to the presiding court in order to safeguard the best interests of the child[ren].

*In re R.S.*, 244 W. Va. 564, 855 S.E.2d 355 (2021)

This case primarily involved whether a court should perform a best interests analysis when considering a sibling placement or other placement under West Virginia Code § 49-2-126, the *Foster Child Bill of Rights*. However, the remand instructions in this case required the circuit court to consider whether an additional guardian *ad litem* should be appointed to represent a child whose placement might best be served by separating the child from his biological siblings. Although the Supreme Court did not point out any specific ethical concerns, the Court explained that the guardian *ad litem* had only

advocated for and considered the placement of the child with his biological siblings, even though the child had developed a bond in a foster home separate from his siblings.

## C. Appellate Duties of Guardians *Ad Litem*

Syl. Pt. 3, *In the Matter of Scottie D.*, 185 W. Va. 191, 406 S.E.2d 214 (1991)

In a proceeding to terminate parental rights pursuant to W. Va. Code §§ 49-6-1 to 49-6-10, as amended, a guardian ad litem, appointed pursuant to W. Va. Code § 49-6-2(a), as amended, must exercise reasonable diligence in carrying out the responsibility of protecting the rights of the children. *This duty includes exercising the appellate rights of the children, if, in the reasonable judgment of the guardian ad litem, an appeal is necessary*. (emphasis added).

*See W. Va. Code §§ 49-4-601, et seq.*

*W. Va. Code § 49-4-601(f)*

*In re N.K.*, Nos. 14-0660,14-0714 (W. Va. June 10, 2015)(memorandum decision); 2015 W. Va. Lexis 727

This case arose when the Supreme Court issued a rule to show cause against a guardian *ad litem* for failing to comply with scheduling orders in two abuse and neglect cases. Specifically, the guardian *ad litem* did not file response briefs and later filed extremely abbreviated summary responses. In turn, the Court issued a rule to show cause because of the lawyer's failure to file timely briefs and the poor quality of the summary responses. As a possible sanction, the Court had considered ordering that the lawyer would not be eligible for future guardian *ad litem* appointments.

As a response to the rule to show cause, the guardian *ad litem* filed an initial response brief and two supplemental response briefs. She also explained her failure to comply with the scheduling orders because of medical issues and an over-focus on a felony case. In addition, she submitted evidence that supported the generally high quality of her work as a guardian *ad litem*. Ultimately, the Court did not find this guardian *ad litem* in contempt. This opinion is, however, an extremely important reminder that the Supreme Court expects a high degree of professionalism for attorneys who represent children in child abuse and neglect cases and that it will issue sanctions in appropriate cases.

*In re A.N.*, Nos. 15-0182, 15-0208 (W. Va. September 30, 2015)(memorandum decision); 2015 W. Va. Lexis 960

This decision addressed a guardian *ad litem's* failure to comply with scheduling orders issued by the Supreme Court. When the guardian *ad litem* first failed to file response briefs as scheduled, the Court issued Notices of Intent to Sanction and Amended Scheduling Orders. However, the guardian *ad litem* still did not file the required response briefs. Because of this failure, the Court issued a rule to show cause. The guardian *ad litem* ultimately filed response briefs the day before oral argument on the rule to show cause.

In its decision, the Court noted that the guardian *ad litem* had failed to take responsibility for the untimely filings. Instead, the guardian *ad litem* had argued that she had decided not to file response briefs as a means to protest the alleged shortcomings of the DHHR and its failure to follow federal guidelines. She also asserted that staffing problems in her office had caused her to be unaware of the deadlines for filing response briefs. The Court, however, did not find the guardian *ad litem's* responses sufficient to avoid sanctions, and, therefore, found the attorney in contempt for willful violations of the Court's orders. The Court directed the Clerk to refer the matter to the Office of Disciplinary Counsel and directed that she would not be eligible for further guardian *ad litem* appointments or other court appointments until the conclusion of the disciplinary action.

## D. Inadequate/Deficient Representation

*In re K.B.-R.*, 246 W. Va. 682, 874 S.E.2d 794 (2022)

*Note: For a discussion of the circuit court judge's mishandling of the in camera interviews, see Chapter 5, Section I.I.*

This case involved allegations of sexual abuse against a father. The allegations came to light after the two children, ages six and seven, returned from a visit with their father and the mother discovered sexually explicit videos of the children on a cell phone. In response to finding the videos, the mother reported the allegations to the police, and an investigation ensued. The children made consistent disclosures throughout interviews with the police, during CAC interviews, and during sessions with their therapist.

At the adjudicatory hearing, the circuit court conducted *in camera* interviews of the children even though there was other sufficient evidence from which the allegations could have been examined. At the end of the adjudicatory hearing, the circuit court found that the DHHR had not proven its case and dismissed the petition. In response, the mother appealed.

On appeal, the Supreme Court found that the manner in which the circuit court conducted the interviews violated both Rule 8 of the Rules of Procedure for Child Abuse and Neglect Proceedings and Rule 611 of the Rules of Evidence because the circuit court implied that one child was lying and both children showed signs of distress. Specifically, the Supreme Court noted that the circuit court violated the provision in Rule 8 that indicates that there is a rebuttable presumption that children would be harmed by testifying in an abuse and neglect case. The Supreme Court also found that the interviews violated Rule 611 of the Rules of Evidence because the circuit court did not prevent undue harassment or embarrassment but actually perpetrated the harassment of the children. The Supreme Court further found that the circuit court erred in using leading questions and implied that one of the children was lying. Given the extreme and egregious problems with the interviews, the Supreme Court found that a new circuit court judge would be required to preside over the case upon the remand.

As for the representation of the children, the Supreme Court noted that the guardian *ad litem* had only met with the children once during the initial six months of the case and a second time in conjunction with the Rule 11(j) updates. Observing that the guardian *ad litem's* failure to maintain contact with the children was part of an overall trend that it had observed in the representation of children, the Court expressly stated that:

> Lest there be any confusion going forward, let us be clear: in effectively representing a child, it is imperative that a guardian maintain contact with the child throughout the proceedings, just as they would any other client. Doing so is necessary, at a minimum, to understand what is in that child's best interests and what the guardian must do to effectively advocate for those interests. 874 S.E.2d at 805.

Emphasizing the importance of maintaining contact with a child client, the Supreme Court explained that: "[W]e are firmly of the opinion that failure to maintain contact with a child ward throughout the proceedings is an abdication of a guardian *ad litem's* legal and ethical responsibilities to that child and constitutes inadequate representation." 874 S.E.2d at 805.

Not only did the Supreme Court take issue with the guardian *ad litem's* failure to maintain contact with the children, it also found that the guardian *ad litem's* representation of the children was deficient because he did not object to the circuit court's method of interviewing the children. The Supreme Court observed that guardian *ad litem* did not attempt to pause or end the interviews even though the children were obviously distressed. Based upon the guardian *ad litem's* failure to adequately represent the children, the Supreme Court orders that the new circuit court judge must appoint another attorney to represent the children upon the remand.

## E. Duty Regarding Extraordinary Writs

*State ex rel. P.G.-1 v. Wilson*, 247 W. Va. 235, 878 S.E.2d 730 (2021)

The guardian *ad litem* filed a petition for a writ of prohibition when a circuit court had granted multiple extensions to the respondent parents' post-adjudicatory improvement periods, such that the children had been placed in foster care for 25 months. In footnote 15, the Supreme Court commended the guardian ad litem for seeking relief in prohibition. The Court also observed that that both the DHHR and the guardian ad litem should have filed the petition for a writ of prohibition sooner.

## F. Domestic Relations Proceeding Under Rule 6, RPCANP

*In the Interest of Z.D.*, 239 W. Va. 890, 806 S.E.2d 814 (2017)

Syl. Pt. 4: Pursuant to Rule 47 of the West Virginia Rules of Practice and Procedure for Family Court, courts shall not routinely assign guardians ad litem for children in a domestic relations case. Where, however, the court is presented with substantial allegations of domestic abuse, serious allegations of abuse and neglect, serious issues relating to the child's health and safety, or allegations involving disproving a child's paternity, a guardian ad litem shall be appointed by the court for the child(ren).

Syl. Pt. 5: Under Rule 47 of the West Virginia Rules of Practice and Procedure for Family Court, the order appointing a guardian ad litem shall specify the terms of the appointment, including the guardian's role, duties and scope of authority, the issues to be investigated, as well as the specific reasons for the appointment and the expectations of the court for the guardian ad litem's report, including the date by which the written report is due. The order appointing a guardian ad litem shall also require the parties to fully cooperate with the guardian ad litem in terms of the investigation.

Syl. Pt. 6: Before a guardian ad litem may seek payment by this Court, a proper order that comports with Rule 47 of the West Virginia Rules of Practice and Procedure for Family Court must be entered and there must be compliance with the requirements of West Virginia Trial Court Rule 21.04 and 21.05.

An abuse and neglect petition was filed against two divorced parents because of their children's excessive absenteeism. After a pre-adjudicatory improvement period, the DHHR moved to dismiss the case. The mother, however, had filed a motion to modify the previous custodial agreement that had been adopted by the family court. The court informed the parents that they would no longer entitled to court-appointed counsel because the abuse and neglect case was being dismissed. The circuit court, however, instructed the guardian *ad litem* to continue his representation of the children and to bill under the Supreme Court guidelines for domestic cases.

The father appealed the ruling that he would no longer be entitled to court-appointed counsel. The Supreme Court affirmed the circuit court order concerning the representation of the parents.

However, the Court, also addressed the issue of the guardian *ad litem's* continued appointment. Under the version of Rule 47 of the Rules of Practice and Procedure for Family Court, in effect at that time, the Court noted that a guardian *ad litem* should not be routinely appointed unless there was "reasonable cause to suspect the parenting issues involve a child's safety or the best interest of the child warrants further investigation by the court." Family Ct. R. 47. The Court additionally noted that a guardian *ad litem* had never been appointed in the domestic relations case and there was no evidence indicating that a guardian *ad litem* was necessary with regard to the motion for modification of custody. The Court, therefore, reversed the order that appointed the guardian *ad litem* and required him to continue his duties because the requisite findings had not been made.

Further, the Court noted that there must be compliance with Family Court Rule 47 and Trial Court Rules 21.04 and 21.05 to warrant the appointment of a guardian *ad litem*.

## IV. ROLES OF COUNSEL FOR ADULT RESPONDENTS AND DHHR

### A. Custodian or Parent

*Bowens v. Maynard*, 174 W. Va. 184, 324 S.E.2d 145 (1984)

A custodian, like a parent, has a statutory right to be represented in any abuse or neglect proceeding concerning the child. This includes a meaningful opportunity to be heard, and the opportunity to testify and to present and cross examine witnesses.

### B. Appellate Responsibilities of Respondent's Counsel

*Lawyer Disciplinary Bd. v. Sayre*, 242 W. Va. 246, 834 S.E.2d 721 (2019)

In this case, a lawyer was subject to a suspension of his license for his violation of the Rules of Professional Conduct. In addition to other matters, the lawyer had failed to file appeals in a timely manner for adult respondents in two cases.

### C. Guardians *Ad Litem* for Parents

#### 1. Involuntary Hospitalization for Mental Illness

*In the Matter of Lindsey C.*, 196 W. Va. 395, 473 S.E.2d 110 (1996)

The Court reversed an order terminating parental rights for a mother who was hospitalized for mental illness in another state during the pendency of the proceedings and for whom no guardian *ad litem* was appointed. In the following syllabus points, the Court provided guidance concerning the appointment of attorneys and guardians *ad litem*, and service on parents who are hospitalized for mental illnesses.

Syl. Pt. 3: In abuse and neglect proceedings the appointment of a guardian ad litem is required for adult respondents who are involuntarily hospitalized for mental illness, whether or not such adult respondents have also been adjudicated incompetent.

Syl. Pt. 4: It is error to enter a decree terminating parental rights after a suggestion of involuntary hospitalization for mental illness of the affected parent or custodian without first having appointed a guardian ad litem for such parent or custodian.

Syl. Pt. 5: A parent or custodian named in an abuse and neglect petition who is involuntarily hospitalized for mental illness but who retains all of his or her civil rights, must be effectively served with process, including, if service is personal or by mail, service of a copy of any petition or other pleading upon which an order terminating parental rights may be based.

Syl. Pt. 6: In abuse and neglect cases, service of original process on a guardian ad litem appointed for a parent or custodian involuntarily hospitalized for mental illness whose legal capacity has not been terminated by law cannot be substituted in lieu of service on the hospitalized parent or custodian where the parental rights of such person may be terminated under the process to be served.

Syl. Pt. 9: If the appointment of a guardian ad litem is required for a parent or custodian, the trial court may also provide in its order appointing counsel or in a later order, a direction that the appointment imposes on that counsel the additional status of guardian ad litem, with the attendant duties of protecting the interests of the persons for whom such counsel is appointed guardian ad litem and the attendant duty on the court to see to the protection of such person's interests until and unless it later appears that such person's circumstances do not require the continued protection of a guardian ad litem or that the two functions cannot be performed by the same attorney.

Concerning a dual-status appointment as counsel and guardian *ad litem*, although conflicts in this dual role are typically rare, three particular areas of potential conflict in the roles of guardian *ad litem* and counsel, including cases involving counsel and guardians *ad litem* for children, are as follows: (1) when the best interests of the ward and the ward's wishes are not identical, (2) when a privileged communication is made, and the attorney's duty to protect that communication conflicts with his or her duty as guardian, and (3) when a court would require a guardian *ad litem* to actually testify in a case, a function that counsel ordinarily should not perform.

The practice of dual appointments is recommended, but if such conflict arises, dual status of counsel should be terminated, and a second attorney appointed as guardian *ad litem*.

2. Incarcerated Adults

n. 4, *Kenneth B. v. Elmer Jimmy S.*, 184 W. Va. 49, 399 S.E.2d 192 (1990)

In footnote 4, the Court noted that the incarcerated father's rights were protected by a guardian ad litem even though the father was not present at a hearing terminating his rights.

## D. Duties of County Prosecutor and DHHR

*In re Jonathan G.*, 198 W. Va. 716, 482 S.E.2d 893 (1996)

DHHR, as a party to this case (usually by its agent, an individual child protective services worker), has the right and responsibility to advocate whatever position it determines proper under the law and in the best interest of the child. However, DHHR also has the duty to follow the court's directives in working on the case from the perspective of the delivery of social services. In a case, such as this, where DHHR refuses to comply with court directives, a circuit court may appoint an agency independent of DHHR to assist in case management. DHHR, however, as the circuit court clearly

recognized by virtue of its directive that DHHR remain a party, was not absolved of its statutory duties to Jonathan G. despite its removal as the case manager.

Syl. Pt. 4, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997); Syl. Pt. 1, *In the Matter of Taylor B.*, 201 W. Va. 60, 491 S.E.2d 607 (1997); Syl. Pt. 3, *In re Ashton M.*, 228 W. Va. 584, 723 S.E.2d 409 (2012)

In civil abuse and neglect cases, the legislature has made DHHR the State's representative. In litigations that are conducted under State civil abuse and neglect statutes, DHHR is the client of county prosecutors. The legislature has specifically indicated that prosecutors must cooperate with DHHR's efforts to pursue civil abuse and neglect actions. The relationship between DHHR and county prosecutors under the statute is a pure attorney-client relationship. The legislature has not given authority to county prosecutors to litigate civil abuse and neglect actions independent of DHHR. Such authority is granted to prosecutors only under State criminal abuse and neglect statutes. Therefore, all the legal and ethical principles that govern the attorney-client relationship, in general, are applicable to the relationship that exists between DHHR and county prosecutors in civil abuse and neglect proceedings. W. Va. Code § 49-4-502.

Syl. Pt. 5, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997)

When county prosecutors represent the DHHR, they may not invoke the Supreme Court of Appeals' appellate or original jurisdiction in a civil abuse and neglect proceeding, unless they have the express consent and approval of DHHR.

See also *DHHR v. Clark*, 209 W. Va. 102, 543 S.E.2d 659 (2000) (discussing investigative duties and powers of DHHR).

*In re Emily G.*, 224 W. Va. 390, 686 S.E.2d 41 (2009)

*W. Va. Code § 49-4-601*

When an abuse and neglect petition was brought by a child's grandparents and was dismissed without a hearing, the Supreme Court held that West Virginia Code § 49-6-1 requires the DHHR to participate in abuse and neglect proceedings and to provide supportive services to remedy the circumstances of abuse and neglect. Upon remand, the DHHR was to be granted intervenor status.

Syl. Pt. 2, in part, *In re George Glen B., Jr.*, 207 W. Va. 346, 532 S.E.2d 64 (2000); Syl. Pt. 4, *In re Emily G.*, 224 W. Va. 390, 686 S.E.2d 41 (2009)

"[T]he Department of Health and Human Resources has a duty to join or participate in proceedings to terminate parental rights . . .."

*In re N.H.*, 241 W. Va. 648, 827 S.E.2d 436 (2019)

*Note: For a complete discussion of this case, see Chapter 5, Section IX.N.*

During the course of this case, a mother had a fourth child, but the petition was not amended to include the newly born child in the case, nor was the fourth child placed in foster care. Apparently, the DHHR had requested that an amended petition be filed, but the prosecutor had refused. At disposition, the mother's parental rights to her three older children were terminated, and the mother appealed.

Although no party addressed the error with respect to the failure to join the fourth child, the Court noted that it was troubled that the child was not named as a party to the case, especially because the mother's parental rights to her other three children were terminated. Citing to West Virginia Code § 49-4-502, the Court pointed out that prosecutors have the duty to cooperate with the DHHR and represent it in abuse and neglect cases. The Court also noted that the prosecutor should have filed the amended petition at DHHR's request. Remanding the case, the Court directed that proceedings involving the fourth child must be initiated.

*In re K.S.*, 246 W. Va. 517, 874 S.E.2d 319 (2022)

An abuse and neglect petition was filed after a mother tested positive for illicit substances during a family court hearing. Each of the mother's three children were placed with their biological fathers because of the mother's methamphetamine use. During her post-adjudicatory improvement period, the mother, who had been testing negative, relapsed and went to an inpatient 28-day treatment program. After her completion, she remained clean for several months and was granted a post-dispositional improvement period. During this time, the mother's visits were suspended for administrative reasons. Shortly thereafter, the mother relapsed in March of 2020. Although the planned disposition had been reunification or placement with the fathers, the DHHR began to request termination of the mother's parental rights after the second relapse. A disposition hearing was originally scheduled for July of 2020, it but was rescheduled for three months later. In the interim, the mother was not provided with drug screens, nor was she afforded any visitation with her children.

At the beginning of the hearing, the guardian *ad litem* and the assistant prosecutor recommended a disposition 5, but the DHHR and the three fathers all requested termination of parental rights. At the hearing, the assistant prosecutor did not present any testimony, nor did she introduce any other evidence. The mother presented the testimony of her therapist, who indicated that the mother was faithfully attending therapy, even though the termination of her parental rights appeared to be imminent. The mother's therapist also testified as to the mother's insight into her substance abuse and her plan to continue in therapy even if her parental rights were terminated. The mother further testified to obtaining employment. At the end of the hearing, the mother requested that she be allowed additional time on her dispositional improvement period. The circuit court, however, terminated her parental rights and placed each child with his or her biological father.

Reviewing the record below, the Supreme Court found that the circuit court erred in terminating the mother's parental rights without a sufficient evidentiary basis presented by the DHHR. The second error addressed by the Court was the position of the assistant prosecutor who recommended a disposition that was inconsistent with the position of the DHHR. Addressing this issue, the Supreme Court stated that: "We therefore reiterate our caution that prosecutors serve as counsel for DHHR in a traditional attorney-client construct for purposes of abuse and neglect proceedings and must conform their advocacy accordingly." 874 S.E.2d at 332.

### E. All Counsel Must Have Opportunity to Advocate

Syl. Pt. 5, *In re Mark M., III*, 201 W. Va. 265, 496 S.E.2d 215 (1997), Syl. Pt. 3, *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 470 S.E.2d 205 (1996)

There is a clear legislative directive that guardians ad litem and counsel for both sides be given an opportunity to advocate for their clients in child abuse or neglect proceedings. West Virginia Code § 49-6-5(a) states that the circuit court shall give both the petitioner and respondents an opportunity to be heard when proceeding to the disposition of the case. This right must be understood to mean that the circuit court may not impose unreasonable limitations upon the function of guardians ad litem in representing their clients in accord with the traditions of the adversarial fact-finding process.

*W. Va. Code § 49-4-601(h)*

## V. THE OVERLAP OF CHILD ABUSE AND NEGLECT IN FAMILY COURT AND CIRCUIT COURT

### A. Judicial Officers' Duty to Report Suspected Child Abuse and Neglect

Syl. Pt. 6, *John D.K. v. Polly A.S.*, 190 W. Va. 254, 438 S.E.2d 46 (1993)

Under W. Va. Code § 49-6A-2, it is mandatory for any circuit judge, family law master, or magistrate having reasonable cause to suspect abuse or neglect to immediately report the same to the Division of Human Services of the Department of Health and Human Resources.

*W. Va. Code § 49-2-803(a)*

Syl. Pt. 8, *Katherine B.T. v. Jackson*, 220 W. Va. 219, 640 S.E.2d 569 (2006)

When any circuit court judge, family court judge, or magistrate has reasonable cause to suspect that a child is neglected or abused, the circuit court judge, family court judge, or magistrate shall immediately report the suspected neglect or abuse to the state child protective services agency pursuant to W. Va. Code § 49-6A-2 and, if applicable, Rule 48 of the Rules of Practice and Procedure for Family Court.

*W. Va. Code § 49-2-803(a)*

## B. Investigations Ordered by a Family Court Pursuant to West Virginia Code § 48-9-301

*State ex rel. WV DHHR v. Ruckman*, 223 W. Va. 368, 674 S.E.2d 229 (2009)

In an ongoing custody dispute, a father asked the family court to end the requirement of supervised visitation. There were no current allegations of child abuse or neglect; however, based on the history of the case, the family court decided not to alter the custodial arrangement without further investigation. The family court ordered DHHR, who was previously involved with the family, to conduct an investigation regarding the potential harm to the children should the visits be unsupervised; and further, ordered DHHR to supervise visitation between the father and the children while the investigation was pending.

DHHR sought a writ of prohibition in circuit court claiming the family court exceeded its authority by ordering DHHR to investigate when there were no current allegations of abuse or neglect, and by ordering DHHR to supervise the visits outside of a child abuse and neglect proceeding. The circuit court found that pursuant to W. Va. Code § 48-9-301, the family court had the authority to order an investigation by DHHR. With regard to the second issue, the circuit court found that supervised visitation could not be ordered until the family court had a hearing and made the requisite findings of fact as commanded by *Mary D. v. Watt*, 438 S.E.2d 521 (W. Va. 1992). The circuit court did not, however, find that DHHR could not be ordered to supervise visitation in a domestic relations case if the requisite findings were made. DHHR appealed.

With regard to court ordered investigations pursuant to W. Va. Code § 48-9-301, the West Virginia Supreme Court held:

*W. Va. Code § 49-2-803*

Syl. Pt. 3: In a circumstance where mandatory reporting of abuse or neglect pursuant to West Virginia Code § 49-6A-2 and Rule 48 of the Rules of Practice and Procedure for Family Court is not implicated, a family court judge has discretion pursuant to West Virginia Code § 48-9-301(a) to order an investigation to assess the potential of exposing a child to harm should a custodial decision such as ordering unsupervised visitation be made.

Syl. Pt. 4: The West Virginia Department of Health and Human Resources falls within the classification in West Virginia Code § 48-9-301(a) of "professional social service organization experienced in counseling children and families" which in the course of a child custody proceeding a family or circuit court may order to conduct an investigation and report to the court.

However, the Supreme Court found that court ordered investigations by DHHR should not be a routine matter in family court, holding:

Syl. Pt. 5: Family court judges ordering an investigation pursuant to West Virginia Code § 48-9-301(a) should make every effort to determine the best available options for obtaining the information needed in a timely manner in each case and should only resort

to ordering DHHR to perform an investigation and report to the family court when extraordinary circumstances exist.

Factors bearing on whether DHHR, as opposed to another entity, should be ordered to conduct an investigation pursuant to West Virginia Code § 48-9-501, include but are not necessarily limited to: DHHR's previous involvement and knowledge of the safety issues involved, the financial resources of the family, and the resources available in the lower court's circuit.

## C. Proactive Role of Circuit Judges in Resolving Abuse and Neglect Cases

*In re Skyelan H.*, 219 W. Va. 661, 639 S.E.2d 753 (2006)

The guardian *ad litem* moved the circuit court to stay its dismissal order based on new medical evidence that suggested three of the children in the respondent's care had been sexually abused. The circuit court denied the motion and the guardian *ad litem* appealed.

The Supreme Court reversed the dismissal order based on the evidence submitted by the parties during oral argument. The Court underscored the proactive role of circuit courts should take in resolving abuse and neglect cases when it stated:

> We are, however, troubled by the additional evidence submitted into the record after the circuit court's decision. After entry of the court's dismissal order, the guardian *ad litem* proffered to the court evidence suggesting that three of the children may have been victims of sexual abuse. While the evidence, standing alone, proves nothing, the circuit court should have taken a more proactive role in compelling a further investigation of the evidence. In other words, we believe that the circuit court was empowered to demand that the DHHR **investigate** and report to the circuit court whether the evidence could or should be the basis of further action to protect the interest of the children. *See, e.g., Rules of Procedure for Child Abuse and Neglect Proceedings,* Rule 3a; *Rules of Practice and Procedure for Domestic Violence Civil Proceedings*, Rule 25a. 639 S.E.2d at 755. (emphasis in original).

*In re Randy H.*, 220 W. Va. 122, 640 S.E.2d 185 (2006)

Similar to its analysis in *Skyelan H.*, the Supreme Court emphasized the proactive role of judges in promptly and fairly resolving child abuse or neglect cases. Recognizing the important role of judges, the Court relied upon the procedural rules which are commonly referred to as the "overlap" rules. In a new syllabus point, the Court held that:

Syl. Pt. 5: To facilitate the prompt, fair and thorough resolution of abuse and neglect actions, if, in the course of a child abuse and/or neglect proceeding, a circuit court discerns from the evidence or allegations presented that reasonable cause exists to believe that additional abuse or neglect has occurred or is imminent which is not

encompassed by the allegations contained in the Department of Health and Human Resource's petition, then pursuant to Rule 19 of the *Rules of Procedure for Child Abuse and Neglect Proceedings* the circuit court has the inherent authority to compel the Department to amend its petition to encompass the evidence or allegations.

## D. Circuit Court Jurisdiction Over Minor Guardianship Proceedings

Syl. Pt. 7, *In re Abbigail Faye B.*, 222 W. Va. 466, 665 S.E.2d 300 (2008)

Rule 48a(a) of the West Virginia Rules of Practice and Procedure for Family Court requires that if a family court presiding over a petition for infant guardianship brought pursuant to W. Va. Code § 44-10-3 learns that the basis for the petition, in whole or in part, is an allegation of child abuse and neglect as defined by W. Va. Code § 49-1-3, then the family court is required to remove the petition to circuit court for a hearing thereon. Furthermore, "[a]t the circuit court hearing, allegations of child abuse and neglect must be proven by clear and convincing evidence." West Virginia Rules of Practice and Procedure for Family Court 48a(a).

*W. Va. Code § 49-1-201*

*In re Guardianship of K.W.*, 240 W. Va. 501, 813 S.E.2d 154 (2018)

Syl. Pt. 2: Consistent with the plain language of Rule 13 of the Rules of Practice and Procedure for Minor Guardianship Proceedings and Rule 48a of the Rules of Practice and Procedure for Family Court, once a family court removes an infant guardianship case to circuit court because the basis for the guardianship is, in part, abuse and neglect, the case, in its entirety, remains in circuit court and may not be remanded.

Syl. Pt. 4: A temporary guardianship granted over the natural parents' objection based on substantiated allegations of abuse and neglect does not provide a permanent solution for child custody such that it obviates the need for an abuse and neglect petition.

This appeal arose when a family court granted permanent guardianship of three children to their maternal grandparents over their parents' objections. Before the guardianship petition was initiated, the children's mother sought and obtained a domestic violence protective order (DVPO) based upon her husband's physical abuse of both her and the children. To address the abuse allegations, the family court appointed a guardian *ad litem* for the children. His investigation indicated that the husband/father had perpetrated acts of physical and emotional abuse against the mother and the children and that the children had significant anxiety issues and wanted no contact with their father. In addition, the investigation indicated that the mother was physically abusive to one of the children and that the father had physically abused the children while the mother was present. The family court did not refer the case to CPS because the mother was not allowing the father to contact the children.

While the DVPO was in effect, the mother filed for divorce, and the family court appointed the same guardian *ad litem* to represent the children. Shortly after filing for divorce, the parents reconciled. In response, the maternal grandparents sought

guardianship of the children, and the family court granted temporary guardianship based upon the father's violence and the mother's failure to protect the children. The family court also ordered that the case should be removed to circuit court under Family Court Rule 48a and Minor Guardianship Rule 13 and referred the matter to the DHHR for investigation.

As part of an investigation, the DHHR, substantiated the allegations and referred the case to the prosecuting attorney for a child abuse and neglect petition. The circuit court also conducted a hearing on the DHHR's findings. At this hearing, the guardian *ad litem* recommended that the case be remanded to family court because the children were no longer in danger as they had been placed in the temporary custody of the grandparents. The circuit court adopted this recommendation and remanded the case to family court.

In turn, the grandparents filed a petition for permanent guardianship of the children. At this hearing, the parents objected on the basis that the family court lacked subject matter jurisdiction. The family court, however, proceeded to address the guardianship petition because the circuit court had ordered the remand twice -- once as an original ruling and again upon the parents' reconsideration motion. After the hearing, the family court awarded permanent guardianship to the grandparents with a no-contact order for the father and a limited contact order for the mother. After an unsuccessful motion to reconsider to family court and an appeal to circuit court, the parents appealed to the Supreme Court.

Addressing the case, the Supreme Court reviewed Minor Guardianship Rule 13, Family Court Rule 48a, Abuse and Neglect Rule 3a, prior case law, and the procedure for addressing abuse and neglect allegations when they arise in family court. After reviewing this authority, the Court concluded that the temporary guardianship did not do away with the need for a child abuse and neglect petition. Instead, the Court found that:

> The circuit court's conclusion that a petition was unnecessary because the children were in the temporary custody of their grandparents is no more sound than concluding that a child's temporary placement with foster parents prior to institution of an abuse and neglect proceeding negates the need for a petition against the parents in and of itself. 813 S.E.2d at 163.

In addition, the Court addressed the issue that a temporary guardianship would not provide permanency for the children or a permanent solution to custody. The Court concluded that the remand was in error and found that the family court lacked subject matter jurisdiction to establish a permanent guardianship, even though the family court was acting appropriately under the circumstances. Accordingly, the Court remanded the case with instructions that the circuit court must consider whether the grandparents should continue to serve as guardians as the children. Apparently, the grandparents vacillated in their position as to whether the parents were unfit. 813 S.E.2d 154, n. 7. Further, the Court instructed that the circuit court must determine whether an abuse and neglect petition must be filed against the parents

## E. Collateral Estoppel/Res Judicata

Syl. Pt. 6, *In re B.C.*, 233 W. Va. 130, 755 S.E.2d 664 (2014)

A petition for a domestic violence protective order under *W.Va. Code* § 48-27-101, *et seq.*, and a petition alleging abuse and/or neglect under *W.Va. Code* § 49-6-1, *et seq.*, may be filed upon the same facts without consequences under the doctrine of *res judicata* or the doctrine of collateral estoppel.

*W. Va. Code §§ 49-4-601, et seq.*

As an initial method to address allegations of abuse, a mother filed a domestic violence petition on her child's behalf against the father. At a final hearing, the family court denied the domestic violence protective order. After the circuit court affirmed the family court ruling, the mother filed an abuse and neglect case against the father based on similar allegations.

While the abuse and neglect case was pending, the father grabbed the child during an exchange and fractured the child's wrist. The mother sought and received a domestic violence protective order on her son's behalf. In response to the incident, the DHHR also moved to intervene in the abuse and neglect case to provide supportive services to the family. Approximately one month later, the mother amended the abuse and neglect petition to include the incident involving the fracture of the child's arm. Misdemeanor criminal charges were also initiated against the father.

The father's attorney moved to dismiss both the original and amended abuse and neglect petitions, on the basis of *res judicata* and/or collateral estoppel. The circuit court agreed with this argument and dismissed the abuse and neglect case.

On appeal, the Supreme Court found that, although a reputable person may file an abuse and neglect petition, the real party in interest in an abuse and neglect case is the State of West Virginia through the DHHR. In domestic violence cases, the Court found that the party in interest may be one of the following: "(1) a person individually seeking relief from domestic violence; (2) an adult person seeking relief from domestic violence on behalf of a family or household member, such as a minor child; or (3) a person who is being abused, threatened or harassed because they witnessed or reported domestic violence." 755 S.E.2d at 672. Since the real party in interest in each type of case is different from the other, the Court held that a domestic violence petition and/or abuse and neglect petition based on the same set of facts would not implicate the doctrines of collateral estoppel or *res judicata*.

As an additional basis for reversal, the Supreme Court discussed the difference in the types of remedies available in each type of proceeding. The Court observed that: "A domestic violence action is intended solely as a short-term, temporary response to domestic violence; an abuse and neglect action is designed to craft long-term solutions to both violence and neglect in the household." 755 S.E.2d at 673. Finally, the Court found that the circuit court erred in finding that the mother had the opportunity to litigate her allegations in the criminal case. The Court, therefore, reversed and remanded the case for further proceedings.

## VI. PROCEDURAL PROTECTIONS FOR CHILDREN

### A. Meaning and Purpose of Child Case Plan

*State ex rel. S.C. v. Chafin*, 191 W. Va. 184, 444 S.E.2d 62 (1994)

*W. Va. Code § 49-4-604(a)*

*W. Va. Code § 49-4-408*

West Virginia Code § 49-6-5(a) defines the child case plan as a written document which includes, where applicable, the requirements of the family case plan set forth in W. Va. Code § 49-6D-3, as well as the additional requirements set forth in W. Va. Code § 49-6-5(a).

Syl. Pt. 4: The purpose of the child's case plan is the same as the family case plan, except that the focus of the child's case plan is on the child rather than the family unit.

### B. Concurrent Planning

*In re Billy Joe M.*, 206 W. Va. 1, 521 S.E.2d 173 (1999)

Syl. Pt. 5: Concurrent planning, wherein a permanent placement plan for the child(ren) in the event reunification with the family is unsuccessful is developed contemporaneously with reunification efforts, is in the best interests of children in abuse and neglect proceedings.

Syl. Pt. 6: A permanency plan for abused and neglected children designating their permanent placement should generally be established prior to a determination of whether post-termination visitation is appropriate.

*Kristopher O. v. Mazzone*, 227 W. Va. 184, 706 S.E.2d 381 (2011)

In this case, the child resided with her foster parents from birth until she was 22 months old. After a permanency hearing, in which the foster parents were not allowed to participate, the circuit court found that the child should be placed with her paternal aunt based upon a DHHR policy that preferred the placement of the child with a blood relative. At the time of the appeal, the child had lived with her aunt for ten months. The Court stated that the DHHR should have used concurrent planning in order to provide the child with resolution and permanency. Further, it observed that the DHHR should have contacted the aunt at the outset of the case, had it believed that the child should have been placed with a relative.

*State ex rel. C.H. v. Faircloth*, 240 W. Va. 729, 815 S.E.2d 540 (2018)

Primarily, this case addressed intervention by foster parents. However, as part of its analysis, the Court discussed the importance of concurrent planning and stated:

> It is the goal of this planning to ensure that the concurrent placement is ready, willing, and able to proceed to permanency with the subject child if and when termination occurs. What being a concurrent placement requires

> of foster parents then is that they commit themselves fully to the anticipatory permanent physical and legal custody of the child and be appropriately bonded with and invested in the well-being of the child. Naturally, this results in attachment and a desire to maintain a loving bond and involvement in the child's life, even with an understanding that the child could be reunified with one or more parents. We should expect and desire nothing less of people who may ultimately share their lives, homes, and families with an abused or neglected child. 815 S.E.2d at 552.

## C. West Virginia Procedures for Child Witnesses in Abuse and Neglect Cases

*In re J.S.*, 233 W. Va. 394, 758 S.E.2d 747 (2014)

The family in this case involved a mother, a father, the mother's niece who had been placed with the mother in a previous guardianship case, the father's son from a prior relationship and the mother and father's infant son. The allegations against the father involved his sexual abuse of the niece and his sexual abuse of his son on one occasion. The allegations against the mother involved her failure to heed warnings from the DHHR concerning the father's risk to the children's safety.

The primary evidence offered in support of the allegations were the videotaped forensic interviews of the niece and the father's son and handwritten notes from interviews. Other evidence included a letter from the niece to the mother in which she detailed both the sexual abuse and the father's threats if she were to disclose the sexual abuse. Records from the niece's therapy were also admitted. The children did not testify in the abuse and neglect case, and the focus of the opinion was the admission of the videotaped interviews.

As an initial basis for appeal, the adult respondents argued that they were denied due process because they were not afforded the opportunity to confront the children and cross-examine them. The Court, however, pointed out that: "The fundamental requirement of procedural due process in a civil proceeding is 'the opportunity to be heard at a meaningful time and in a meaningful manner.'" 758 S.E.2d at 756. The Court went on to explain that: "What would constitute due process in this case must be determined by weighing the competing interests of the children, the parents and the State." *Id.* Finding that the parents had been afforded due process, the Court noted that the parents had been provided proper notice of the allegations, they had been appointed counsel, they had the opportunity to review evidence in advance of its presentation and to offer rebuttal the evidence.

Secondly, the adult respondents argued that the presentation of videotaped interviews, as opposed to confrontation and cross-examination, failed to minimize the risk of an erroneous finding. The Court, however, rejected this argument because the adult respondents failed to specify how confrontation and cross-examination would have contributed to the fact-finding process.

Third, the adult respondents argued that Rule 8(a), the rule that places limits on the testimony of children, violated the right to confrontation and cross-examination established by the relevant statutes in Chapter 49. See W. Va. Code § 49-4-601(h).[32] Analyzing the arguments, the Court observed that the respondents had equated the statutory right to confront and cross-examine established in Chapter 49 with the rule established by *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). The Court, however, found that abuse and neglect cases are civil, not criminal and, therefore, the *Crawford* rule does not apply.

With regard to whether Rule 8(a) conflicts with the statutory right to confront and cross-examine, the Court held that Rule 8(a), as a procedural rule, would determine whether a child should testify or not, because the Court has the constitutional authority to adopt procedural rules. See W. Va. Const., article VIII, § 3. In a syllabus point, the Court held that:

*W. Va. Code § 49-4-601(h)*

> In a child abuse and neglect civil proceeding held pursuant to West Virginia Code § 49-6-2, a party does not have a procedural due process right to confront and cross-examine a child. Under Rule 8(a) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, there is a rebuttable presumption that the potential psychological harm to the child outweighs the necessity of the child's testimony. The circuit court shall exclude this testimony if it finds the potential psychological harm to the child outweighs the necessity of the child's testimony. Syl. Pt. 7, *J.S.*, 758 S.E.2d 747.

The Court further addressed the admissibility of the videotaped interviews under the West Virginia Rules of Evidence, specifically the residual or catch-all provisions now found in West Virginia Rule of Evidence 807. Analyzing this issue, the Court noted that five general factors must be met in order to be admissible under these provisions. *State v. Smith*, 358 S.E.2d 188 (W. Va. 1987). Applying this test, the Court found that the evidence appeared to be reliable and that the adult respondents did not attack the interview techniques or trustworthiness of the children's statements. Secondly, the Court observed that the evidence was probative as to the question of the sexual abuse. Third, the Court found that the circuit court did not abuse its discretion in determining that the evidence was more probative than other evidence and there were sufficient guarantees of trustworthiness to be reliable. Under the fourth element, the Court concluded that the interests of justice would be served by the admission of the interviews. And fifth, the Court pointed out that the DHHR had provided notice of the evidence and that the adult respondents had been provided with the opportunity to meet the evidence. For these reasons, the Court affirmed the admission of the evidence and the termination of parental rights.

[32]The relevant part of subsection (h) states as follows: "[T]he party or parties having custodial or other parental rights or responsibilities to the child shall be afforded a meaningful opportunity to be heard, including the opportunity to testify and to present and cross-examine witnesses." W. Va. Code § 49-4-601(h).

*In re A.M.*, 243 W. Va. 593, 849 S.E.2d 371 (2020)

The allegations against the respondent father involved sexual abuse of his minor daughter, A.M., and her friend. At the adjudicatory hearing, the DHHR introduced the forensic interviews of the two children as evidence, and the children did not testify. In his defense, the father offered testimony of other witnesses that contradicted the children's testimony. In its order, the circuit court found that the children's testimony was less credible than the defense witnesses because the children had not been cross-examined. The circuit court, therefore, found that the allegations of sexual abuse against the father had not been proven, but it adjudicated the father for his alcohol and substance abuse. Since it did not adjudicate the father based upon the sexual abuse allegations, it did not adjudicate the respondent mother. The guardian *ad litem*, joined by the DHHR, appealed the adjudicatory hearing order.

In its opinion, the Supreme Court explained that children who testify in abuse and neglect proceedings often experience further trauma if they are required to testify in the presence of their alleged abusers. It also discussed the rebuttable presumption that the potential psychological harm to the child outweighs the need for the child's testimony. Rule 8(a), RPCANP. It further noted that the admission of forensic interviews is allowed in abuse and neglect cases. See *In re J.S.*, 758 S.E.2d 747 (W. Va. 2014).

Reviewing the record, the Supreme Court concluded that the lower court erred when it found the children's testimony to be less credible simply because the father had not cross-examined the children. The Court concluded that:

> Discounting both the weight and the veracity of the child victims' testimony for this reason in an abuse and neglect proceeding that specifically allows the presentation of such evidence in this manner was clearly an erroneous ruling by the circuit court. *A.M.,* 849 S.E.2d at 377.

Discussing the details involving the alleged sexual abuse, the Court concluded that the father's actions constituted sexual abuse and that the lower court, upon remand, must adjudicate him for this reason. It also concluded that the circuit court committed error when it did not adjudicate the mother. It remanded the case with instructions to vacate the adjudicatory hearing order and to proceed to disposition consistent with the opinion.

*In re Joseph A.*, 199 W. Va. 438, 485 S.E.2d 176 (1997)

In an appeal challenging the termination of parental rights, the respondent father contended that the trial court erred by excluding him from his minor son's *in camera* testimony. His attorney, however, was present during the minor's testimony. Affirming the circuit court, the Supreme Court held that:

> W.Va. Code, 49-6-2(c) (1996), provides parties having custodial or parental rights the opportunity to testify during abuse and neglect proceedings and to present and cross-examine witnesses. The requirement of cross-examination is fully met when counsel for the parent or guardian is present

*W. Va. Code § 49-4-601(h)*

> during the testimony of a child witness and is given the opportunity to fully cross-examine the witness. Syl. Pt. 3, *Joseph A.*, 485 S.E.2d 176.

At the time that *Joseph A.* was decided, the Rules of Procedure for Child Abuse and Neglect Proceedings had been approved but were not in effect. The Court, however, noted that:

> Rule 8(b) of the Rules of Procedure for Child Abuse and Neglect Proceedings controls the procedure for taking testimony from children in abuse and neglect proceedings in future cases. Syl. Pt. 4, *Joseph A.*, 485 S.E.2d 176.

*Burdette v. Lobban*, 174 W. Va. 120, 323 S.E.2d 601 (1984); *State v. Stacy*, 179 W. Va. 686, 371 S.E.2d 614 (1988)

A child who is the alleged victim of abuse may not be interrogated at any time during the abuse or neglect proceeding without the presence of his or her counsel unless counsel waives that right on behalf of the child. When a child's capacity to testify that he/she was the victim of abuse or neglect is present, the Court should appoint a neutral child psychologist or psychiatrist to conduct a transcribed or otherwise recorded interview to inquire into the child's capacity to be a competent witness. However, the Court may not force the child to be interviewed by the psychologist or psychiatrist alone unless both the court and the guardian *ad litem* agree that the interview is best conducted in that manner. The guardian *ad litem* must give permission, however, the trial court may refuse to allow the child to be a witness in the absence of an impeded interview with a child psychiatrist or psychologist who can then give some assurance of competency.

*In re Elizabeth A.*, 217 W. Va. 197, 617 S.E.2d 547 (2005)

This appeal involved the dismissal of two successive petitions that were supported by the testimony of a teenage girl. In her testimony supporting the first petition, the teenager did not testify about a specific incident of sexual abuse. Later when she was in foster care, the teenager disclosed the details of the incident that formed the basis of the second petition. The circuit court, however, dismissed the second petition because she had not testified about the incident during a hearing on the first petition. Reversing the circuit court, the Supreme Court noted that:

> Such failure does not render her testimony inherently incredible, and it should not have been the sole basis, as appears from the record, for the lower court's decision to dismiss the second petition. It may have provided the court with a legitimate basis for more rigorous investigation of the allegations, but Elizabeth's credibility, as an alleged child sexual assault victim, should not have been totally devalued by her failure to assert all abusive events during the initial hearing. 617 S.E.2d at 556.

## D. Children as Witnesses in Criminal Cases

*Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157 (1990)

On a writ of certiorari in a criminal case, the defendant challenged a Maryland procedure which allowed a child sexual abuse victim to testify via one-way closed circuit television on the basis that it violated her Sixth Amendment right of confrontation. Upholding the Maryland procedure, the United States Supreme Court held that "if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant." 497 U.S. at 855, 110 S. Ct. at 3169.

Providing further guidance concerning the necessity of using closed-circuit testimony, the Court noted that trial courts must make the following findings to warrant the use of this technology. First, the trial court must hear evidence and find that the use of closed circuit testimony is necessary to protect the child's welfare. Secondly, the trial court must find that the child would be traumatized by testifying in the presence of the defendant, as opposed to being traumatized by the courtroom in general. Third, the trial court must find that the child's distress or emotional upset must be more than mere nervousness or excitement.

*Lomholt v. Iowa*, 327 F.3d 748 (8th Cir. 2003)

In this federal habeas corpus proceeding, the defendant challenged the use of closed circuit testimony on the basis that the factual determinations related to the necessity of this testimony were unreasonable and that the Iowa courts unreasonably applied *Maryland v. Craig*, *supra*. The Iowa trial court based its findings on the unchallenged testimony of one expert who had conducted numerous counseling sessions with the two victims.

On appeal, the Eighth Circuit noted that the expert concluded that testifying in the defendant's presence would be traumatic and would impair the victims' ability to communicate. The Eighth Circuit reasoned that *Craig* did not require the specific finding that the victim is afraid of the defendant, but rather that *Craig* required a finding of emotional distress that would impede communication. Additionally, the Eighth Circuit found that the findings were case specific even though the expert testified that all child sex abuse victims would experience trauma if they testified in the abuser's presence. Based upon this reasoning, the Eighth Circuit held that the Iowa courts' factual findings relating to the necessity for closed circuit testimony were not unreasonable and that the Iowa courts did not unreasonably apply the holding of *Craig* to the facts in this case.

*Ault v. Waid*, 654 F. Supp. 2d 465 (N.D.W.Va. 2009)

In a federal habeas corpus case, the court found that the defendant's right to confrontation was not violated when the West Virginia circuit court allowed a child sexual

abuse victim to testify via closed-circuit television as authorized by West Virginia Code §§ 62-6B-1, *et seq.* Although there were some minor deviations from the statutory procedure, the district court concluded that the defense either agreed to the deviations or that they had no effect on the defendant's right to confrontation.

### E. Children Born During Proceedings

*In re Lacey P.*, 189 W. Va. 580, 433 S.E.2d 518 (1993)

In light of finding that four older children were neglected, the trial court did not abuse its discretion in placing mother's unborn child in protective custody so that child would come under auspices of DHHR once born.

*In re Tracy C.*, 205 W. Va. 602, 519 S.E.2d 885 (1999)

The Court found that the circuit court erred by denying the guardian *ad litem's* motion to join a child born during the pendency of the proceedings, as well as the child's father.

*In re N.H.*, 241 W. Va. 648, 827 S.E.2d 436 (2019)

*Note: For a complete discussion of this case, see Chapter 5, Section IX.N.*

The Court found that the petition should be amended to include a fourth child that was born during the case, especially because the mother's rights to three other children were terminated. Apparently, the DHHR had requested that the prosecutor amend the petition to join the child at birth, but the prosecutor had not done so.

### F. Court Appointed Special Advocates – CASA

n. 5, *In re Dejah Rose P.*, 216 W. Va. 514, 607 S.E.2d 843 (2004)

Rule 52 of this Court's Rules of Procedure for Child Abuse and Neglect Proceedings provides for the appointment of a Court-Appointed Special Advocate (CASA) who has the authority in abuse and neglect cases to independently review the record and advocate the best interests of the child.

See also *In re Nelson B.*, 225 W. Va. 680, 695 S.E.2d 910, n. 2 (2010).

## VII. PROCEDURAL PROTECTIONS FOR PARENTS

### A. Appointment of Counsel

*Note: For a complete discussion of the appointment of counsel, including when a parent is a co-petitioner with the Department, see Overview Section V. F.*

Syl. Pt. 8, *In the Matter of Lindsey C.*, 196 W. Va. 395, 473 S.E.2d 110 (1995); Syl. Pt. 2, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996)

Circuit courts should appoint counsel for parents and custodians required to be named as respondents in abuse and neglect proceedings incident to the filing of each abuse and neglect petition. Upon the appearance of such persons before the court, evidence should be promptly taken, by affidavit and otherwise, to ascertain whether the parties for whom counsel has been appointed are or are not able to pay for counsel. In those cases in which the evidence rebuts the presumption of inability to pay as to one or more of the parents or custodians, the appointment of counsel for any such party should be promptly terminated upon the substitution of other counsel or the knowing, intelligent waiver of the right to counsel. Counsel appointed in these circumstances are entitled to compensation as permitted by law.

## B. Notice Requirements

Syl. Pt. 2, *In re Travis W.*, 206 W. Va. 478, 525 S.E.2d 669 (1999)

Circuit courts must comply with Rule 31 of the West Virginia Rules of Procedure for Child Abuse and Neglect by providing notice of the date, time, and place of the disposition hearing to all parties, their counsel, and the CASA representative, if one was appointed.

The Court expressly stated that: "The end result of this case will doubtless be the same regardless of whether or not the court provides notice of and holds a disposition hearing. *However, neither this Court nor circuit courts can simply ignore mandatory procedural requirements*." 525 S.E.2d at 677 (emphasis added).

*In re Emily G.*, 224 W. Va. 390, 686 S.E.2d 41 (2009)

*W. Va. Code § 49-4-601(e)*

Under West Virginia Code § 49-6-1(b), the Department of Health and Human Resources is to be provided notice of all child abuse and neglect proceedings brought in circuit court. The purpose of providing notice to the DHHR is to allow it to fulfill its statutory duty to participate in abuse and neglect proceedings and to provide services to remedy the situation that is detrimental to the child. See also Syl. Pt. 2, *In re George Glen B., Jr.*, 532 S.E.2d 64 (W. Va. 2000).

*In re L.M.,* 245 W. Va. 751, 865 S.E.2d 493 (2021)

In a petition and amended petition, the DHHR alleged that the father had legally abandoned his child. The original petition was mailed to Wilmington, North Carolina to the father's last known address, but it was returned. Next, the circuit court, by order, permitted the DHHR to serve the amended complaint in the Charleston Gazette, but no proof of service was filed. While the case was pending, the BCSE had found a new address in Wilmington, and the father was also listed on a website as being on probation or parole in Wilmington. However, no proof of service was filed. In another attempt at service, the DHHR published in Boone County, but it did not file proof of publication.

At adjudication, counsel for the respondent father argued that service was not proper, but the circuit court found that publication in Boone County was sufficient because the child lived in Boone County. Based upon this finding, the court adjudicated the respondent father. After the initial adjudicatory hearing, the court entered an amended order that found that DHHR reported that it had served the father by publication in a Wilmington newspaper. The DHHR, however, did not file any proof of publication.

The circuit court proceeded to disposition, and it terminated the father's rights. After disposition, the respondent father contacted his lawyer, and he informed his lawyer that he had been incarcerated. He also asserted that he did not know about the proceedings and that he had been contacting the child. He moved to re-open the proceedings, but the circuit court denied his motion. The respondent father appealed the termination based upon lack of service.

In its opinion, the Supreme Court discussed the requirements of service established by West Virginia Code § 49-4-601(e) that involve service in the following sequence: 1) personal; 2) certified mail; and 3) publication pursuant to West Virginia Code § 59-3-1. See also, W. Va. RPCANP 21. It also noted that the appendix record did not contain any proof of publication and that the circuit court did not re-open adjudication after the DHHR had published in Wilmington, North Carolina.

The Court found that the relevant inquiry, based upon West Virginia Code § 48-20-108 and *Mullane v. Central Hanover Bank*, 339 U.S. 306, 70 S. Ct. 652 (1950), is whether the publication in Boone County "was reasonably calculated to apprise Petitioner of the proceedings given all of the attendant circumstances." 865 S.E.2d at 501. Given the circumstances in this case, the Court concluded that the publication in Boone County "so diminishe[d] the likelihood of notice to Petitioner that it is no notice at all—it was so hollow a gesture of due process that it is was seemingly intended *not* to reach him." 865 S.E.2d at 502 (emphasis in original). The Court vacated the disposition order and remanded the case for further proceedings.

Syl. Pt. 2, *In re A.G.*, 247 W. Va. 249, 878 S.E.2d 744 (2022)

West Virginia Code § 49-4-601 and the Due Process Clauses of the West Virginia and United States Constitutions prohibit a court from determining "whether [a] child is abused or neglected and whether the respondent is abusing, neglecting, or, if applicable, a battered parent," without notice to the respondent that an adjudicatory hearing will be held and that such hearing will be held to adjudicate that respondent. Without such notice, the respondent has not received an adjudicatory hearing or due process of law. W. Va. Code § 49-4-601(i).

An infant, A.G.-1, was placed in foster care when allegations against the child's mother and her boyfriend were made. When the petition was filed, paternity of A.G.-1 had not been established, although it was known that the mother's boyfriend was not the father. The petition included allegations against A.G.-2 and/or the unknown father of the

infant, and separate counsel for the unknown father and A.G.-2 were appointed. A.G.-2 appeared at the preliminary hearing and requested a paternity test.

After the next two hearings, the mother and boyfriend were adjudicated, but A.G.-2 did not appear at either of the hearings. The order, scheduling the next hearing, indicated that the court would address disposition for the mother and boyfriend, and that it was a status hearing on paternity for the child, A.G.-1.

At this hearing, the mother and boyfriend did not appear. The bailiff, at the judge's direction, called for the mother, the boyfriend, but not for A.G.-2. At the hearing, a caseworker testified as to A.G.-2's failure to appear for paternity testing twice and that men other than A.G-2 were likely to be the child's father. Another witness testified as to A.G.-2's relationship with the mother and the probability of his paternity. At the conclusion of the hearing, the court adjudicated the unknown father of the child based upon abandonment, and the written order reflected that the adjudication was for the unknown father.

At the next hearing, A.G.-2 appeared. Reviewing the status of the case, the judge indicated that the disposition hearing was for the putative father, A.G.-2, but the prosecutor indicated that it was for the unknown father. At the hearing, A.G.-2 testified as to his relationship with the mother and as to the mother and boyfriend's efforts to curtail his involvement with the child. After this hearing, A.G.-2 participated in paternity testing and was found to be the child's father.

Next, the court conducted two dispositional hearings at which A.G.-2 testified as to his relationship with the mother and his support for his son. His sister also testified in support of the mother's efforts to bar A.G.-2 from his son's life. At the conclusion of the hearing, the court found, over A.G.-2's objection, that the adjudication of the unknown father applied to A.G.-2. The court also terminated his parental rights.

On appeal, A.G.-2 argued that he was not afforded an adjudicatory hearing of which he had notice and a meaningful opportunity to be heard. Reviewing the constitutional principles and statutory procedure for abuse and neglect cases and the record, the Supreme Court concluded that A.G.-2 was not afforded notice of an adjudicatory hearing that would address whether he had abused or neglected his son. The Supreme Court explained that the circuit court erred when it conflated the unknown father with A.G.-2, who was then a putative father, because paternity had not yet been established. The Supreme Court further concluded that the circuit court erred when it proceeded to a disposition of A.G.-2 because he had not been properly adjudicated.

### C. Mandatory Procedure for Abuse and Neglect Cases

Syl. Pt. 5, *In re Edward B.*, 210 W. Va. 621, 558 S.E.2d 620 (2001)

Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the

disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order.

*In re Emily G.*, 224 W. Va. 390, 686 S.E.2d 41 (2009)

On October 25, 2006, approximately two months after the birth of Emily G., her parents assigned temporary guardianship of her to her maternal grandparents in a family court proceeding. The guardianship proceeding continued in the family court for the next 21 months, and a guardian *ad litem* was appointed to protect Emily's interests. Emily's father made several attempts to regain custody; however, court records indicate that the parents' relationship was fraught with domestic violence. Thus, Emily remained in her grandparents' care.

On May 8, 2008, the guardian *ad litem* made numerous recommendations to the family court aimed at protecting Emily's interests and improving the parenting abilities of her parents. Included was a recommendation for the commencement of abuse and neglect proceedings if the parents failed to fulfill the conditions imposed by the family court. On July 8, 2008, the family court entered a final order giving the maternal grandparents "sole care custody and control" of Emily. Supervised visitation was awarded to both parents. Two months later, the maternal grandparents filed a child abuse and neglect petition in the circuit court seeking the termination of the parents' rights. The circuit court, without holding a hearing or appointing counsel, dismissed the petition finding that the petition did not allege facts sufficient to come within the statutory definition of child abuse and neglect. The grandparents appealed.

Citing procedural error, the Supreme Court vacated the circuit court's order and remanded the case for further proceedings. The Court found that when a petition is filed pursuant to Chapter 49 of the West Virginia Code, a circuit court is required to hold a hearing and appoint counsel for the child. The Supreme Court also noted that under the applicable statute, notice of abuse and neglect proceedings is to be provided to the DHHR. The purpose of providing notice to the DHHR is so that it can fulfill its statutory duty established by Chapter 49 of the West Virginia Code to join in and participate in abuse and neglect proceedings and to provide supportive services to remedy the circumstances of abuse and neglect. The Court directed that, upon remand, the DHHR should be granted intervenor status so that it would fulfill its statutory duty.

## D. Right to Participate in Hearings

Syl. Pt. 3, *In re Joseph A.*, 199 W. Va. 438, 485 S.E.2d 176 (1997)

*W. Va. Code § 49-4-601 (h)*

W. Va. Code § 49-6-2(c) provides parties having custodial or parental rights the opportunity to testify during abuse and neglect proceedings and to present and cross-examine witnesses. The requirement of cross-examination is fully met when counsel for the parent or guardian is present during the

testimony of a child witness and is given the opportunity to fully cross-examine the witness.

Syl. Pt. 3, *In re T.S.*, 241 W. Va. 599, 827 S.E.2d 29 (2019)

West Virginia Code, Chapter 49, Article [4], Section [601], as amended, and the Due Process Clauses of the West Virginia and United States Constitutions prohibit a court or other arm of the State from terminating the parental rights of a natural parent having legal custody of his child, without notice and the opportunity for a meaningful hearing.

At a disposition hearing, the DHHR presented evidence in support of its request to terminate the respondent father's parental rights. In response, the father, by counsel, indicated that he wanted to present the CASA's testimony, but the court did not allow him to do so because the witness had not been disclosed. The father's attorney also indicated that he would like to present the respondent father's testimony. After asking about the substance of the testimony, the court converted counsel's response to a proffer and proceeded to impose disposition pursuant to West Virginia Code § 49-4-604(b)(5) even though the DHHR and the guardian *ad litem* had requested termination.

On appeal, the respondent father argued that he was not afforded a meaningful opportunity to be heard during the dispositional hearing. In response, the DHHR and the guardian *ad litem* asserted that the father was represented by counsel throughout the hearing, and it was not necessary for the father to present additional witnesses.

After reviewing the record, the Court found that a parent cannot be divested of parental rights without a meaningful opportunity to be heard. See *In the Matter of Ronald Lee Willis*, 157 W. Va. 225, 207 S.E.2d 129 (1973); *State ex rel. H.S. v. Beane*, 240 W. Va. 643, 814 S.E.2d 660 (2018). The Court held that a meaningful opportunity to be heard includes the right to testify, to present witnesses, and to cross-examine witnesses. Further, the Court found that representation by counsel did not afford the father with a meaningful opportunity to be heard. Therefore, the Court reversed the ruling and remanded the case to the circuit court for a disposition hearing that followed the guidance in the opinion.

*In re P.F.*, 243 W. Va. 569, 848 S.E.2d 826 (2020)

*Note: A more complete discussion of this case is found in Chapter 5, Section XV.E.*

After an infant was placed in foster care, the grandmother sought placement of the child and moved to intervene. After the guardian *ad litem* and DHHR opposed the motion, the circuit court did not conduct an evidentiary hearing and denied the grandmother's motion.

As an initial allegation of error, the grandmother argued that she had been denied a meaningful opportunity to be heard. However, the grandmother acknowledged that she was not a party, nor was she a foster parent or relative caregiver. See W. Va. Code §

49-4-601(h). Therefore, the Court concluded that circuit court did not deny the grandmother "a meaningful opportunity to be heard."

The Court found that the case should be remanded for an evidentiary hearing to resolve factual disputes about the suitability of placing the child with the grandmother. However, the Court noted that an evidentiary hearing would not be required in all cases involving a grandparent's motion to intervene.

## E. Hearing Attendance by Incarcerated Parent

### 1. Subject to Court's Discretion

Syl. Pt. 10, *State ex rel. Jeanette H. v. Pancake*, 207 W. Va. 154, 529 S.E.2d 865 (2000); Syl. Pt. 2, *In re Stephen Tyler R.*, 213 W. Va. 725, 584 S.E.2d 581 (2003)

Whether an incarcerated parent may attend a dispositional hearing addressing the possible termination of his or her parental rights is a matter committed to the sound discretion of the circuit court.

Syl. Pt. 11, *State ex rel. Jeanette H. v. Pancake*, 207 W. Va. 154, 529 S.E.2d 865 (2000); Syl. Pt. 3, *In re Stephen Tyler R.*, 213 W. Va. 725, 584 S.E.2d 581 (2003).

In exercising its discretion to decide whether to permit an incarcerated parent to attend a dispositional hearing addressing the possible termination of his or her parental rights, regardless of the location of the institution wherein the parent is confined, the circuit court should balance the following factors: (1) the delay resulting from parental attendance; (2) the need for an early determination of the matter; (3) the elapsed time during which the proceeding has been pending before the circuit court; (4) the best interests of the child(ren) in reference to the parent's physical attendance at the termination hearing; (5) the reasonable availability of the parent's testimony through a means other than his or her attendance at the hearing; (6) the interests of the incarcerated parent in presenting his or her testimony in person rather than by alternate means; (7) the affect of the parent's presence and personal participation in the proceedings upon the probability of his or her ultimate success on the merits; (8) the cost and inconvenience of transporting a parent from his or her place of incarceration to the courtroom; (9) any potential danger or security risk which may accompany the incarcerated parent's transportation to or presence at the proceedings; (10) the inconvenience or detriment to parties or witnesses; and (11) any other relevant factors.

### 2. Incarcerated Parent Must Notify Court

Syl. Pt. 4, *In re Stephen Tyler R.*, 213 W. Va. 725, 584 S.E.2d 581 (2003).

In order to activate the procedural protections enunciated in syllabus points 10 and 11 of *State ex rel. Jeanette H. v. Pancake*, 207 W. Va. 154, 529 S.E.2d 865 (2000), an incarcerated parent who is a respondent to an abuse and neglect proceeding must inform the circuit court in which such case is pending that he/she is incarcerated and request the

court's permission to attend the hearing(s) scheduled therein. Once the circuit court has been so notified, by the respondent parent individually or by the respondent parent's counsel, the determination of whether to permit the incarcerated parent to attend such hearing(s) rests in the court's sound discretion.

### F. Involuntary Sterilization

*In re Lacey P.*, 189 W. Va. 580, 433 S.E.2d 518 (1993)

The Court held that an order requiring the DHHR to assist a person with an involuntary sterilization could not be upheld.

## VIII. CHILD SUPPORT IN ABUSE AND NEGLECT CASES

### A. Jurisdiction for Child Support in Abuse and Neglect Cases

*DHHR v. Smith*, 218 W. Va. 480, 624 S.E.2d 917 (2005); See also Syl. Pt. 3, *In re Ryan B.*, 224 W. Va. 461, 686 S.E.2d 601 (2009)

*Note: Rule 16a incorporated the holding of Smith in the Rules of Procedure for Child Abuse and Neglect Proceedings. In addition, West Virginia Code §§ 49-4-801, et seq. has established procedures governing child support in abuse and neglect cases.*

When a child is the subject of an abuse or neglect or other proceeding in a circuit court pursuant to Chapter 49 of the West Virginia Code, the circuit court, and not the family court, has jurisdiction to establish a child support obligation for that child.

In this case involving certified questions concerning child support in abuse and neglect cases, the West Virginia Supreme Court held that a circuit court, not a family court, has jurisdiction to set child support in a child abuse and neglect case or other proceeding brought pursuant to Chapter 49 of the West Virginia Code, most typically juvenile status offense or delinquency cases. It further held that the entry of a support order is mandatory when an order is entered that alters the custodial responsibility for a child or commits the child to the custody of DHHR. In *Smith*, the Court expressly recognized that altering custodial responsibility may include transferring custody to one parent or placing the child in the custody of a third party, such as a relative. Finally, the Court held that the child support guidelines set forth in West Virginia Code §§ 48-13-101, *et seq.* apply to child support obligations in child abuse and neglect cases.

*In the Interest of J.L.*, 234 W. Va. 116, 763 S.E.2d 654 (2014).

Syl. Pt. 4: When a circuit judge enters an order on an abuse or neglect petition filed pursuant to Chapter 49 of the West Virginia Code, and in so doing alters the custodial and decision-making responsibility for the child and/or commits the child to the custody of the Department of Health and Human Resources, W. Va. Code § 49-7-5 requires the circuit judge to impose a support obligation upon one or both parents for the support, maintenance and education

*W. Va. Code §§ 49-4-801, et seq.*

of the child. The entry of an order establishing a support obligation is mandatory; it is not optional.

Syl. Pt. 5: Any order establishing a child support obligation in an abuse or neglect action filed pursuant to Chapter 49 of the West Virginia Code must use the Guidelines for Child Support Awards found in W. Va. Code §§ 48-13-101, *et seq.*

## B. Modification or Enforcement of Child Support in Abuse and Neglect Cases

Syl. Pt. 5, *In the Interest of J.L.*, 234 W. Va. 116, 763 S.E.2d 654 (2014)

Pursuant to Rule 16a(d) of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, a circuit court cannot transfer or remand a child support order that it has entered in an abuse and neglect case to the family court for enforcement or modification.

The parents of a child were divorced in 2005, and custody of the child was placed with the mother. The father was required to pay child support, but substantial arrearages accrued ($13,130.53). In response, the BCSE initiated contempt proceedings in family court in 2011. While the contempt proceedings were pending, the DHHR initiated a child abuse and neglect petition based on allegations that the father had committed domestic violence in the child's presence and that the mother had failed to shield the child from it. In turn, the family court dismissed the contempt proceedings because it determined that Rule 6[33] of the Rules of Procedure for Child Abuse and Neglect Proceedings prohibited it from addressing the child support contempt petition.

At the conclusion of the abuse and neglect case, the circuit court terminated the father's parental rights, modified his child support obligation and reduced payments on the arrearage to $50 per month. When the father again fell behind on his support obligation, the mother, *pro se*, filed a contempt petition in the abuse and neglect case. The circuit court found the father to be in contempt, issued a capias and remanded the case to family court for enforcement of the support order entered by the circuit court. In response, the BCSE appealed the remand of the case to family court.

On appeal, the Supreme Court first observed that family courts are courts of limited jurisdiction, while circuit courts are courts of general jurisdiction. The Court also noted that circuit courts have exclusive jurisdiction over child abuse and neglect cases, and that this jurisdiction includes the authority to decide child support issues. The Court went on to find that the establishment of child support is an integral part of an abuse and neglect case. The Court further recognized that, under Rule 6, the circuit court has continuing exclusive jurisdiction over matters, i.e., visitation or support, that might ordinarily lie within

[33] The relevant part of Rule 6 states as follows: "The court retains exclusive jurisdiction over placement of the child while the case is pending, as well as over any subsequent requests for modification, including, but not limited to, changes in permanent placement or visitation, except that (1) if the petition is dismissed for failure to state a claim under Chapter 49 of the W. Va. Code, or (2) if the petition is dismissed, and the child is thereby ordered placed in the legal and physical custody of both of his/her cohabitating parents without any visitation or child support provisions, then any future child custody, visitation, and/or child support proceedings between the parents may be brought in family court."

the jurisdiction of family court. The Court finally stated that Rule 16a(d) makes it "patently clear" that the circuit court could not transfer abuse and neglect matters to family court. Accordingly, the Supreme Court adopted Syllabus Point 5 in which it held that enforcement or modification of a circuit court child support order in an abuse and neglect case must be addressed by the circuit court and may not be remanded to family court.

### C. Child Support Following a Termination or Voluntary Relinquishment of Parental Rights

*In re Stephen Tyler R.*, 213 W. Va. 725, 584 S.E.2d 581 (2003)

The circuit court terminated the respondent father's parental rights but required him to continue paying child support. On appeal, the respondent father argued that the child support requirement was fundamentally unfair because he could not visit his son. Rejecting this argument, the Court reasoned that disposition statute, West Virginia Code § 49-4-604(b)(6), allowed the circuit court to terminate parental rights and/or responsibilities. Finding that child support is a parental responsibility, the Court held:

Syl. Pt. 7: Pursuant to the plain language of W. Va. Code § 49-6-5(a)(6), a circuit court may enter a dispositional order in an abuse and neglect case that simultaneously terminates a parent's parental rights while also requiring said parent to continue paying child support for the child(ren) subject thereto.

*See also W. Va. Code § 49-4-802(d)*

As further grounds to challenge the decision, the respondent father argued that the support obligation would be inequitable if the child were later adopted. Addressing this concern, the Court held that:

Syl. Pt. 8: A circuit court may, in the course of modifying a previously-entered dispositional order in an abuse and neglect case in accordance with W. Va. Code § 49-6-6, amend a parent's continuing child support obligation or the amount thereof. The court may not, however, modify said dispositional order to cancel accrued child support or decretal judgments resulting from child support arrearages.

*W. Va. Code § 49-4-606*

*In re Ryan B.*, 224 W. Va. 461, 686 S.E.2d 601 (2009)

In these consolidated appeals, the Supreme Court addressed whether a parent who voluntarily relinquishes his or her parental rights can be required to make child support payments after his or her rights are permanently severed. The Court also addressed whether the imposition of a child support obligation is mandatory under West Virginia Code § 49-7-5 when a circuit court enters an order accepting a voluntary relinquishment or involuntarily terminating a parent's rights. With regard to the first issue, the parents whose rights were terminated argued that the Legislature's modification of West Virginia Code § 49-6-5(a)(6) overruled *In re Stephen Tyler R.* and consequently, precluded a circuit court from ordering a parent to pay child support after his or her rights are terminated. The Supreme Court held:

*See W. Va. Code §§ 49-4-801, et seq.*

*W. Va. Code § 49-4-604(b)(6)*

Syl. Pt. 1: The Legislature's 2006 amendment of *W. Va. Code,* § 49-6-5(a)(6), changing the statute's "guardianship rights and/or responsibilities" language to "guardianship rights and responsibilities" was not intended to relieve parents who have their parental rights terminated in an abuse and neglect proceeding from providing their child(ren) with child support.

Syl. Pt. 2: A circuit court terminating a parent's parental rights pursuant to *W. Va. Code,* § 49-6-5(a)(6), must ordinarily require that the terminated parent continue paying child support for the child, pursuant to the *Guidelines for Child Support Awards* found in *W. Va. Code,* § 48-13-101, et. seq. If the circuit court finds, in a rare instance, that it is not in the child's best interest to order the parent to pay child support pursuant to the *Guidelines* in a specific case, it may disregard the *Guidelines* to accommodate the needs of the child if the court makes that finding on the record and explains its reasons for deviating from the *Guidelines* pursuant to *W. Va. Code,* § 48-13-702.

*See also W. Va. Code §§ 49-4-801, et seq.*

## D. No Retroactive Discharge of Arrearages

*In re K.S.,* 246 W. Va. 626, 874 S.E.2d 738 (2022)

Syl. Pt. 3: The authority of the circuit courts to modify alimony or child support awards is prospective only and, absent a showing of fraud or other judicially cognizable circumstance in procuring the original award, a circuit court is without authority to modify or cancel accrued alimony or child support installments. Syllabus Point 2, *Goff v. Goff,* 177 W. Va. 742, 356 S.E.2d 496 (1987).

Syl. Pt. 4: A circuit court lacks the power to alter or cancel accrued installments for child support.' Syl. pt. 2, *Horton v. Horton,* 164 W. Va. 358, 264 S.E.2d 160 (1980). Syllabus Point 4, *Robinson v. McKinney,* 189 W. Va. 459, 432 S.E.2d 543 (1993).

The issue in this case was whether child support arrearages may be cancelled or discharged when the child support obligor has placement of the child and the obligee's rights have been terminated. Before an abuse and neglect case was initiated, the father owed a support obligation to the mother, and substantial arrearages accrued over a 10-year period. The arrearages were payable both to the BCSE and to the mother. When the abuse and neglect petition was filed, the child was placed with the father, and his support obligation was suspended. After an improvement period, the circuit court terminated the mother's parental rights.[34] Subsequent to disposition, the father moved the circuit court to discharge the child support arrearages that were payable to the mother. The circuit court declined to discharge the arrearages based upon the following statutory language: "Except as provided in rule 23 of rules of practice and procedure for family law and as provided in section 1-302, a child support order may not be retroactively modified so as to cancel or alter accrued installments of support. W. Va. Code § 48-1-204.

[34] The Supreme Court reversed the disposition order because the DHHR had not presented any evidence in support of the termination of the mother's parental rights. See *In re K.S.,* 874 S.E.2d 319 (W. Va. 2022).

In its analysis, the Supreme Court discussed the unambiguous language of the applicable statute that prohibits such a discharge. The Supreme Court also noted that the facts of the instant case were not similar to the cases in which it had allowed this type of discharge. See *Supcoe v. Shearer*, 512 S.E.2d 583 (W. Va. 1998); *Kimble v. Kimble*, 341 S.E.2d 420 (W. Va. 1986). The Supreme Court, therefore, affirmed the circuit court. It, however, observed that, upon remand, the circuit court could structure a payment plan and also require the mother to pay support to the father.

## IX. THE ICWA IN ABUSE AND NEGLECT CASES

### A. Notice Under the ICWA

*In re N.R.*, 242 W. Va. 581, 836 S.E.2d 799 (2019)

In an abuse and neglect case, the adult respondents claimed error because the DHHR had not provided notice by registered mail to the applicable tribe in accordance with 25 U.S.C. § 1912(a). However, it was undisputed that a tribal representative had called the DHHR after the father had notified the tribe of the case. After this actual notification, the DHHR kept the tribe informed about the case and provided documentation from the case to the tribal representative. Therefore, the circuit court found that any deficiency with notice had been resolved and that the case should not have been dismissed. The Supreme Court affirmed the ruling and found that there was no basis to invalidate the proceeding.

### B. Transfer to a Tribal Court

*State ex rel. Del. Tribe of Indians v. Nowicki-Eldridge*, --- W. Va. ---, 888 S.E.2d 866 (2023)

The abuse and neglect case began in January of 2020 when a mother was abusing drugs, was homeless, and could not care for her 13-month-old child. The mother's parental rights to the child were terminated in August of 2020 because of her non-compliance with an improvement period.

Although the father was originally unknown, paternity testing of B.D. indicated that he was the child's father. In January of 2021, the circuit court found that B.D. was the child's father, that he was a non-maltreating parent, and that he should be unified with his child. The father lived in Minnesota, and this state required a homestudy under the ICPC. However, the father did not complete the homestudy and indicated that he could not care for the child by the latter part of March 2021. The father requested that his sister, A.S., be considered as a relative placement for the child. The father's cousins also expressed interest in placement of the child. In December 2021, the father informed the DHHR that he was a member of a tribe.

In January of 2022, the DHHR filed an amended petition because the father had abandoned the homestudy process. A.S., the child's aunt, moved to intervene, and the court allowed her to do so. In addition, the West Virginia foster parents indicated that they planned to intervene. The father requested that the amended petition be withdrawn

because he intended to relinquish his parental rights, and the DHHR did so. However, the father did not relinquish his rights, so the DHHR filed a second amended petition.

Next, the Delaware Tribe of Indians (hereinafter "Tribe") contacted the circuit court and indicated that it may move to intervene in the case. When the lower court conducted a hearing, the father again stated that he wished to relinquish his rights. The court continued the proceedings so that the father could complete the relinquishment process. After the father failed to do so, the court conducted another hearing and directed the parties to submit briefs regarding the applicability of the ICWA. In addition, the Tribe filed a motion to transfer the case to its tribal court.

In September of 2022, the circuit court found that ICWA did not apply because the child was not removed from an intact Indian family, and it, thereby, adopted the Existing Indian Family ("EIF") exception to the ICWA. The EIF doctrine indicates that ICWA does not apply when the Indian child has been removed from a family which does not have a significant connection to the Indian community. Alternatively, the circuit court found that even if the ICWA would apply to proceedings, there was good cause to deny the motion to transfer because the proceedings were in such an advanced stage. See 25 U.S.C. § 1911(b). It based its conclusion on the fact that the case had been pending for three years when the Tribe moved to transfer the case to its court. In turn, the Tribe sought a writ of prohibition.

In the opinion, the Supreme Court first addressed the applicability of the ICWA to the case. It found that the ICWA applied because the case involved a child, who is the daughter of a tribe member. Next, the Court discussed the EIF exception to the ICWA and noted that it was a minority doctrine that had been repudiated by the court which had established it. *Del. Tribe of Indians*, 888 S.E.2d at 872; *In re A.J.S.*, 204 P.3d 543 (Kan. 2009). After discussing this doctrine and the primary cases rejecting it, the Supreme Court concluded that: "the EIF exception is plainly incompatible with the explicit provisions of the Act and contrary to Congress's stated intent in passing the Act, namely the protection of Indian tribes and their resources, including their children." 888 S.E.2d at 872. In a new syllabus point, the Court held that: "West Virginia does not recognize the Existing Indian Family exception to the *Indian Child Welfare Act, 25 U.S.C. §§ 1901 to - 1963 (2021)*." Syl. Pt. 2, *Del. Tribe of Indians*, *supra*.

Addressing the next allegation of error, the Supreme Court discussed that the circuit court ruling that denied the Tribe's motion to transfer the case to a tribal court based upon a finding of "good cause" because the case had been pending for three years. In its objection to the ruling, the Tribe argued that the proceedings could not be considered advanced with respect to the father because he had not even been adjudicated.

Reviewing the proceedings below, the Supreme Court noted that the Tribe had moved to transfer the case to tribal court based upon 25 U.S.C. § 1911(b). The Supreme Court summarized the statute and found that such a motion should be granted unless the parent opposes it; the Tribe declines to accept the transfer; or the state court finds good cause to deny the transfer.

Discussing what would constitute good cause to deny a motion to transfer, the Supreme Court cited to a federal regulation, 25 C.F.R. § 23.118(c), that defines what *cannot* be considered as a basis for a finding of good cause to deny the transfer. It then found that the circuit court had relied upon the *Guidelines for State Cts: Indian Child Custody Proc*., 44 Fed. Reg. 67584 (Nov. 26, 1979) which had been replaced by the 2016 version of the Guidelines. The 1979 version of the Guidelines had allowed a state court to deny a transfer motion based upon the passage of time. In the case below, the circuit court had relied upon the Tribe's eight-month delay in filing its motion to transfer. The Supreme Court discussed that the 2016 Guidelines clarified that a motion to transfer should be treated as a motion to transfer venue which can occur at any stage of an underlying case.

In addition, the Supreme Court discussed that federal regulations recognize two different stages in a child welfare case: 1. the foster care stage where reunification is the goal; and 2. the termination phase where the parent's rights may be terminated and the child is placed in an adoptive home. 25 C.F.R. § 23.118. Under the applicable regulations, the state court must consider whether the particular phase is advanced, not whether the entire case is advanced. In the underlying case, the circuit court had found that the proceedings were advanced because the entire case had been pending for three years.

Applying this authority, the Supreme Court found that the circuit court had erred in in its finding of good cause because the underlying case had encompassed three different phases: 1. when the goal was reunification with the mother; 2. when the DHHR attempted to unify the child with her father; and 3. when the circuit court was addressing the termination of the father's parental rights. The Supreme Court noted that the proceedings in the circuit court had not even reached adjudication with respect to the father because the circuit court had been addressing whether the ICWA would apply, not the merits of the petition. The Supreme Court, therefore, concluded that the circuit court had erred when it found that good cause to deny the Tribe's motion to transfer. In its instructions, the Supreme Court ordered that the circuit court must transfer the case to the District Court of the Delaware Tribe.

### C. Burden of Proof When the ICWA Applies

*In re N.R.*, 242 W. Va. 581, 836 S.E.2d 799 (2019)

In a case involving the Indian Child Welfare Act ("ICWA"), the Supreme Court discussed the higher standard of proof required to terminate parental rights when the family is an Indian family, that is, proof beyond a reasonable doubt. After reviewing cases from other states, the Court observed that the higher burden of proof does not change the requirements of a state court proceeding, but it does impose a heightened burden of proof, which is higher than the West Virginia standard of proof, that of clear and convincing evidence. See 25 U.S.C. § 1912(f).

In addition, the Court also addressed the statutory requirement under the ICWA which indicates that termination of parental rights cannot occur without the testimony of a qualified expert witness. The applicable statute states that the expert must conclude "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f). When implicated by the facts of a specific case, expert testimony should also be presented on the tribe's social and cultural standards. See *N.R.*, 836 S.E.2d at 813; 25 C.F.R. § 23.122(a). However, the Supreme Court concluded that it was not necessary to present expert testimony on social or culture bias in this case because the facts did not point to this issue. Rather, the Supreme Court concluded that circuit court correctly terminated parental rights because of the father's perpetration of abuse, both against the children and the mother, and the mother's failure to acknowledge the risk caused by her relationship with the father.

For a complete discussion of this case, see Chapter 5, Section XII.M.

## X. CRIMINAL PROSECUTION ISSUES - OFFENSES AGAINST CHILDREN

### A. Prosecutors' Role

*State v. James R., II*, 188 W. Va. 44, 422 S.E.2d 521 (1992)

In this case, the Court overturned a ruling which prohibited a prosecutor from representing the State in criminal proceedings in which the prosecutor had formerly represented the State in abuse and neglect proceedings against the same person. The Court held that such prior representation was insufficient to support disqualification of the prosecutor in the criminal proceedings, particularly in light of its further holding that no evidence acquired from a parent or custodian as the result of examinations performed in the course of abuse and neglect proceedings may be used in any subsequent criminal proceedings.

Syl. Pt. 5, *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997)

When county prosecutors represent the DHHR, they may not invoke the Supreme Court of Appeals' appellate or original jurisdiction in a civil abuse and neglect proceeding, unless they have the express consent and approval of DHHR.

### B. Medical and Mental Examinations of Victims

*State v. Delaney*, 187 W. Va. 212, 417 S.E.2d 903 (1992)

*Note: Passed in 2020, West Virginia Code § 61-8B-11 prohibits a court, in a prosecution of a sexual offense case, from ordering that a victim undergo a physical or gynecological examination of his or her body in areas associated with the sexual offense.*

Affirming a six-count conviction of sexual assault, the Court rejected the defendant's argument that the trial court erred in refusing to permit the alleged child victims to be physically and psychologically examined by his experts, holding that a

defendant must present evidence of a "compelling need or reason" for such examinations. The court set forth a six-part test for determining when independent examinations may be warranted: (1) the nature of the examination requested; (2) the age of the victim; (3) the potential trauma to the victim; (4) the probative value of the results of the requested examination; (5) the period of time since the alleged criminal act; and (6) the evidence already available to the defendant.

### C. Expert Psychological Testimony

Syl. Pt. 7, *State v. Edward Charles L., Sr.*, 183 W. Va. 641, 398 S.E.2d 123 (1990); Syl. Pt. 3, *State v. Wood*, 194 W. Va. 525, 460 S.E.2d 771 (1995)

Expert psychological testimony is permissible in cases involving incidents of child sexual abuse and an expert may state an opinion as to whether the child comports with the psychological and behavioral profile of a child sexual abuse victim, and may offer an opinion based on objective findings that the child has been sexually abused. Such an expert may not give an opinion as to whether he personally believes the child, nor an opinion as to whether the sexual assault was committed by the defendant, as these would improperly and prejudicially invade the province of the jury.

### D. Testimonial Evidence

*Note: The cases discussed below do not involve child abuse and neglect. However, the instruction about the admissibility of testimonial hearsay is applicable to criminal prosecutions involving child abuse and neglect.*

*Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004)

In this case, the defendant was convicted of first-degree assault with a deadly weapon. At trial, the defendant's wife, a witness to the assault, did not testify because the defendant asserted a state-law marital privilege which prevents a spouse from testifying without the consent of the other spouse. The trial court, however, admitted the wife's statement to police officers because it found that the statement bore "'particularized guarantees of trustworthiness.'" *Crawford v. Washington*, 541 U.S. at 1358, 124 S. Ct. at 1358 (quoting *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531 (1980)). The mid-tier appellate court reversed the trial court, but the Washington Supreme Court held that the statement bore guarantees of trustworthiness and upheld the conviction. The U.S. Supreme Court granted certiorari to determine whether the admission of the statement violated the defendant's right to confront witnesses as provided by the Sixth Amendment to the United States Constitution.

In *Crawford*, the U.S. Supreme Court held that the defendant's right to confrontation was violated by the admission of the wife's statement to police officers. To reach its holding, the U.S. Supreme Court established a new test – whether hearsay statements are *testimonial* or *nontestimonial*. To admit the *testimonial* statement of a witness, the Court held that the witness must be unavailable, and the defendant must have had a prior opportunity for cross-examination. However, *nontestimonial* statements

may be admissible under state-law exceptions to a hearsay rule. Further, the Court expressly overruled *Ohio v. Roberts* which allowed for the admission of hearsay statements if the declarant was unavailable and the statement bore "adequate 'indicia of reliability.'" *Roberts*, 448 U.S. at 66, 100 S. Ct. at 2538. The holding in *Crawford*, therefore, requires the exclusion of testimonial statements in criminal prosecutions unless the witness is unavailable and the defendant had an opportunity to cross-examine the witness.

Although the Court established the categories of *testimonial* and *nontestimonial* statements, it declined to establish precise definitions for them. However, it provided some guidance on the parameters of these two categories. Distinguishing between testimonial and nontestimonial statements, the Court noted that: "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Crawford*, 541 U.S. at 51, 124 S. Ct. at 1364. The Court further indicated that testimonial statements include affidavits, deposition testimony, prior testimony or confessions. With particular application to the wife's statement, the Court concluded that a prototypical example of a testimonial statement is a statement made to a police officer.

*Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L.Ed.2d 224 (2006)

Addressing two state court cases, the United States Supreme Court established a test to determine whether statements made during a 911 call or made to law enforcement at a crime scene are testimonial, and are therefore, subject to the Confrontation Clause of the Sixth Amendment to the United States Constitution. In the first case, a domestic violence victim made statements to a 911 operator that were admitted into evidence at trial. As is common in domestic violence prosecutions, the victim did not testify at trial.

In the second case, the police conducted an investigation of a domestic disturbance. When the police arrived at the scene, they interviewed the victim and the perpetrator in different rooms. As part of the investigation, the victim signed an affidavit and told the officers what had happened. As in the first case, the victim did not testify at trial. At trial, the victim's affidavit was admitted under the present sense impression to the hearsay rule, and her statements were admitted under the excited utterance exception.

As the Court began its analysis, it noted that it had previously determined that testimonial statements included "'[s]tatements taken by police officers in the course of interrogations.'" 126 S. Ct. at 2273 (quoting *Crawford*, *supra.*). The Court recognized, however, that it had not established a precise definition for the term "testimonial."

Establishing parameters to determine whether a statement is testimonial, the United States Supreme Court adopted the following test:

> Statements are *nontestimonial* when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an

> ongoing emergency. They are *testimonial* when the circumstances objectively indicate there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. 126 S. Ct. at 2273-74 (emphasis added).

Applying the test to the 911 call, the Court found that the purpose of the call was not to establish the facts of a past crime or occurrence that could be used to convict the defendant. Rather, the Court concluded that the purpose of the call was to request help for a present, ongoing emergency. Additionally, the information elicited by the 911 operator was for the purpose of responding to the emergency, not to learn what had previously happened. For this reason, the Court held that the statements to the 911 operator were nontestimonial and were admissible under exceptions to the hearsay rule.

The Court, however, cautioned that a statement taken in response to an emergency may evolve into a statement that would properly be considered testimonial. The Court noted that the victim's responses to the operator's questions in the latter part of the 911 call could be considered testimonial. To resolve issues of this nature, the Court determined that trial courts, through an *in limine* review procedure, should determine whether statements, or portions of them, should be excluded pursuant to *Crawford* and *Davis*.

In the second case involving the police interview of a domestic violence victim, the Court held that the victim's statements were testimonial because there was no ongoing emergency. The Court found that the primary purpose of the interrogation by the officers was to determine what had already happened and whether a crime had been committed.

The Court further addressed the practical problem faced in domestic violence prosecutions, that is – that domestic violence victims often do not testify at trial. As a solution to this common problem, the Court noted that the rule of forfeiture by wrongdoing defeats confrontation claims. The Court expressly stated that: "[O]ne who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." 126 S. Ct. at 2280. Although it discussed forfeiture, the Court expressly stated that it was not adopting a standard necessary to prove forfeiture. It did, however, observe that federal courts generally require forfeiture to be proved by the preponderance of evidence.

*State v. Ferguson*, 216 W. Va. 420, 607 S.E.2d 526 (2004)

In this murder case, the trial court allowed the admission of hearsay statements about a prior incident between the victim and the defendant. At trial, friends of the victim testified about statements the victim had made about an incident in which the defendant threatened the victim with a knife. On appeal, the defendant argued that *Crawford* barred the admission of the statements. Affirming the trial court, the Supreme Court held that: "[W]e do not perceive that *Crawford*'*s* largely unexplored ban on 'testimonial hearsay' that has not been tested by cross-examination extends to the statements to non-official and non-investigatorial witnesses, made prior to and apart from any governmental investigation that are issues in this case." 607 S.E.2d at 529.

*State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006)

In this misdemeanor domestic violence prosecution, the victim did not appear and testify at trial. The trial court, however, admitted the victim's statements to a neighbor and also to police officers.

On appeal, the West Virginia Supreme Court first discussed its prior adoption of the rule set forth in *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L.E.2d 597 (1980) in the following three West Virginia cases: *State v. James Edward S.*; *State v. Mason*; and *State v. Kennedy*. The Court recognized that *Crawford* overruled the test set forth in *Roberts* that allowed admission of hearsay statements that had an "adequate 'indicia of reliability.'" In Syllabus Point 7 of this opinion, the Court overruled the three West Virginia cases that adopted the test set forth in *Roberts* to the extent that they allowed for the admission of testimonial statements by witnesses.

After overruling the cases noted above, the West Virginia Supreme Court discussed the holdings in both *Crawford* and *Davis*. In the new syllabus points set forth below, the Court adopted the holdings of *Crawford* and *Davis* to determine whether a statement is testimonial. Following the guidance of the United States Supreme Court, the West Virginia Supreme Court recognized that a defendant may forfeit his or her right to confrontation if he or she, by wrongdoing, obtains the absence of a witness.

With regard to the facts of the instant case, the Court held that the victim's statements to the police officers were testimonial and, therefore, should have been excluded. The Court, however, remanded the case to the trial court to determine whether the victim's statements to her neighbor could be considered testimonial or not.

Syl. Pt. 6: Pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004), the Confrontation Clause contained within the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness. See Syl. Pt. 1, *State v. Jessica Jane M.*, 226 W. Va. 242, 700 S.E.2d 302 (2010); Syl. Pt. 3, *State v. Lambert*, 232 W. Va. 104, 750 S.E.2d 657 (2013).

Syl. Pt. 7: To the extent that *State v. James Edward S.*, 184 W. Va. 408, 400 S.E.2d 843 (1990), *State v. Mason*, 194 W. Va. 221, 460 S.E.2d 36 (1995), and *State v. Kennedy*, 205 W. Va. 224, 517 S.E.2d 457 (1999), rely upon *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L.Ed.2d 597 (1980) (overruled by *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004)) and permit the admission of a testimonial statement by a witness who does not appear at trial, regardless of the witness's unavailability for trial and regardless of whether the accused had a prior opportunity to cross-examine the witness, those cases are overruled.

Syl. Pt. 8: Under the Confrontation Clause contained within the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia

Constitution, a testimonial statement is, generally a statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Syl. Pt. 9: Under the Confrontation Clause contained within the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution, a witness's statement taken by a law enforcement officer in the course of an interrogation is testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the witness's statement is to establish or prove past events potentially relevant to later criminal prosecution. A witness's statement taken by a law enforcement officer in the course of an interrogation is non-testimonial when made under circumstances objectively indicating that the primary purpose of the statement is to enable police assistance to meet an ongoing emergency.

Syl. Pt. 10: A court assessing whether a witness's out-of-court statement is "testimonial" should focus more upon the witness's statement, and less upon any interrogator's questions.

Syl. Pt. 11: Under the doctrine of forfeiture, an accused who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.

## E. Alford/Kennedy Pleas

*State ex rel. DHHR v. Fox*, 218 W. Va. 397, 624 S.E.2d 834 (2005)

In this abuse and neglect case, the DHHR contended that a child was abused because his father had allegedly killed the child's brother. Subject to criminal charges as well as the abuse and neglect petition, the father was tried and convicted, but the verdict was set aside because of juror misconduct. Faced with a second trial, the father entered an *Alford* plea, "a guilty plea by a defendant who continues to protest his or her innocence," to involuntary manslaughter. 624 S.E.2d 834, n. 4. (This type of plea was recognized by the West Virginia Supreme Court in *Kennedy v. Frazier*, 357 S.E.2d 43 (W. Va. 1987), and may be referred to as a *Kennedy* plea.)

In the dissenting and two concurring opinions, the significance of the father's entry of an *Alford* plea was addressed. The dissent indicated that the plea supported a conclusion of child abuse. In the first concurring opinion, it was recognized that the father's entry of an *Alford* plea allowed him the opportunity to avoid prison and thereby the chance to regain custody of his son. In the second concurring opinion, it was recognized that the entry of the plea was the result of the financial burden associated with the defense of criminal charges. Although the *Alford* plea was discussed, the majority opinion did not adopt a rule of law concerning the significance of an *Alford* plea in a criminal case to an abuse and neglect case.

## F. Evidence of Other Crimes, Wrongs, or Acts

*State v. Mongold*, 220 W. Va. 259, 647 S.E.2d 539 (2007)

In this case, the defendant was convicted of the crime of death of a child by a parent, guardian or custodian by child abuse in violation of West Virginia Code § 61-8D-2a. On appeal, the defendant claimed that the trial court erred when it allowed the prosecution to cross-examine him on a prior child abuse incident pursuant to Rule 404(b) of the West Virginia Rules of Evidence because he did not receive pretrial notice from the State, and he had been acquitted of the prior felony child abuse charge.

The Supreme Court disagreed and adopted the following syllabus points:

Syl. Pt. 3: Rule 404(b)[35] of the West Virginia Rules of Evidence requires the prosecution in a criminal case to disclose evidence of other crimes, wrongs or acts prior to trial if such disclosure has been requested by the accused; however, upon reasonable notice such evidence may be disclosed for the first time during trial upon a showing of good cause for failure to provide the requested pretrial notice.

Syl. Pt. 4: The fact that a criminal charge against a defendant is dismissed or that he/she is acquitted of the same does not prohibit use of the incident under Rule 404(b) of the West Virginia Rules of Evidence.

# XI. CRIMINAL OFFENSES INVOLVING ABUSE AND NEGLECT OF CHILDREN

## A. Felonious Neglect

*State v. DeBerry*, 185 W. Va. 512, 408 S.E.2d 91 (1991)

The defendant mother took her 12-year-old daughter to a party where she knew alcohol would be served. Once there, the defendant encouraged her daughter to consume alcohol. The daughter did so until she lost consciousness. The defendant then arranged for a man to carry her daughter's unconscious body home, while the defendant remained at the party. The man raped the daughter, after which the daughter dies from acute ethanol intoxication. The Court reversed a trial court's dismissal of a charge of causing serious bodily injury to a child by felonious neglect, holding that (1) to obtain a conviction pursuant to West Virginia Code § 61-8D-4(b), the state must prove that the defendant neglected a minor child within the meaning of the term neglect found in West Virginia Code § 61-8D-1(6). The term neglect is defined as "the unreasonable failure by a parent, guardian, or any person voluntarily accepting a supervisory role towards a minor child to exercise a minimum degree of care to assure said minor child's physical safety or health." The state must also prove that the neglect caused serious bodily injury. There

[35] Rule 404(b) has been amended. Any party who seeks to admit this type of evidence must disclose it before trial unless the court excuses the lack of pretrial notice. The duty to disclose is no longer trigged by a defendant's request.

is no need, however, for the state to prove criminal intent under the statute; and (2) the term neglect as defined by the statute is not unconstitutionally vague.

### B. Sexual Assault

*State v. Edward Charles L., Sr.*, 183 W. Va. 641, 398 S.E.2d 123 (1990)

The defendant was convicted of two counts of first-degree sexual assault and two counts of first degree sexual abuse of his four year old son and daughter. The defendant assaulted his son both orally and anally. He assaulted his daughter by inserting his finger into her vagina. The state introduced collateral evidence of the defendant's sexual acts and sexual tendencies toward the children. Also introduced into evidence were statements about the crime made by the child victim to his treating psychologist and his mother.

### C. Abuse Creating Substantial Risk of Injury or Death

Syl. Pt. 3, *State v. Snodgrass*, 207 W. Va. 631, 535 S.E.2d 475 (2000)

The offense of child abuse creating a risk of injury as set forth in W. Va. Code § 61-8D-3(c) is committed when any person inflicts upon a minor physical injury by other than accidental means and by such action, creates a substantial possibility of serious bodily injury or death.

### D. Death of a Child by a Parent, Guardian or Custodian by Child Abuse

*State v. Mongold*, 220 W. Va. 259, 647 S.E.2d 539 (2007)

While in his care, the defendant's two-year-old stepdaughter was rushed to the hospital when she became limp and unresponsive. At the hospital, doctors concluded that the child was suffering from swelling of the brain and that she had blood on the surface of her skull. The child died two days later, and an autopsy revealed that the cause of her death was four blunt impacts to the head.

At trial, the defendant claimed that her injuries could have been caused by a fall from the deck, being knocked over by the family dog, or when the defendant and the child were playing a game of airplane. The State's evidence indicated that the injuries could not have occurred as claimed by the defendant. The jury found the defendant guilty of death of a child by a parent, guardian or custodian by child abuse pursuant to W. Va. Code § 61-8D-2a.

## XII. MINOR GUARDIANSHIP PROCEEDINGS

### A. Circuit Court Jurisdiction

*In re Abbigail Faye B.*, 222 W. Va. 466, 665 S.E.2d 300 (2008)

Syl. Pt. 6: Pursuant to the plain language of W. Va. Code § 44-10-3(a), the circuit court or family court of the county in which a minor resides may appoint a suitable person to serve as the minor's guardian. In appointing a guardian, the court shall give priority to the minor's mother or father. "However, in every case, the competency and fitness of the proposed guardian and the welfare and best interests of the minor shall be given precedence by the court when appointing the guardian." W. Va. Code § 44-10-3(a).

Syl. Pt. 7: Rule 48a(a) of the West Virginia Rules of Practice and Procedure for Family Court requires that if a family court presiding over a petition for infant guardianship brought pursuant to W. Va. Code § 44-10-3 learns that the basis for the petition, in whole or in part, is an allegation of child abuse and neglect as defined by W. Va. Code § 49-1-3, then the family court is required to remove the petition to circuit court for a hearing thereon. Furthermore, "[a]t the circuit court hearing, allegations of child abuse and neglect must be proven by clear and convincing evidence." West Virginia Rules of Practice and Procedure for Family Court 48a(a).

After a custody dispute arose between a mother and maternal grandparents, the parties each filed domestic violence petitions and minor guardianship petitions. The grandparents also filed an amended guardianship petition that included abuse and neglect allegations. After the family court conducted initial proceedings, it appointed the grandparents as temporary guardians of the minor, removed the case to circuit court and referred the matter to Child Protective Services to investigate the abuse and neglect allegations. After conducting several evidentiary hearings, the circuit court appointed the mother as the guardian of the child and the grandparents appealed.

Reviewing the minor guardianship statute, West Virginia Code § 44-10-3, the Court recognized that "a court shall give priority to the minor's mother or father." Syl. Pt. 6, in part, *Abbigail Faye B.*, *supra*. Notwithstanding this priority, the Court further held that: "'[I]n every case, the competency and fitness of the proposed guardian and the welfare and best interests of the minor shall be given precedence by the court when appointing the guardian.' W. Va. Code § 44-10-3(a)." *Id.* Therefore, the preference for appointing a parent as a guardian may give way based upon the competency and fitness of the guardian and the child's best interests.

The Court further discussed the provisions of Rule 48a of the Rules of Practice and Procedure for Family Court that address removal of minor guardianship cases to circuit court when a minor guardianship is based, in whole or part, upon abuse and neglect allegations. The Court expressly noted that the directives of this rule were clear and that the family court had correctly removed the case to circuit court.

*In re Guardianship of K.W.*, 240 W. Va. 501, 813 S.E.2d 154 (2018)

Syl. Pt. 2: Consistent with the plain language of Rule 13 of the Rules of Practice and Procedure for Minor Guardianship Proceedings and Rule 48a of the Rules of Practice and Procedure for Family Court, once a family court removes an infant guardianship case to circuit court because the basis for the guardianship is, in part, abuse and neglect, the case, in its entirety, remains in circuit court and may not be remanded.

Syl. Pt. 4: A temporary guardianship granted over the natural parents' objection based on substantiated allegations of abuse and neglect does not provide a permanent solution for child custody such that it obviates the need for an abuse and neglect petition.

This appeal arose when a family court granted permanent guardianship of three children to their maternal grandparents over their parents' objections. Before the guardianship petition was initiated, the children's mother sought and obtained a domestic violence protective order (DVPO) based upon her husband's physical abuse of both her and the children. To address the abuse allegations, the family court appointed a guardian *ad litem* for the children. His investigation indicated that the husband/father had perpetrated acts of physical and emotional abuse against the mother and the children and that the children had significant anxiety issues and wanted no contact with their father. In addition, the investigation indicated that the mother was physically abusive to one of the children and that the father had physically abused the children while the mother was present. The family court did not refer the case to CPS because the mother was not allowing the father to contact the children.

While the DVPO was in effect, the mother filed for divorce, and the family court appointed the same guardian *ad litem* to represent the children. Shortly after filing for divorce, the parents reconciled. In response, the maternal grandparents sought guardianship of the children, and the family court granted temporary guardianship based upon the father's violence and the mother's failure to protect the children. The family court also ordered that the case should be removed to circuit court under Family Court Rule 48a and Minor Guardianship Rule 13 and referred the matter to the DHHR for investigation.

As part of an investigation, the DHHR, substantiated the allegations and referred the case to the prosecuting attorney for a child abuse and neglect petition. The circuit court also conducted a hearing on the DHHR's findings. At this hearing, the guardian *ad litem* recommended that the case be remanded to family court because the children were no longer in danger as they had been placed in the temporary custody of the grandparents. The circuit court adopted this recommendation and remanded the case to family court.

In turn, the grandparents filed a petition for permanent guardianship of the children. At this hearing, the parents objected on the basis that the family court lacked subject matter jurisdiction. The family court, however, proceeded to address the guardianship petition because the circuit court had ordered the remand twice -- once as an original

ruling and again upon the parents' reconsideration motion. After the hearing, the family court awarded permanent guardianship to the grandparents with a no-contact order for the father and a limited contact order for the mother. After an unsuccessful motion to reconsider to family court and an appeal to circuit court, the parents appealed to the Supreme Court.

Addressing the case, the Supreme Court reviewed Minor Guardianship Rule 13, Family Court Rule 48a, Abuse and Neglect Rule 3a, prior case law, and the procedure for addressing abuse and neglect allegations when they arise in family court. After reviewing this authority, the Court concluded that the temporary guardianship did not do away with the need for a child abuse and neglect petition. Instead, the Court found that:

> The circuit court's conclusion that a petition was unnecessary because the children were in the temporary custody of their grandparents is no more sound than concluding that a child's temporary placement with foster parents prior to institution of an abuse and neglect proceeding negates the need for a petition against the parents in and of itself. 813 S.E.2d at 163.

In addition, the Court addressed the issue that a temporary guardianship would not provide permanency for the children or a permanent solution to custody. The Court concluded that the remand was in error and found that the family court lacked subject matter jurisdiction to establish a permanent guardianship, even though the family court was acting appropriately under the circumstances. Accordingly, the Court remanded the case with instructions that the circuit court must consider whether the grandparents should continue to serve as guardians as the children. Apparently, the grandparents vacillated in their position as to whether the parents were unfit. 813 S.E.2d 154, n. 7. Further, the Court instructed that the circuit court must determine whether an abuse and neglect petition must be filed against the parents.

*M.H. v. C.H.*, 242 W. Va. 307, 835 S.E.2d 171 (2019)

The mother in this guardianship case had originally asked the child's great-grandparents to watch her child while she worked during the day. The child began spending overnights with the great-grandparents because of the mother's work schedule. At some point, a CPS worker contacted the great-grandmother concerning allegations against the mother, and she purportedly advised that the great-grandmother should assume temporary custody of the child to avoid a removal by CPS. To prevent the removal, the mother signed a one-sentence document that placed temporary custody of the child with the great-grandmother.

Sometime later, the mother learned that the CPS investigation had been resolved, and she requested return of her child from the great-grandmother. Instead of returning the child, the great-grandmother filed a domestic violence petition and alleged maltreatment by the mother's boyfriend (allegedly whipping the child till he defecated and locking him in a dark room as punishment). At the final domestic violence protective order hearing, the family court dismissed the petition.

On the same day of the dismissal of the domestic violence petition, the great-grandparents filed a minor guardianship petition based upon allegations of abuse and neglect, and the family court appointed them as guardians on an emergency basis. At the final guardianship hearing, the family court assigned the mother the burden of proof because the mother had transferred custody (pursuant to *Overfield v. Collins*, 483 S.E.2d 27 (W. Va. 1996)), and the family court ultimately appointed the great-grandparents as guardians with sole decision-making authority. The family court granted the mother visitation. The circuit court, in turn, affirmed the family court's order.

On appeal to the Supreme Court, the mother alleged various errors, including a claim that the guardianship statute, West Virginia Code § 44-10-3, is unconstitutional. Reviewing the record, the Supreme Court first observed that although family and circuit courts have concurrent jurisdiction over guardianship cases, family court guardianships are subject to the removal provisions found in Rule 13 of the Rules of Minor Guardianship Proceedings. The Court also explained the timing of the removal -- that minor guardianship cases in family court are subject to removal to circuit court pursuant to Rule 13 of the Rules of Minor Guardianship Proceedings *when* a family court learns that the basis for the guardianship petition is based on allegations of abuse and/or neglect. See also W. Va. R. Fam. Ct. 48a(a).

In this case, the Supreme Court found that the minor guardianship petition included allegations of abuse and neglect as defined by West Virginia Code § 49-1-201. The Court, therefore, concluded that the family court had no jurisdiction to address the minor guardianship petition at any point. Consequently, the Court found that the emergency order that appointed the great-grandparents as guardians was void for lack of subject matter jurisdiction. Given its conclusion, the Court did not address the other allegations of error raised by the mother. Accordingly, it vacated the orders of the lower courts and remanded the case to circuit court to address the guardianship petition within ten days.

*A.A. v. S.H.*, 242 W. Va. 523, 836 S.E.2d 490 (2019)

The paternal grandmother of a young child filed a guardianship petition when both of the parents were incarcerated for relatively short periods of time. Apparently, the mother had arranged care for the child with other relatives before she went to jail, but the paternal grandmother felt that she had a stronger relationship with the child. Before a hearing was conducted, the mother was released from incarceration. At the initial hearing, the family court, on a temporary basis, established that the mother would be the primary custodian and that the grandmother would have weekly visitation. Sometime after this initial family court order, the paternal grandmother had assumed primary physical custody of the child. At the next hearing, the family court awarded temporary physical custody of the child to the grandmother so that the mother could find a residence and become employed. Before the next hearing, the mother entered a guilty plea to criminal charges, and she was again incarcerated. While the mother remained in jail, the family court appointed the grandmother as the child's guardian. When the mother was released, she attempted to visit with the child, but the grandmother refused.

Approximately 14 months after her release from jail, the mother sought to modify or terminate the guardianship, and the paternal grandmother opposed the modification because she and her ex-husband (and his current wife) had been providing care for the child throughout this period. The grandmother also alleged that the mother had not contacted the child and that the mother had abused and/or neglected the child. The paternal grandmother claimed that she, her ex-husband, and his current wife were the child's psychological parents.

At an initial hearing on the modification petition, the family court appointed a guardian *ad litem*. After an investigation, the guardian *ad litem* reported that the mother's home was unsuitable, that the mother associated with drug dealers, and that the mother had effectively abandoned an older child. The guardian *ad litem* recommended that the mother not have any contact with the child. At the next hearing, the family court found that the mother had abandoned the child and that the paternal grandmother, the paternal grandfather and his wife were the child's psychological parents. In its order, the family court relied heavily on the guardian *ad litem's* report concerning the mother's alleged maltreatment of the child, and it denied any visitation between the mother and the child. The circuit court affirmed the family court guardianship order.

On appeal, the mother argued that the family court did not have jurisdiction to terminate her parental rights and that the case should have been transferred to circuit court under Rule 48a(a) of the Rules of Family Court. See *In re Abbigail Faye B.*, 665 S.E.2d 300 (W. Va. 2008). After reviewing the lengthy proceedings in the case, the Court concluded that the family court lacked jurisdiction and should have removed the case to circuit court when it became aware that the allegations involved abuse and neglect. In addition, the Court pointed out that the guardianship order did not provide the child with permanency. The Court further noted that the rights of the parents needed to be addressed under the proceedings set forth in Chapter 49 of the West Virginia Code and that the correct standard for terminating parental rights is the standard of clear and convincing evidence. For all of these reasons, the Court vacated the guardianship order and remanded it to the circuit court for further proceedings. In the interim, the Court found that the child should remain in the temporary guardianship of the paternal grandmother.

*In re G.S.*, 244 W. Va. 614, 855 S.E.2d 922 (2021)

*Note: For a complete discussion of this case, see Chapter 5, Sections II.E. and XV.D.*

Syl. Pt. 2: When a writing signed by both parents purports to transfer custody of a child to a third person, and that child later becomes the subject of an abuse and neglect petition against the child's parents, the person with purported custody of the child has a right to be heard at the preliminary phase of the proceedings to determine: (a) whether the writing is authentic, (b) whether he or she is a responsible person for purposes of West Virginia Code § 49-4-602, and (c) whether temporary placement with such person is in the child's best interest.

*In re Richard P.*, 227 W. Va. 285, 708 S.E.2d 479 (2010)

This case originated when the petitioners filed a minor guardianship petition in family court. One of the petitioners, Jennifer P., was a parent of two minor children, and the second petitioner, Cary P., had been residing with them for a significant period of time and had been providing parental care for the children. In the petition, the petitioners sought to have Cary P. named as the children's legal guardian so that she could make medical, educational and other legal decisions for the children when Jennifer P. was unavailable. As background, the petition indicated that the children's father has been abusive to Jennifer P. and the children. Because the petition contained allegations of abuse and neglect, the family court transferred the case to circuit court.

The primary holding of this case did not involve the appointment of a guardian because of abuse and neglect. Rather, it involved the Caregiver's Consent Act, West Virginia Code §§ 49-2-701, *et seq.*, an act that allows parents to designate a third party who resides with the children to consent to health care for the children, provided the requirements of the statute have been fulfilled. The Court did, however, note that either the family or circuit court may rule on a minor guardianship petition and discussed the transfer provisions in Rule 48a(a) of the Family Court Rules if a minor guardianship proceeding is based upon allegations of abuse and neglect.

## B. Venue for Minor Guardianship Proceedings

Syl. Pt. 12, *Brooke B. v. Donald C.*, 230 W. Va. 355, 738 S.E.2d 21 (2013)

W.Va. Code § 44-10-3(a) places jurisdiction and venue of an infant guardianship action in the West Virginia county in which a minor resides. It is the minor's residency alone that controls, and not the residency of any other person such as a parent, guardian, or other person with custody or control of the minor. A determination of the minor's residency is typically a question of fact.

## C. Burden of Proof

*D.B. v. J.R.*, 235 W. Va. 409, 774 S.E.2d 75 (2015)

This case involved a dispute over the guardianship of a three-year-old girl, J.R. The parties to the case were the maternal grandfather and his wife (step-grandmother to J.R.) and the child's father. The child's mother had died in a car accident before the case was initiated. The child and her mother had lived with the maternal grandfather and step-grandmother for most of the child's young life. As a result of the mother's death, the maternal grandfather and his wife filed a guardianship petition. At an initial hearing, the parties agreed that the grandfather should serve as the guardian pending a final evidentiary hearing. The evidentiary hearing was not, however, conducted until over a year later.

At the evidentiary hearing, the grandparents presented evidence that the child's father had committed three acts of domestic violence against the child's mother.

Specifically, a CPS worker and a deputy testified as to different acts of domestic violence that the father had perpetrated against J.R.'s mother. Ultimately, the circuit court found that the domestic violence was not relevant because the mother had died, and the father was not currently in a relationship. Other testimony involved the child's worsened asthma as a result of exposure to secondhand smoke from the father, and the child's attachment to her step-grandmother.

Approximately three months after the evidentiary hearing was completed, the trial court denied the grandparents' guardianship petition. As a basis to deny the guardianship petition, the circuit court relied upon the syllabus of *Whiteman v. Robinson*, 116 S.E.2d 691 (W. Va. 1960), which indicates that a parent has a right to the custody of his or her child unless the parent is proven to be unfit. In its order, the circuit court found that the petitioners had failed to meet their burden to prove that the father was unfit and, therefore, denied the guardianship petition.

On appeal, the grandparents argued that the burden of proof should have been placed on the father pursuant to Syllabus Point 2 of *Overfield v. Collins*, 483 S.E.2d 27 (W. Va. 1996) and that the circuit court erred when it found that the domestic violence incidents were not relevant. In response, the father argued that the circuit was correct in finding him to be a fit parent.

To address these issues, the Court first discussed *Whiteman*, a case in which a father had left his child with an uncle for a relatively brief period of time when the child's mother died. In *Whiteman*, the Court noted that there was no evidence that the father had transferred custody of the child to the uncle. In addition, there was no evidence that the father was unfit. For that reason, the burden was placed on the proposed guardians to prove the father unfit.

The Court also discussed *Overfield* which involved a mother, who, after experiencing a traumatic injury, executed an affidavit that placed custody of a child with her parents. Suing to regain custody, the mother argued that the transfer of custody was intended to be temporary, and the grandparents argued that the transfer was intended to be permanent. In *Overfield*, the Supreme Court reversed and remanded the case and adopted Syllabus Point 2. This syllabus point indicates that when a parent transfers custody to a third person, he or she has the burden to prove his or her fitness as a parent. The burden then shifts to the third party to show that the child's placement should not be disturbed.

To resolve the instant case, the Court found that Syllabus Point 2 of *Overfield* should be applied, not the syllabus of *Whiteman*, because custody had been transferred to the grandparents. Secondly, the Court found that the allegations of domestic violence were relevant to the father's fitness as a parent. The Court remanded the case with instructions to apply Syllabus Point 2 of *Overfield* and to consider the evidence of the father's acts of domestic violence.

## D. Circumstances that Warrant the Appointment of a Guardian

*Terrence E. v. Christopher R.*, 243 W. Va. 202, 842 S.E.2d 755 (2020)

Before the guardianship case was initiated, the child's parents were named as adult respondents in an abuse and neglect case. The allegations against the mother involved substance abuse, and the allegations against the father involved his failure to protect the child from the mother's substance abuse. During the proceedings, the father also became delinquent in his child support payments. Ultimately, the circuit court found that the parents had corrected the conditions of abuse and neglect. In its final order, the court placed primary custody of the child with the mother, and the father received overnight visitation.

Approximately one month later, the mother was arrested, charged with intent to deliver heroin, and was incarcerated. The maternal grandparents filed a petition to be appointed guardian of the child, and they were appointed on an emergency basis until the court could conduct a hearing. At the initial hearing, the court appointed the grandparents as guardians on a temporary basis, over the father's objection, but with the mother's consent. The order from this hearing did not include any of the findings set forth in subsection (f) of West Virginia Code 44-10-3 that establish when a guardianship may be established. At a subsequent hearing, the father objected to the guardianship, but agreed that the child should remain with the grandparents until the end of the school year.

Before the school year ended, the father filed a petition to modify the guardianship, and he alleged a change in circumstances. The grandparents objected, and the court found that the father had failed to show that there had been a substantial change of circumstances that warranted the modification or termination of the guardianship.

After a review of the record and West Virginia Code § 44-10-3, the Supreme Court concluded that the factors justifying a guardianship were not met; therefore, the original guardianship could only be considered a temporary guardianship. The Court further found that the record did not show why the father did not receive priority to be appointed as the child's guardian or whether he was unfit. Since the Court found that the guardianship was temporary, the father was not required to show that there had been a material change of circumstances. Rather, the Court concluded that he only had to show that there was no immediate need for a guardianship or that no period of transition to the father's custody was needed. Accordingly, the Court remanded the case with instructions to determine whether there was a continued need for a guardianship.

*In re I.T.*, 233 W. Va. 500, 759 S.E.2d 447 (2014) (per curiam)

The grandmother of a child filed a minor guardianship petition in family court based upon the mother's alleged unfitness. An order was entered that granted the grandmother temporary custody, and the case was removed to circuit court because the mother had filed several domestic violence petitions. After conducting two evidentiary hearings in which a CPS worker testified that CPS did not have a reason to object to placing custody of the child with the mother, the circuit court awarded custody to the mother. Affirming

the circuit court ruling, the Supreme Court held that the circuit court did not abuse its discretion.

## E. Nomination of a Guardian

Syl. Pt. 5, *In re Antonio R.A.,* 228 W. Va. 380, 719 S.E.2d 850 (2011)

A family or circuit court's authority to appoint a suitable person as a guardian for a minor, including a minor above the age of fourteen, is derived from West Virginia Code § 44-10-3, which grants courts discretion in determining when the appointment of a guardian for a minor is appropriate. West Virginia Code § 44-10-4, which entitles a minor above the age of fourteen to nominate his or her own guardian, applies only after a court has determined, pursuant to West Virginia Code § 44-10-3, that a particular circumstance warrants the appointment of a guardian.

## F. Fitness of Proposed Guardian

*In re Guardianship of A.C.*, 240 W. Va. 23, 807 S.E.2d 271 (2017)

This minor guardianship case arose after the mother of a 12-year-old girl died of an overdose and the girl's father was incarcerated. Both the child's godmother and the grandmother had filed guardianship petitions seeking custody of the child. The godmother was a Florida resident, and the grandmother lived in West Virginia. After the mother died, the child lived with the grandmother. To address the matter, the circuit court appointed a guardian *ad litem* for the child. The circuit court also referred the matter to the DHHR, but it provided minimal information about the father. The DHHR investigation focused on the incarcerated father and the godmother but did not address the grandmother.

The guardian *ad litem* conducted an extensive investigation, and she ultimately recommended placement of the child with her godmother. Her recommendation was based on several factors -- the child had lived with the godmother for substantial periods of time and the screening factors found in Rule 10 of the Rules for Minor Guardianship Proceedings as they applied to the grandmother. Specifically, the guardian *ad litem* had discovered that a sex offender had been living in the grandmother's home; that the grandmother abused alcohol and had two convictions for driving on a license revoked for DUI; that the grandmother drove while intoxicated; and that other family members in the residence abused illegal substances.

During an *in camera* interview, the child indicated that she wanted to live with her godmother and that her grandmother abused alcohol and allowed drug use in the home. During the hearing, one witness testified that she had seen the grandmother driving the child even though her license had been revoked for DUI.

Over the guardian *ad litem's* objection, the circuit court awarded guardianship of the child to the grandmother, primarily because the child's extended family lived in West Virginia. The court also noted that the DHHR had not found any abuse on the part of the

grandmother. On a related issue, the circuit court did not appoint a guardian *ad litem* for the incarcerated father.

On appeal, the Court noted that the child had expressed her preference to live with her godmother and observed that the child's preference was based upon conditions in the grandmother's home. The Court pointed out that the grandmother abused alcohol and possibly drugs, drove on a revoked license, and allowed other people who abuse drugs to live in the home.

After a review of the record, the Court concluded that the lower court erred in awarding guardianship to the grandmother. The Court found that the lower court had based its decision out of a concern for maintaining and developing family relationships. However, the Court found that the child's best interests would be served by placement with the godmother. In addition, the Rule 10 screening factors indicated that the grandmother should not serve as the child's guardian.

On remand, the circuit court was directed to plan to transition the child to the godmother's home at the end of the school semester and establish a visitation plan for the child and her family. On the issue of a guardian *ad litem* for the father, the Court found that the father had not been prejudiced, but the better practice would have been to appoint a guardian *ad litem* because of his incarceration. Finally, the Court noted that the ICPC process should be followed.

## G. Termination of A Minor Guardianship

*In re Haylea G.*, 231 W. Va. 494, 745 S.E.2d 532 (2013) (per curiam)

The primary issue in this case was whether a five-year minor guardianship should continue. The minor guardianship was originally established because the mother was going to prison for fraudulent use of a credit card and some related misdemeanors. After completing both her sentence and parole and making significant positive changes in her life, the mother sought to have the guardianship terminated. Although it was evident that the child had thrived under the care of her guardian, the circuit court terminated the guardianship because "the ability for another person to provide for a child does not render a parent unfit to raise her child." 745 S.E.2d at 538. On appeal, the Supreme Court found that the circuit court had correctly applied the law to the facts and affirmed the ruling.

*In re K.H.*, 235 W. Va. 254, 773 S.E.2d 20 (2015)

The issue in this case was whether the family court had correctly terminated a grandmother's eight-year guardianship of K.H., a minor child. When K.H. was born, she resided with her mother, and her father did not meet the child until she was over a year old. Approximately six weeks after the meeting between the child and her father, K.H.'s mother died in a car accident. In response to these circumstances, K.H.'s maternal grandmother petitioned for and was appointed guardian for K.H. At this initial hearing, the father did not object to the grandmother's appointment as a guardian.

A year later, the father filed a petition to establish custodial responsibility for K.H., and he received parenting time every other weekend and began paying child support. Two years later, the father filed a petition to revoke the guardianship, and it was resolved by an agreed order that granted the father increased parenting time.

Approximately two years later, the father filed another petition to revoke the guardianship. A guardian *ad litem* was appointed, and he recommended that the child be placed in her father's custody based upon the father's ability to care for the child. The guardian *ad litem* also discovered that the grandmother had been sharing custody of the child with a 76-year-old man who had an extensive criminal history. A psychologist, hired by the grandmother, testified that the child viewed the grandmother as her mother. The psychologist did not, however, interview the father. After hearing the evidence, the family court terminated the guardianship and denied the grandmother's request for visitation.

As an initial allegation of error, the grandmother argued that the family court had failed to apply the amended provisions of West Virginia Code § 44-10-3 correctly. The Supreme Court, however, found that the family court had correctly considered the child's best interests and also considered the father's increased participation in parenting his daughter.

As another allegation of error, the grandmother argued that the family court had erred when it failed to recognize her as the psychological parent of K.H. Rather, the family court had characterized the eight-year guardianship as "temporary." The Supreme Court discussed, in detail, the concept of a "psychological parent" and the cases addressing it. After reviewing the facts of the case, the Court found that the lower court had erred when it failed to recognize the grandmother as the psychological parent of K.H. The Court also held that K.H. and her grandmother had a right to continued association. Accordingly, the case was remanded to establish a visitation schedule between the child and her grandmother.

# CHAPTER 7:
# RELEVANT STATUTES AND REGULATIONS

(Through 2023 Spring Legislative Sessions)

*Chapter Contents*

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## ARTICLE 1. GENERAL PROVISIONS AND DEFINITIONS.

### PART I. GENERAL PROVISIONS AND PURPOSE.

***§ 49-1-101 Short title; intent of recodification.***

(a) This chapter shall be known and may be cited as the “West Virginia Child Welfare Act.”

(b) The recodification of this chapter during the regular session of the Legislature in the year 2015 is intended to embrace in a revised, consolidated, and codified form and arrangement the laws of the State of West Virginia relating to child welfare at the time of that enactment.

***§ 49-1-102 Legislative Intent; continuation of existing statutory provisions; no increase in funding obligations.***

In recodifying the child welfare law of this state during the regular session of the Legislature in the year 2015, it is intended by the Legislature that each specific reenactment of a substantively similar prior statutory provision will be construed as continuing the intended meaning of the corresponding prior statutory provision and any existing judicial interpretation of the prior statutory provision. It is not the intent of the

Legislature, by recodifying the child welfare law of this state during the regular session of the Legislature in the year 2015 to alter the substantive law of this state as it relates to child welfare or to increase or enlarge any funding obligation of any spending unit of the state.

***§ 49-1-103 Operative date of enactment; effect on existing law.***

The amendment and reenactment of chapter forty-nine of this code, as enacted by the Legislature during the regular session, 2015, are operative ninety days from passage. The prior enactments of chapter forty-nine of this code, whether amended and reenacted or repealed by the action of the Legislature during the 2015 regular session, have full force and effect until that time.

***§ 49-1-104 West Virginia Code replacement; no increase of funding obligations to be construed.***

(a) The Department of Health and Human Resources and the Department of Military Affairs and Public Safety are not required to change any form or letter that contains a citation to this code that is changed or otherwise affected by the recodification of this chapter during the 2015 regular session of the Legislature unless specifically required by a provision of this code.

(b) No provision of the recodification of this chapter during the 2015 regular session of the Legislature may be construed to increase or enlarge any funding obligation of any spending unit of the state.

***§ 49-1-105 Purpose.***

(a) It is the purpose of this chapter to provide a system of coordinated child welfare and juvenile justice services for the children of this state. The state has a duty to assure that proper and appropriate care is given and maintained.

(b) The child welfare and juvenile justice system shall:

(1) Assure each child care, safety and guidance;

(2) Serve the mental and physical welfare of the child;

(3) Preserve and strengthen the child family ties;

(4) Recognize the fundamental rights of children and parents;

(5) Develop and establish procedures and programs which are family-focused rather than focused on specific family members, except where the best interests of the child or the safety of the community are at risk;

(6) Involve the child, the child's family or the child's caregiver in the planning and delivery of programs and services;

(7) Provide community-based services in the least restrictive settings that are consistent with the needs and potentials of the child and his or her family;

(8) Provide for early identification of the problems of children and their families, and respond appropriately to prevent abuse and neglect or delinquency;

(9) Provide for the rehabilitation of status offenders and juvenile delinquents;

(10) As necessary, provide for the secure detention of juveniles alleged or adjudicated delinquent;

(11) Provide for secure incarceration of children or juveniles adjudicated delinquent and committed to the custody of the director of the Division of Juvenile Services; and

(12) Protect the welfare of the general public.

(c) It is also the policy of this state to ensure that those persons and entities offering quality child care are not over-encumbered by licensure and registration requirements and that the extent of regulation of child care facilities and child placing agencies be moderately proportionate to the size of the facility.

(d) Through licensure, approval, and registration of child care, the state exercises its benevolent police power to protect the user of a service from risks against which he or she would have little or no competence for self protection. Licensure, approval, and registration processes shall, therefore, continually balance the child's rights and need for protection with the interests, rights and responsibility of the service providers.

***§ 49-1-106 Location of child welfare services; state and federal cooperation; juvenile services.***

(a) The child welfare service of the state shall be located within and administered by the Bureau for Social Services. The Division of Corrections and Rehabilitation of the Department of Homeland Security shall administer the secure predispositional juvenile detention and juvenile correctional facilities of the state. Notwithstanding any other provision of this code to the contrary, the administrative authority of the Division of Corrections and Rehabilitation over any child or juvenile in this state extends only to those detained or committed to a secure detention facility or secure correctional facility operated and maintained by the division by an order of a court of competent jurisdiction during the period of actual detention or confinement in the facility.

(b) The Department of Health and Human Resources is designated as the state entity to cooperate with the United States Department of Health and Human Services and United States Department of Justice in extending and improving child welfare services, to comply with federal regulations, and to receive and expend federal funds for these services: Provided, That beginning January 1, 2024, the Department of Human Services is designated as the state entity to cooperate with the United States Department of Health and Human Services and United States Department of Justice in extending and improving

child welfare services, to comply with federal regulations, and to receive and expend federal funds for these services. The Division of Corrections and Rehabilitation of the Department of Homeland Security is designated as the state entity to cooperate with the United States Department of Health and Human Services and United States Department of Justice in operating, maintaining and improving juvenile correction facilities and centers for the predispositional detention of children, to comply with federal regulations, and to receive and expend federal funds for these services.

(c) The Division of Corrections and Rehabilitation of the Department of Homeland Security is authorized to operate and maintain centers for juveniles needing detention pending disposition by a court having juvenile jurisdiction or temporary care following that court action.

**PART II. DEFINITIONS.**

***§ 49-1-201 Definitions related, but not limited, to child abuse and neglect.***

When used in this chapter, terms defined in this section have the meanings ascribed to them that relate to, but are not limited to, child abuse and neglect, except in those instances where a different meaning is provided or the context in which the word is used clearly indicates that a different meaning is intended.

“Abandonment” means any conduct that demonstrates the settled purpose to forego the duties and parental responsibilities to the child;

“Abused child” means:

(1) A child whose health or welfare is being harmed or threatened by:

(A) A parent, guardian, or custodian who knowingly or intentionally inflicts, attempts to inflict, or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home. Physical injury may include an injury to the child as a result of excessive corporal punishment;

(B) Sexual abuse or sexual exploitation;

(C) The sale or attempted sale of a child by a parent, guardian, or custodian in violation of § 61-2-14h of this code;

(D) Domestic violence as defined in § 48-27-202 of this code; or

(E) Human trafficking or attempted human trafficking, in violation of § 61-14-2 of this code.

(2) A child conceived as a result of sexual assault, as that term is defined in this section, or as a result of the violation of a criminal law of another jurisdiction which has the same essential elements: Provided, That no victim of sexual assault may be

determined to be an abusive parent, as that term is defined in this section, based upon being a victim of sexual assault.

"Abusing parent" means a parent, guardian, or other custodian, regardless of his or her age, whose conduct has been adjudicated by the court to constitute child abuse or neglect as alleged in the petition charging child abuse or neglect.

"Battered parent" for the purposes of § 49-4-601 et seq. of this code means a respondent parent, guardian, or other custodian who has been adjudicated by the court to have not condoned the abuse or neglect and has not been able to stop the abuse or neglect of the child or children due to being the victim of domestic violence as defined by § 48-27-202 of this code, which was perpetrated by the same person or persons determined to have abused or neglected the child or children.

"Child abuse and neglect" or "child abuse or neglect" means any act or omission that creates an abused child or a neglected child as those terms are defined in this section.

"Child abuse and neglect services" means social services which are directed toward:

(A) Protecting and promoting the welfare of children who are abused or neglected;

(B) Identifying, preventing, and remedying conditions which cause child abuse and neglect;

(C) Preventing the unnecessary removal of children from their families by identifying family problems and assisting families in resolving problems which could lead to a removal of children and a breakup of the family;

(D) In cases where children have been removed from their families, providing time-limited reunification services to the children and the families so as to reunify those children with their families, or some portion of the families;

(E) Placing children in suitable adoptive homes when reunifying the children with their families, or some portion of the families, is not possible or appropriate; and

(F) Assuring the adequate care of children or juveniles who have been placed in the custody of the department or third parties.

"Condition requiring emergency medical treatment" means a condition which, if left untreated for a period of a few hours, may result in permanent physical damage; that condition includes, but is not limited to, profuse or arterial bleeding, dislocation or fracture, unconsciousness, and evidence of ingestion of significant amounts of a poisonous substance.

"Imminent danger to the physical well-being of the child" means an emergency situation in which the welfare or the life of the child is threatened. These conditions may include an emergency situation when there is reasonable cause to believe that any child in the home

is or has been sexually abused or sexually exploited, or reasonable cause to believe that the following conditions threaten the health, life, or safety of any child in the home:

(A) Nonaccidental trauma inflicted by a parent, guardian, custodian, sibling, babysitter or other caretaker;

(B) A combination of physical and other signs indicating a pattern of abuse which may be medically diagnosed as battered child syndrome;

(C) Nutritional deprivation;

(D) Abandonment by the parent, guardian, or custodian;

(E) Inadequate treatment of serious illness or disease;

(F) Substantial emotional injury inflicted by a parent, guardian, or custodian;

(G) Sale or attempted sale of the child by the parent, guardian, or custodian;

(H) The parent, guardian, or custodian's abuse of alcohol or drugs or other controlled substance as defined in § 60A-1-101 of this code, has impaired his or her parenting skills to a degree as to pose an imminent risk to a child's health or safety; or

(I) Any other condition that threatens the health, life or safety of any child in the home.

"Neglected child" means a child:

(A) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian, or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care, or education, when that refusal, failure, or inability is not due primarily to a lack of financial means on the part of the parent, guardian, or custodian;

(B) Who is presently without necessary food, clothing, shelter, medical care, education, or supervision because of the disappearance or absence of the child's parent or custodian; or

(C) "Neglected child" does not mean a child whose education is conducted within the provisions of § 18-8-1 et seq. of this code.

"Petitioner or copetitioner" means the department or any reputable person who files a child abuse or neglect petition pursuant to § 49-4-601 et seq. of this code.

"Permanency plan" means the part of the case plan which is designed to achieve a permanent home for the child in the least restrictive setting available.

"Respondent" means all parents, guardians, and custodians identified in the child abuse and neglect petition who are not petitioners or copetitioners.

"Sexual abuse" means:

(A) Sexual intercourse, sexual intrusion, sexual contact, or conduct proscribed by § 61-8c-3 of this code, which a parent, guardian, or custodian engages in, attempts to engage in, or knowingly procures another person to engage in, with a child notwithstanding the fact that for a child who is less than 16 years of age, the child may have willingly participated in that conduct or the child may have suffered no apparent physical, mental or emotional injury as a result of that conduct or, for a child 16 years of age or older, the child may have consented to that conduct or the child may have suffered no apparent physical injury or mental or emotional injury as a result of that conduct;

(B) Any conduct where a parent, guardian, or custodian displays his or her sex organs to a child, or procures another person to display his or her sex organs to a child, for the purpose of gratifying the sexual desire of the parent, guardian, or custodian, of the person making that display, or of the child, or for the purpose of affronting or alarming the child; or

(C) Any of the offenses proscribed in § 61-8b-7, § 61-8b-8, or § 61-8b-9 of this code.

"Sexual assault" means any of the offenses proscribed in § 61-8b-3, § 61-8b-4, or § 61-8b-5 of this code.

"Sexual contact" means sexual contact as that term is defined in § 61-8b-1 of this code.

"Sexual exploitation" means an act where:

(A) A parent, custodian, or guardian, whether for financial gain or not, persuades, induces, entices or coerces a child to engage in sexually explicit conduct as that term is defined in § 61-8c-1 of this code;

(B) A parent, guardian, or custodian persuades, induces, entices or coerces a child to display his or her sex organs for the sexual gratification of the parent, guardian, custodian or a third person, or to display his or her sex organs under circumstances in which the parent, guardian, or custodian knows that the display is likely to be observed by others who would be affronted or alarmed; or

(C) A parent, guardian, or custodian knowingly maintains or makes available a child for the purpose of engaging the child in commercial sexual activity in violation of § 61-14-5 of this code.

"Sexual intercourse" means sexual intercourse as that term is defined in § 61-8b-1 of this code.

"Sexual intrusion" means sexual intrusion as that term is defined in § 61-8b-1 of this code.

"Serious physical abuse" means bodily injury which creates a substantial risk of death, causes serious or prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.

***§ 49-1-202 Definitions related, but not limited, to adult, child, developmental disability, and transitioning adult status.***

When used in this chapter, terms defined in this section have the meanings ascribed to them that relate to, but are not limited to, adult, child, developmental disability, and transitioning adult status, except in those instances where a different meaning is provided or the context in which the word is used clearly indicates that a different meaning is intended.

"Adult" means a person who is at least eighteen years of age.

"Child" or "Juvenile" means any person under eighteen years of age or is a transitioning adult. Once a child or juvenile is transferred to a court with criminal jurisdiction pursuant to section seven hundred ten, article four of this chapter, he or she shall remain a child or juvenile for the purposes of the applicability of this chapter. Unless otherwise stated, for the purpose of child care services "child" means an individual who meets one of the following conditions:

(A) Is under thirteen years of age;

(B) Is thirteen to eighteen years of age and under court supervision; or

(C) Is thirteen to eighteen years of age and presenting a significant delay of at least twenty-five percent in one or more areas of development, or a six-month delay in two or more areas as determined by an early intervention program, special education program or other multidisciplinary team.

"Juvenile delinquent" means a juvenile who has been adjudicated as one who commits an act which would be a crime under state law or a municipal ordinance if committed by an adult.

"Status offender" means a juvenile who has been adjudicated as one:

(A) Who habitually and continually refuses to respond to the lawful supervision by his or her parents, guardian or legal custodian such that the juvenile's behavior substantially endangers the health, safety or welfare of the juvenile or any other person;

(B) Who has left the care of his or her parents, guardian or custodian without the consent of that person or without good cause; or

(C) Who is habitually absent from school without good cause.

"Transitioning adult" means an individual with a transfer plan to move to an adult setting who meets one of the following conditions:

(A) Is eighteen years of age but under twenty-one years of age, was in the custody of the Department of Health and Human Resources upon reaching eighteen years of age and committed an act of delinquency before reaching eighteen years of age, remains under the jurisdiction of the juvenile court, and requires supervision and care to complete an education and or treatment program which was initiated prior to the eighteenth birthday; or

(B) Is eighteen years of age but under twenty-one years of age, was adjudicated abused, neglected, or in the custody of the Department of Health and Human Resources upon reaching eighteen years of age and enters into a contract with the Department of Health and Human Resources to continue in an educational, training, or treatment program which was initiated prior to the eighteenth birthday.

***§ 49-1-203 Definitions related, but not limited, to licensing and approval of programs.***

When used in this chapter, terms defined in this section have the meanings ascribed to them that relate to, but are not limited to, licensing and approval of programs, except in those instances where a different meaning is provided or the context in which the word used clearly indicates that a different meaning is intended.

“Approval” means a finding by the Secretary of the Department of Health and Human Resources that a facility operated by the state has met the requirements of legislative rules promulgated for operation of that facility and that a certificate of approval or a certificate of operation has been issued.

“Certification of approval” or “certificate of operation” means a statement issued by the Secretary of the Department of Health and Human Resources that a facility meets all of the necessary requirements for operation.

“Certificate of license” means a statement issued by the Secretary of the Department of Health and Human Resources authorizing an individual, corporation, partnership, voluntary association, municipality, or county, or any agency thereof, to provide specified services for a limited period of time in accordance with the terms of the certificate.

“Certificate of registration” means a statement issued by the Secretary of the Department of Health and Human Resources to a family child care home, informal family child care home, or relative family child care home to provide specified services for a limited period in accordance with the terms of the certificate.

“License” means the grant of official permission to a facility to engage in an activity which would otherwise be prohibited.

“Registration” means the grant of official permission to a family child care home, informal family child care home, or a relative family child care home determined to be in compliance with the legislative rules promulgated pursuant to this chapter.

"Rule" means legislative rules promulgated by the Secretary of the Department of Health and Human Resources or a statement issued by the Secretary of the Department of Health and Human Resources of the standards to be applied in the various areas of child care.

"Variance" means a declaration that a rule may be accomplished in a manner different from the manner set forth in the rule.

"Waiver" means a declaration that a certain legislative rule is inapplicable in a particular circumstance.

***§ 49-1-204 Definitions related, but not limited, to custodians, legal guardians and family.***

When used in this chapter, terms defined in this section have the meanings ascribed to them that relate to, but are not limited to, custodians, legal guardians and family, except in those instances where a different meaning is provided or the context in which the word is used clearly indicates that a different meaning is intended.

"Caregiver" means any person who is at least eighteen years of age and:

(A) Is related by blood, marriage or adoption to the minor, but who is not the legal custodian or guardian of the minor; or

(B) Has resided with the minor continuously during the immediately preceding period of six months or more.

"Custodian" means a person who has or shares actual physical possession or care and custody of a child, regardless of whether that person has been granted custody of the child by any contract or agreement.

"Dysfunctional family," for the purposes of part two, article two of this chapter, means a parent or parents or an adult or adults and a child or children living together and functioning in an impaired or abnormal manner so as to cause substantial physical or emotional danger, injury or harm to one or more children thereof regardless of whether those children are natural offspring, adopted children, step children or unrelated children to that parents.

"Legal or minor guardianship" means the permanent relationship between a child and a caretaker, established by order of the court having jurisdiction over the child or juvenile, pursuant to this chapter and chapter forty-four of this code.

"Parent" means an individual defined as a parent by law or on the basis of a biological relationship, marriage to a person with a biological relationship, legal adoption or other recognized grounds.

"Parental rights" means any and all rights and duties regarding a parent to a minor child.

"Parenting skills" means a parent's competency in providing physical care, protection, supervision and psychological support appropriate to a child's age and state of development.

"Siblings" means children who have at least one biological parent in common or who have been legally adopted by the same parent or parents.

***§ 49-1-205 Definitions related, but not limited, to developmental disabilities.***

When used in this chapter, terms defined in this section have the meanings ascribed to them that relate to, but are not limited to, developmental disabilities, except in those instances where a different meaning is provided or the context in which the word is used clearly indicates that a different meaning is intended.

"Developmental disability" means a severe, chronic disability of a person which:

(A) Is attributable to a mental or physical impairment or a combination of mental and physical impairments;

(B) Is manifested before the person attains age twenty-two;

(C) Results in substantial functional limitations in three or more of the following areas of major life activity:

(i) Self-care;

(ii) Receptive and expressive language;

(iii) Learning;

(iv) Mobility;

(v) Self-direction;

(vi) Capacity for independent living; and

(vii) Economic self-sufficiency; and

(D) Reflects the person's need for services and supports which are of lifelong or extended duration and are individually planned and coordinated.

(E) The term "developmental disability", when applied to infants and young children, means individuals from birth to age five, inclusive, who have substantial developmental delays or specific congenital or acquired conditions with a high probability of resulting in developmental disabilities if services are not provided.

"Family or primary caregiver," for the purposes of part six, article two of this chapter, means the person or persons with whom the developmentally disabled person resides

and who is primarily responsible for the physical care, education, health and nurturing of the disabled person pursuant to the provisions of part six, article two of this chapter. The term does not include hospitals, nursing homes, personal care homes or any other similar institution.

"Legal guardian," for the purposes of part six of article two of this chapter, means the person who is appointed legal guardian of a developmentally disabled person and who is responsible for the physical and financial aspects of caring for that person, regardless of whether the disabled person resides with his or her legal guardian or another family member.

***§ 49-1-206 Definitions related, but not limited, to child advocacy, care, residential, and treatment programs.***

When used in this chapter, the following terms have the following meanings, unless the context clearly indicates otherwise:

"Child Advocacy Center (CAC)" means a community-based organization that is a member, in good standing, of the West Virginia Child Advocacy Network, Inc., as set forth in § 49-3-101 of this code.

"Child care" means responsibilities assumed and services performed in relation to a child's physical, emotional, psychological, social, and personal needs and the consideration of the child's rights and entitlements, but does not include secure detention or incarceration under the jurisdiction of the Division of Corrections and Rehabilitation pursuant to §49-2-901 et seq. of this code. It includes the provision of child care services or residential services.

"Child care center" means a facility maintained by the state or any county or municipality thereof, or any agency or facility maintained by an individual, firm, corporation, association, or organization, public or private, for the care of 13 or more children for child care services in any setting, if the facility is open for more than 30 days per year per child.

"Child care services" means direct care and protection of children during a portion of a 24-hour day outside of the child's own home which provides experiences to children that foster their healthy development and education.

"Child placing agency" means a child welfare agency organized for the purpose of placing children in private family homes for foster care or for adoption. The function of a child placing agency may include the investigation and certification of foster family homes and foster family group homes as provided in this chapter. The function of a child placing agency may also include the supervision of children who are 16 or 17 years of age and living in unlicensed residences.

"Child welfare agency" means any agency or facility maintained by the state or any county or municipality thereof, or any agency or facility maintained by an individual, firm,

corporation, association, or organization, public or private, to receive children for care and maintenance or for placement in residential care facilities, including, without limitation, private homes or any facility that provides care for unmarried mothers and their children. A child welfare agency does not include juvenile detention facilities or juvenile correctional facilities operated by or under contract with the Division of Corrections and Rehabilitation, pursuant to § 49-2-901 et seq. of this code, nor any other facility operated by that division for the secure housing or holding of juveniles committed to its custody.

"Community based" means a facility, program, or service located near the child's home or family and involving community participation in planning, operation, and evaluation and which may include, but is not limited to, medical, educational, vocational, social, and psychological guidance, training, special education, counseling, substance abuse, and any other treatment or rehabilitation services.

"Community-based juvenile probation sanctions" means any of a continuum of nonresidential accountability measures, programs, and sanctions in response to a technical violation of probation, as part of a system of community-based juvenile probation sanctions and incentives, that may include, but are not limited to:

(A) Electronic monitoring;

(B) Drug and alcohol screening, testing, or monitoring;

(C) Youth reporting centers;

(D) Reporting and supervision requirements;

(E) Community service; and

(F) Rehabilitative interventions such as family counseling, substance abuse treatment, restorative justice programs, and behavioral or mental health treatment.

"Community services" means nonresidential prevention or intervention services or programs that are intended to reduce delinquency and future court involvement.

"Evidence-based practices" means policies, procedures, programs, and practices demonstrated by research to reliably produce reductions in the likelihood of reoffending.

"Facility" means a place or residence, including personnel, structures, grounds, and equipment used for the care of a child or children on a residential or other basis for any number of hours a day in any shelter or structure maintained for that purpose. Facility does not include any juvenile detention facility or juvenile correctional facility operated by or under contract with the Division of Corrections and Rehabilitation for the secure housing or holding of juveniles committed to its custody.

"Family child care facility" means any facility which is used to provide nonresidential child care services for compensation for seven to 12 children, including children who are

living in the household, who are under six years of age. A facility may be in a provider's residence or a separate building.

"Family child care home" means a facility which is used to provide nonresidential child care services for compensation in a provider's residence. The provider may care for four to six children at one time, including children who are living in the household, who are under six years of age.

"Family resource network" means:

(A) A local community organization charged with service coordination, needs and resource assessment, planning, community mobilization, and evaluation, and which has met the following criteria:

(i) Has agreed to a single governing entity;

(ii) Has agreed to engage in activities to improve service systems for children and families within the community;

(iii) Addresses a geographic area of a county or two or more contiguous counties;

(iv) Has, as the majority of the members of the governing body, nonproviders, which includes family representatives and other members who are not employees of publicly funded agencies, with family representatives as the majority of those members who are nonproviders;

(v) Has members of the governing body who are representatives of local service agencies, including, but not limited to, the public health department, the behavioral health center, the local health and human resources agency, and the county school district; and

(vi) Adheres to principles consistent with the cabinet's mission as part of its philosophy.

(B) A family resource network may not provide direct services, which means to provide programs or services directly to children and families.

"Family support", for the purposes of § 49-2-601 et seq. of this code, means goods and services needed by families to care for their family members with developmental disabilities and to enjoy a quality of life comparable to other community members.

"Family support program" means a coordinated system of family support services administered by the Department of Health and Human Resources through contracts with behavioral health agencies throughout the state.

"Fictive kin" means an adult of at least 21 years of age, who is not a relative of the child, as defined herein, but who has an established, substantial relationship with the child, including but not limited to, teachers, coaches, ministers, and parents, or family members of the child's friends.

“Foster family home” means a private residence which is used for the care on a residential basis of no more than six children who are unrelated, by blood, marriage, or adoption, to any adult member of the household.

“Foster parent” means a person with whom the department has placed a child and who has been certified by the department, a child placing agency, or another agent of the department to provide foster care.

“Health care and treatment” means:

(A) Developmental screening;

(B) Mental health screening;

(C) Mental health treatment;

(D) Ordinary and necessary medical and dental examination and treatment;

(E) Preventive care including ordinary immunizations, tuberculin testing, and well-child care; and

(F) Nonemergency diagnosis and treatment. However, nonemergency diagnosis and treatment does not include an abortion.

“Home-based family preservation services” means services dispensed by the Department of Health and Human Resources or by another person, association, or group who has contracted with that division to dispense services when those services are intended to stabilize and maintain the natural or surrogate family in order to prevent the placement of children in substitute care. There are two types of home-based family preservation services and they are as follows:

(A) Intensive, short-term intervention of four to six weeks; and

(B) Home-based, longer-term after care following intensive intervention.

“Informal family child care” means a home that is used to provide nonresidential child care services for compensation for three or fewer children, including children who are living in the household who are under six years of age. Care is given in the provider’s own home to at least one child who is not related to the caregiver.

“Kinship parent” means a person with whom the department has placed a child to provide a kinship placement.

“Kinship placement” means the placement of the child with a relative of the child, as defined herein, or a placement of a child with a fictive kin, as defined herein.

“Needs Assessment” means an evidence-informed assessment which identifies the needs a child or family has, which, if left unaddressed, will likely increase the chance of reoccurring.

“Nonsecure facility” means any public or private residential facility not characterized by construction fixtures designed to physically restrict the movements and activities of individuals held in lawful custody in that facility and which provides its residents access to the surrounding community with supervision.

“Nonviolent misdemeanor offense” means a misdemeanor offense that does not include any of the following:

(A) An act resulting in bodily injury or death;

(B) The use of firearm or other deadly weapon in the commission of the offense;

(C) A domestic abuse offense involving a significant or likely risk of harm to a family member or household member;

(D) A criminal sexual conduct offense; or

(E) Any offense for driving under the influence of alcohol or drugs.

“Out-of-home placement” means a post-adjudication placement in a foster family home, kinship parent home, group home, nonsecure facility, emergency shelter, hospital, psychiatric residential treatment facility, staff secure facility, hardware secure facility, detention facility, or other residential placement other than placement in the home of a parent, custodian, or guardian.

“Out-of-school time” means a child care service which offers activities to children before and after school, on school holidays, when school is closed due to emergencies, and on school calendar days set aside for teacher activities.

“Placement” means any temporary or permanent placement of a child who is in the custody of the state in any foster home, kinship parent home, group home, or other facility or residence.

“Pre-adjudicatory community supervision” means supervision provided to a youth prior to adjudication, for a period of supervision up to one year for an alleged status or delinquency offense.

“Regional family support council” means the council established by the regional family support agency to carry out the responsibilities specified in §49-2-601 et seq. of this code.

“Relative family child care” means a home that provides nonresidential child care services only to children related to the caregiver. The caregiver is a grandparent, great-grandparent, aunt, uncle, great-aunt, great-uncle, or adult sibling of the child or children receiving care. Care is given in the provider’s home.

"Relative of the child" means an adult of at least 21 years of age who is related to the child, by blood or marriage, within at least three degrees.

"Residential services" means child care which includes the provision of nighttime shelter and the personal discipline and supervision of a child by guardians, custodians, or other persons or entities on a continuing or temporary basis. It may include care or treatment, or both, for transitioning adults. Residential services does not include or apply to any juvenile detention facility or juvenile correctional facility operated by the Division of Corrections and Rehabilitation, created pursuant to this chapter, for the secure housing or holding of juveniles committed to its custody.

"Restorative justice program" means a voluntary, community based program which utilizes evidence-based practices that provide an opportunity for a juvenile to accept responsibility for and participate in setting consequences to repair harm caused by the juvenile against the victim and the community by means of facilitated communication including, but not limited to, mediation, dialogues, or family group conferencing, attended voluntarily by the victim, the juvenile, a facilitator, a victim advocate, community members, or supporters of the victim or the juvenile.

"Risk and needs assessment" means a validated, standardized actuarial tool which identifies specific risk factors that increase the likelihood of reoffending and the factors that, when properly addressed, can reduce the likelihood of reoffending.

"Scattered-site living arrangement" means a living arrangement where youth, 17 to 26 years of age, live in a setting that allows staff to be available as needed, depending on the youth's level of autonomy. Sites for such living arrangements shall be in community environments to allow the youth full access to services and resources in order to fully develop independent living skills.

"Secure facility" means any public or private residential facility which includes construction fixtures designed to physically restrict the movements and activities of juveniles or other individuals held in lawful custody in such facility.

"Staff secure facility" means any public or private residential facility characterized by staff restrictions of the movements and activities of individuals held in lawful custody in such facility, and which limits its residents' access to the surrounding community, but is not characterized by construction fixtures designed to physically restrict the movements and activities of residents.

"Standardized screener" means a brief, validated nondiagnostic inventory or questionnaire designed to identify juveniles in need of further assessment for medical, substance abuse, emotional, psychological, behavioral, or educational issues, or other conditions.

"State family support council" means the council established by the Department of Health and Human Resources pursuant to §49-2-601 et seq. of this code to carry out the responsibilities specified in §49-2-101 et seq. of this code.

"Supervised group setting" means a setting where youth, 16 to 21 years of age, live with staff onsite or are available 24 hours per day and seven days per week. In this setting, staff provide face to face daily contact with youth.

"Time-limited reunification services" means individual, group, and family counseling, inpatient, residential, or outpatient substance abuse treatment services, mental health services, assistance to address domestic violence, services designed to provide temporary child care, and therapeutic services for families, including crisis nurseries and transportation to or from those services, provided during 15 of the most recent 22 months a child or juvenile has been in foster or in a kinship placement, as determined by the earlier date of the first judicial finding that the child is subjected to abuse or neglect, or the date which is 60 days after the child or juvenile is removed from home.

"Technical violation" means an act that violates the terms or conditions of probation or a court order that does not constitute a new delinquent offense.

"Truancy diversion specialist" means a school-based probation officer or truancy social worker within a school or schools who, among other responsibilities, identifies truants and the causes of the truant behavior, and assists in developing a plan to reduce the truant behavior prior to court involvement.

***§ 49-1-207 Definitions related to court actions.***

When used in this chapter, terms defined in this section have the meanings ascribed to them that relate to, but are not limited to, court actions, except in those instances where a different meaning is provided or the context in which the word is used clearly indicates that a different meaning is intended.

"Court" means the circuit court of the county with jurisdiction of the case or the judge in vacation unless otherwise specifically provided.

"Court appointed special advocate (CASA) program" means a community organization that screens, trains and supervises CASA volunteers to advocate for the best interests of children who are involved in abuse and neglect proceedings section one hundred two, article three of this chapter.

"Extrajudicial Statement" means any utterance, written or oral, which was made outside of court.

"Juvenile referee" means a magistrate appointed by the circuit court to perform the functions expressly prescribed for a referee under the provisions of this chapter.

"Multidisciplinary team" means a group of professionals and paraprofessionals representing a variety of disciplines who interact and coordinate their efforts to identify, diagnose and treat specific cases of child abuse and neglect. Multidisciplinary teams may include, but are not limited to, medical, educational, child care and law-enforcement personnel, social workers, psychologists and psychiatrists. Their goal is to pool their

respective skills in order to formulate accurate diagnoses and to provide comprehensive coordinated treatment with continuity and follow-up for both parents and children.

"Community team" means a multidisciplinary group which addresses the general problem of child abuse and neglect in a given community and may consist of several multidisciplinary teams with different functions.

"Res gestae" means a spontaneous declaration made by a person immediately after an event and before the person has had an opportunity to conjure a falsehood.

"Valid court order" means an order issued by a court of competent jurisdiction relating to a child brought before the court and who is the subject of that order. Prior to the entry of the order the child shall have received the full due process rights guaranteed to that child or juvenile by the Constitutions of the United States and the State of West Virginia.

"Violation of a traffic law of West Virginia" means a violation of chapter seventeen-a, seventeen-b, seventeen-c or seventeen-d of this code except a violation of section one or two, article four, chapter seventeen-c of this code relating to hit and run or section one, two or three, article five of that chapter, relating, respectively, to negligent homicide, driving under the influence of alcohol, controlled substances or drugs and reckless driving.

***§ 49-1-208 Definitions related, but not limited, to state and local agencies.***

When used in this chapter, terms defined in this section have the meanings ascribed to them that relate to, but are not limited to, state and local agencies, except in those instances where a different meaning is provided or the context in which the word is used clearly indicates that a different meaning is intended.

"Department" or "state department" means the West Virginia Department of Health and Human Resources.

"Division of Juvenile Services" means the division within the West Virginia Department of Military Affairs and Public Safety.

"Law-enforcement officer" means a law-enforcement officer of the State Police, a municipality or county sheriff's department.

"Secretary" means the Secretary of the West Virginia Department of Health and Human Resources.

***§ 49-1-209 Definitions related, but not limited, to missing children.***

As used in article six of this chapter:

"Child" means an individual under the age of eighteen years who is not emancipated;

"Clearinghouse" means the West Virginia missing children information clearinghouse;

“Custodian” means a parent, guardian, custodian or other person who exercises legal physical control, care or custody of a child;

“Missing child” means a child whose whereabouts are unknown to the child’s custodian and the circumstances of whose absence indicate that:

(A) The child did not leave the care and control of the custodian voluntarily and the taking of the child was not authorized by law; or

(B) The child voluntarily left the care and control of his or her custodian without the custodian’s consent and without intent to return;

“Missing child report” means information that is:

(A) Given to a law-enforcement agency on a form used for sending information to the national crime information center; and

(B) About a child whose whereabouts are unknown to the reporter and who is alleged in the form submitted by the reporter to be missing;

”Possible match” means the similarities between an unidentified body of a child and a missing child that would lead one to believe they are the same child;

“Reporter” means the person who reports a missing child; and

“State agency” means an agency of the state, political subdivision of the state or public post-secondary educational institution.

## ARTICLE 2. STATE RESPONSIBILITIES FOR CHILDREN.

## PART I. GENERAL AUTHORITY AND DUTIES OF THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES

### *§ 49-2-101 Authorization and responsibility; Bureau of Social Services.*

(a) The Bureau for Social Services is continued within the department. The bureau is under the immediate supervision of a commissioner.

(b) The Bureau for Social Services is authorized to provide care, support, and protective services for children who are handicapped by dependency, neglect, single parent status, mental or physical disability, or who for other reasons are in need of public service. The bureau is also authorized to accept children for care from their parent or parents, guardian, custodian, or relatives, and to accept the custody of children committed to its care by courts. The bureau or any county office of the department is also authorized to accept temporary custody of children for care from any law-enforcement officer in an emergency situation.

(c) The bureau is responsible for the care of the infant child of an unmarried mother who has been committed to the custody of the department while the infant is placed in the same licensed child welfare agency as his or her mother. The bureau provides care for those children in family homes meeting required standards, at board or otherwise, through a licensed child welfare agency, or in a state institution providing care for dependent or neglected children. If practical, when placing any child in the care of a family or a child welfare agency, the bureau shall select a family holding the same religious belief as the parents or relatives of the child, or a child welfare agency conducted under religious auspices of the same belief as the parents or relatives.

### *§ 49-2-102 Staffing Allocation for Child Protective Services Workers.*

Notwithstanding any other provision of this code to the contrary, effective July 1, 2024, the commissioner shall allocate and station child protective services workers by county based on population, referrals, and average caseload. The allocation may not decrease below the bureau's allocation of January 1, 2023. The county population shall be based on the United States Census. The bureau shall report the allocation to the Legislative Oversight Commission on Health and Human Resources Accountability by July 1 each year.

### *§ 49-2-103 Proceedings by the state department.*

The state department shall have the authority to institute, in the name of the state, proceedings incident to the performance of its duties under the provisions of this chapter.

### *§ 49-2-104 Repealed.*

### *§ 49-2-105 Administrative and judicial review.*

Any person, corporation, governmental official or child welfare agency, aggrieved by a decision of the secretary made pursuant to this chapter may contest the decision upon making a request for a hearing by the secretary within thirty days of receipt of notice of the decision. Administrative and judicial review shall be made in accordance with article five, chapter twenty-nine-a of this code. Any decision issued by the secretary may be made effective from the date of issuance. Immediate relief therefrom may be obtained upon a showing of good cause made by verified petition to the Circuit Court of Kanawha County or the circuit court of any county where the affected facility or child welfare agency may be located. The dependency of administrative or judicial review shall not prevent the secretary from obtaining injunctive relief pursuant to section one hundred twenty, article two of this chapter.

### *§ 49-2-106 Department responsibility for foster care homes.*

It is the responsibility of the Department of Health and Human Resources to provide care for neglected children who are committed to its care for custody or guardianship. The department may provide this care for children in family homes meeting required

standards of certification established and enforced by the Department of Health and Human Resources.

***§ 49-2-107 Foster-home care; minimum standards; certificate of operation; inspection.***

(a) The department shall establish minimum standards for foster-home care to which all certified foster homes must conform by legislative rule. Any home that conforms to the standards of care set by the department shall receive a certificate of operation.

(b) The certificate of operation shall be in force for three years from the date of issuance and may be renewed unless revoked because of willful violation of this chapter.

(c) The certificate shall show the name of the person or persons authorized to conduct the home, its exact location and the number of children that may be received and cared for at one time and other information as set forth in legislative rule. No certified foster home shall provide care for more children than are specified in the certificate.

(d) No unsupervised foster home shall be certified until an investigation of the home and its standards of care has been made by the department or by a licensed child welfare agency serving as a representative of the department.

***§ 49-2-108 Visits and inspections; records.***

The department or its authorized agent shall visit and inspect every certified foster home as often as is necessary to assure proper care is given to the children. Every certified foster home shall maintain a record of the children received. This record shall include information in a type, form, and manner as prescribed by the department in legislative rule.

***§ 49-2-109 Placing children from other states in private homes of state.***

An institution or organization incorporated under the laws of another state shall not place a child in a private home in the state without the approval of the department, and the agency so placing the child shall arrange for supervision of the child through its own staff or through a licensed child welfare agency in this state, and shall maintain responsibility for the child until he or she is adopted or discharged from care with the approval of the department.

***§ 49-2-110 Development of standards of child care.***

The department shall develop standards for the care of children. It shall cooperate with, advise, and assist all child welfare agencies, including state institutions, which care for children who have been neglected, have been adjudicated delinquent, or have special needs such as physical, mental, or intellectual disabilities, and shall supervise those agencies. The department, in cooperation with child welfare agencies, shall formulate and make available

standards of child care and services for children, to which all child welfare agencies must conform.

***§ 49-2-110a Bureau of Social Service authority to hire and employ workers who are not social workers in geographical areas of critical shortage.***

(a) The Legislature hereby finds that there is a crisis in West Virginia in certain geographical regions of the state, that is caused by an absence of people employed by the Department of Health and Human Resources as child protective services workers, youth case workers, and support staff for these positions.

(b) Notwithstanding any other provisions of this code to the contrary, the Bureau of Social Services, pursuant to the provisions of this section, may establish a pilot program to employ persons who do not hold a social worker's license and persons who are not on the social work register to work for the bureau as child protective services workers, youth case workers and support staff, in geographical areas of critical shortage of this state.

(c) For purposes of this pilot program and this section, "geographical areas of critical shortage" means the counties comprising the 14th judicial circuit and the 23rd judicial circuit as of the effective date of the amendments to the section enacted during the 2023 regular session of the Legislature.

(d) Workers hired by the bureau under this section to work in geographical areas of critical shortage may be employed by the bureau and work in said geographical areas as child protective services workers, youth service workers, case managers, clerical staff and in other related positions for the bureau. Wherever possible, workers hired pursuant to this section shall be supervised by a licensed social worker.

(e) The provisions of this section shall operate independently of, and in addition to, any other provisions of law or policy that allow persons to be employed in these jobs, and the provisions of this section do not eliminate any other provisions of law that permit persons to be employed in the jobs described in this section.

(f) In order for a person to be eligible for employment under this section, he or she shall:

(1) Be at least 18 years of age.

(2)(A) Have an associate's degree or higher in social work, human services, sociology, psychology, or social services from an accredited college, university, community and technical college, community college or junior college; or

(B) Be an honorably retired law enforcement officer or be an honorably retired parole officer or honorably retired federal or state probation officer.

(C) Meet any other requirements established by the bureau.

(3) Provide to the bureau three letters of recommendation from persons not related to the applicant.

(4) Not be an alcohol or drug abuser, as these terms are defined in § 27-1A-11 of this code: Provided, That an applicant in an active recovery process, which may, in the discretion of the bureau, be evidenced by participation in an acknowledged substance abuse treatment and/or recovery program, may be considered;

(5) Satisfy the requirements of the West Virginia Clearance for Access Registry and Employment Screening Act, § 16-49-1 et seq. of this code; and

(6) Satisfy the requirements provided in § 30-1-24 of this code.

(g) The bureau shall provide training to any and all persons hired and employed hereunder, as the bureau deems appropriate.

(h) The provisions of this section authorizing the hiring of persons shall sunset, expire, and be of no force and effect on or after the 31st day of December 2026, but shall not serve to require the termination of persons hired pursuant to this section.

***§ 49-2-111 Supervision of child welfare agencies by the department; records and reports.***

(a) In order to improve standards of child care, the department shall cooperate with the governing boards of child welfare agencies, assist the personnel of those agencies through advice on progressive methods and procedures of child care and improvement of the service rendered, and assist in the development of community plans of child care. The department, or its duly authorized agent, may visit any child welfare agency to advise the agency on matters affecting the health of children.

(b) Each child welfare agency shall keep records of each child under its control and care as the department may prescribe, and shall report to the department, whenever requested, facts as may be required with reference to the children, upon forms furnished by the department. All records regarding children and all facts learned about children and their parents or relatives shall be regarded as confidential and shall be properly safeguarded by the agency and the department.

***§ 49-2-111a Performance based contracting for child placing agencies.***

(a) For purposes of this section:

(1) ”Child” means:

(A) A person of less than 18 years of age; or

(B) A person 18 to 21 years of age who is eligible to receive the extended foster care services.

(2) ”Child-placing agency” means an agency licensed by the department to place a child in a foster care home.

(3) ”Department” means the Department of Health and Human Resources.

(4) ”Evidence-based” means a program or practice that is cost-effective and includes at least two randomized or statistically controlled evaluations that have demonstrated improved outcomes for its intended population.

(5) ”Performance-based contracting” means structuring all aspects of the service contract around the purpose of the work to be performed and the desired results with the contract requirements set forth in clear, specific, and objective terms with measurable outcomes and linking payment for services to contractor performance.

(6) ”Promising practice” means a practice that presents, based upon preliminary information, potential for becoming a research-based or consensus-based practice.

(7) ”Research-based” means a program or practice that has some research demonstrating effectiveness, but that does not yet meet the standard of evidence-based practices.

(b) No later than July 1, 2021, the department shall enter into performance-based contracts with child placing agencies.

(c) The department shall actively consult with other state agencies and other entities with expertise in performance-based contracting with child placing agencies to develop the requirements of the performance-based contract.

(d) The performance-based contract shall be developed and implemented in a manner that complies with applicable provisions of this code. Contracts for child placing agencies are exempt from §5A-3-1 of this code.

(e) The resulting contracts shall include, but are not limited to, the following:

(1) Adequate capacity to meet the anticipated service needs in the contracted service area of the child placing agency;

(2) The use of evidence-based, research-based, and promising practices, where appropriate, including fidelity and quality assurance provisions;

(3) Child placing agency data reporting, including data on performance and service outcomes, including, but not limited to:

(A) Safety outcomes;

(B) Permanency outcomes;

(C) Well-being outcomes;

(D) Incentives earned;

(E) Placement of older children;

(F) Placement of children with special needs; and

(G) Recruitment and retention of foster parents; and

(4) A hold harmless period to determine a baseline for evaluation.

(f) Performance-based payment methodologies must be used in child placing agency contracting. Performance measures should relate to successful engagement by a child or parent in services included in their case plan, and resulting improvement in identified problem behaviors and interactions. For the first year of implementation of performance-based contracting, the department may transfer financial risk for the provision of services to the child placing agency only to the limited extent necessary to implement a performance-based payment methodology, such as phased payment for services. However, the department may develop a shared savings methodology through which the child placing agency will receive a defined share of any savings that result from improved performance. If the department receives a Title IV-E waiver, the shared savings methodology must be consistent with the terms of the waiver. If a shared savings methodology is adopted, the child placing agency shall reinvest the savings in enhanced services to better meet the needs of the families and children they serve.

(g) The department shall actively monitor the child placing agency's compliance with the terms of contracts executed under this section.

(h) The use of performance-based contracts under this section shall be done in a manner that does not adversely affect the state's ability to continue to obtain federal funding for child welfare-related functions currently performed by the state and with consideration of options to further maximize federal funding opportunities and increase flexibility in the use of such funds, including use for preventive and in-home child welfare services.

(i) The department shall pay child placing agencies contracted to provide adoption services to foster families a minimum of $1,000 per child for each adoption finalized.

(j) The rate of payment to foster parents and child placing agencies shall be reviewed by the department, at a minimum of every two years, to determine whether the level of foster care payments facilitates or hinders the efficient placement of foster children with West Virginia families. The department shall remit payments to foster parents on the same week each month to facilitate foster parents' ability to budget and appropriately expend payments for the benefit of the children in their custody.

(k) The department shall report the performance of the child placing agency to the Legislative Oversight Commission on Health and Human Resources Accountability by December 31, annually.

***§ 49-2-111b Study of kinship foster care families.***

(a) The department shall conduct a study and make recommendations for improving services provided for kinship foster care families. This study shall include at a minimum:

(1) A review of best practices in other states;

(2) A proposal for an alternate system of regulation for kinship foster care that includes the same reimbursement as other foster care families as well as a reasonable time period for obtaining certification;

(3) An evaluation of what training and supports are needed to ensure that kinship care homes are successful.

(b) The results of this shall be shared with all members of the Legislature by October 1, 2019.

***§ 49-2-111c Priorities for use of funds.***

(a) Subject to appropriations by the Legislature, the department is authorized and directed to:

(1) Enhance and increase efforts to provide services to prevent the removal of children from their homes;

(2) Identify relatives and fictive kin of children in need of placement outside of the home;

(3) Train kinship parents to become certified foster parents;

(4) Expand a tiered foster care system that provides higher payments for foster parents providing care to, and child placing agencies providing services to, foster children who have severe emotional, behavioral, or intellectual problems or disabilities, with particular emphasis upon removing children in congregate care and placing them with suitable foster parents. This program shall be operational no later than December 1, 2020; and

(5) Develop a pilot program to increase payment to uncertified kinship parents for the purpose of further helping families who have accepted kinship placements.

(b) During fiscal year 2021, the department shall expend at least $16,900,000 for the purposes of implementing the priorities and objectives listed in this section.

(c) On or before July 1, 2022 and on or before July 1 of every year thereafter, the secretary of the department shall present a report to the Joint Standing Committee on Government and Finance regarding the expenditures made pursuant to subsection (b) of this section and the department's progress in meeting the priorities and objectives listed in subsection (a) of this section: Provided, That the secretary shall provide the information

described in this subsection and updates to previous reports at any time, upon request of the Joint Standing Committee on Government and Finance.

***§ 49-2-112 Family homes; approval of incorporation by Secretary of State; approval of articles of incorporation.***

Before issuing a charter for the incorporation of any organization having as its purpose the receipt of children for care or for placement in family homes, the Secretary of State shall provide a copy of the petition, together with any other information in his or her possession pertaining to the proposed corporation, to the secretary.

***§ 49-2-113 Residential child care centers; licensure, certification, approval and registration; requirements.***

(a) Any person, corporation, or child welfare agency, other than a state agency, which operates a residential child-care center shall obtain a license from the department.

(b) Any residential child-care facility, day-care center, or any child-placing agency operated by the state shall obtain approval of its operations from the secretary.

(c) Any family day-care facility which operates in this state, including family day-care facilities approved by the department for receipt of funding, shall obtain a statement of certification from the department.

(d) Every family day-care home which operates in this state, including family day-care homes approved by the department for receipt of funding, shall obtain a certificate of registration from the department. The facilities and placing agencies shall maintain the same standards of care applicable to licensed facilities, centers, or placing agencies of the same category.

(e) This section does not apply to:

(1) A kindergarten, preschool, or school education program which is operated by a public school or which is accredited by the West Virginia Department of Education or any other kindergarten, preschool, or school programs which operate with sessions not exceeding four hours per day for any child;

(2) An individual or facility which offers occasional care of children for brief periods while parents are shopping, engaging in recreational activities, attending religious services, or engaging in other business or personal affairs;

(3) Summer recreation camps operated for children attending sessions for periods not exceeding 30 days;

(4) Hospitals or other medical facilities which are primarily used for temporary residential care of children for treatment, convalescence, or testing;

(5) Persons providing family day care solely for children related to them;

(6) Any juvenile detention facility or juvenile correctional facility operated by or under contract with the Division of Corrections and Rehabilitation for the secure housing or holding of juveniles committed to its custody;

(7) Any out-of-school time program that has been awarded a grant by the West Virginia Department of Education to provide out-of-school time programs to kindergarten through 12th grade students when the program is monitored by the West Virginia Department of Education;

(8) Any out-of-school time program serving children six years of age or older and meets all of the following requirements, or is an out-of-school time program that is affiliated and in good standing with a national congressionally chartered organization or is an out-of-school time, summer recreation camp, or day camp program operated by a county parks and recreation commission, boards, and municipalities and meets all of the following requirements:

(A) The program is located in a facility that meets all fire and health codes;

(B) The program performs state and federal background checks on all volunteers and staff;

(C) The program's primary source of funding is not from fees for service except for programs operated by county parks and recreation commissions, boards, and municipalities; and

(D) The program has a formalized monitoring system in place; or

(9) Any kindergarten, preschool, or school education program which is operated by a private, parochial, or church school that is recognized by the West Virginia Department of Education under Policy 2330.

(f) The secretary is authorized to issue an emergency rule relating to conducting a survey of existing facilities in this state in which children reside on a temporary basis in order to ascertain whether they should be subject to licensing under this article or applicable licensing provisions relating to behavioral health treatment providers.

(g) Any informal family child-care home or relative family child-care home may voluntarily register and obtain a certificate of registration from the department.

(h) All facilities or programs that provide out-of-school time care shall register with the department upon commencement of operations and on an annual basis thereafter. The department shall obtain information such as the name of the facility or program, the description of the services provided, and any other information relevant to the determination by the department as to whether the facility or program meets the criteria for exemption under this section.

(i) Any child-care service that is licensed or receives a certificate of registration shall have a written plan for evacuation in the event of fire, natural disaster, or other threatening situation that may pose a health or safety hazard to the children in the child-care service.

(1) The plan shall include, but not be limited to:

(A) A designated relocation site and evacuation;

(B) Procedures for notifying parents of the relocation and ensuring family reunification;

(C) Procedures to address the needs of individual children including children with special needs;

(D) Instructions relating to the training of staff or the reassignment of staff duties, as appropriate;

(E) Coordination with local emergency management officials; and

(F) A program to ensure that appropriate staff are familiar with the components of the plan.

(2) A child-care service shall update the evacuation plan by December 31 of each year. If a child-care service fails to update the plan, no action shall be taken against the child-care services license or registration until notice is provided and the child-care service is given 30 days after the receipt of notice to provide an updated plan.

(3) A child-care service shall retain an updated copy of the plan for evacuation and shall provide notice of the plan and notification that a copy of the plan will be provided upon request to any parent, custodian, or guardian of each child at the time of the child's enrollment in the child-care service and when the plan is updated.

(4) All child-care centers and family child-care facilities shall provide the plan and each updated copy of the plan to the Director of the Office of Emergency Services in the county where the center or facility is located.

(j) A residential child-care center which has entered into a contract with the department to provide services to a certain number of foster children, shall accept any foster child who meets the residential child-care center's program criteria, if the residential child-care center has not met its maximum capacity as provided for in the contract. Any residential child-care center which has entered into a contract with the department may not discharge any child in its program, except as provided in the contract, including that if the youth does not meet the residential treatment level and target population, the provider shall request a MDT and work toward an alternative placement.

***§ 49-2-114 Application for license or approval.***

(a) Any person or corporation or any governmental agency intending to act as a child welfare agency shall apply for a license, approval or registration certificate to operate

child care facilities regulated by this chapter. Applications for licensure, approval or registration shall be made separately for each child care facility to be licensed, approved, certified or registered.

(b) The secretary shall prescribe by legislative rule forms and reasonable application procedures including, but not limited to, fingerprinting of applicants and other persons responsible for the care of children for submission to the State Police and, if necessary, to the Federal Bureau of Investigation for criminal history record checks.

(c) Before issuing a license, or approval, the secretary shall investigate the facility, program and persons responsible for the care of children. The investigation shall include, but not be limited to, review of resource need, reputation, character and purposes of applicants, a check of personnel criminal records, if any, and personnel medical records, the financial records of applicants, review of the facilities emergency evacuation plan and consideration of the proposed plan for child care from intake to discharge.

(d) Before a home registration is granted, the secretary shall make inquiry as to the facility, program and persons responsible for the care of children. The inquiry shall include self-certification by the prospective home of compliance with standards including, but not limited to:

(1) Physical and mental health of persons present in the home while children are in care;

(2) Criminal and child abuse or neglect history of persons present in the home while children are in care;

(3) Discipline;

(4) Fire and environmental safety;

(5) Equipment and program for the children in care; and

(6) Health, sanitation and nutrition.

(e) Further inquiry and investigation may be made as the secretary may direct and sees as necessary.

(f) The secretary shall make a decision on each application within sixty days of its receipt and shall provide to unsuccessful applicants written reasons for the decision.

### *§ 49-2-115 Conditions of licensure, approval and registration.*

(a) A license or approval is effective for a period up to two years from the date of issuance, unless revoked or modified to provisional status based on evidence of a failure to comply with this chapter or any legislative rules promulgated by the secretary. The license or approval shall be reinstated upon application to the secretary and a determination of compliance.

(b) An initial six-month license or approval shall be issued to an applicant establishing a new service found to be in compliance on initial review with regard to policy, procedure, organization, risk management, human resources, service environment and record keeping regulations.

(c) A provisional license or approval may be issued when a licensee is not in compliance with the legislative rules promulgated by the secretary but does not pose a significant risk to the rights, well-being, health and safety of a consumer. It shall expire not more than six months from date of issuance, and not be consecutively reissued unless the provisional recommendation is that of the State Fire Marshal.

(d) A renewal license or approval may be issued of any duration up to two years at the discretion of the secretary. In the event a renewal license is not issued, the facility must make discharge plans for residents and cease operation within thirty days of the expiration of the license.

(e) A certificate of registration is effective for a period up to two years from the date of issuance, unless revoked based on evidence of a failure to comply with this article or any rules promulgated pursuant to this article. The certificate of registration shall be reinstated upon application to the secretary, including a statement of assurance of continued compliance with the legislative rules promulgated pursuant to this article.

(f) The license, approval or registration issued under this article is not transferable and applies only to the facility and its location stated in the application. The license, registration or approval shall be publicly displayed. The foster and adoptive family homes, informal family child care homes and relative family child care homes shall be required to display registration certificates of registration or approval upon request rather than by posting.

(g) Provisional certificates of registration may be issued to family child care homes.

(h) The secretary, as a condition of issuing a license, registration or approval, may:

(1) Limit the age, sex or type of problems of children allowed admission to a particular facility;

(2) Prohibit intake of any children; or

(3) Reduce the number of children which the agency, facility or home operated by the agency is licensed, approved, certified or registered to receive.

***§ 49-2-115a Head Start program licenses. – Omitted from Benchbook.***

***§ 49-2-116 Investigative authority; evaluation; complaint.***

(a) The secretary shall enforce this article.

(b) An on-site evaluation of every facility regulated pursuant to this chapter, except registered family child care homes, informal family child care and relative family child care homes shall be conducted no less than once per year by announced or unannounced visits.

(c) A random sample of not less than five percent of the total number of registered family child care homes, informal family child care homes and relative family child care homes shall be monitored annually through on-site evaluations.

(d) The secretary shall have access to the premises, personnel, children in care and records of each facility subject to inspection, including at a minimum, case records, corporate and financial records and board minutes. Applicants for licenses, approvals, and certificates of registration shall consent to reasonable on-site administrative inspections, made with or without prior notice, as a condition of licensing, approval, or registration.

(e) When a complaint is received by the secretary alleging violations of licensure, approval, or registration requirements, the secretary shall investigate the allegations. The secretary may notify the facility's director before or after a complaint is investigated and shall cause a written report of the results of the investigation to be made.

(f) The secretary may enter any unlicensed, unregistered or unapproved child care facility or personal residence for which there is probable cause to believe that the facility or residence is operating in violation of this article. Those entries shall be made with a law-enforcement officer present. The secretary may enter upon the premises of any unregistered residence only after two attempts by the secretary to bring this facility into compliance.

***§ 49-2-117 Revocation; provisional licensure and approval.***

(a) The secretary may revoke or make provisional the licensure registration of any home facility or child welfare agency regulated pursuant to this chapter if a facility materially violates this article, or any terms or conditions of the license, registration or approval issued, or fails to maintain established requirements of child care. This section does not apply to family child care homes.

(b) The secretary may revoke the certificate of registration of any family child care home if a facility materially violates this article, or any terms or conditions of the registration certificate issued, or fails to maintain established requirements of child care.

***§ 49-2-118 Closing of facilities by the secretary; placement of children.***

When the secretary finds that the operation of a residential care facility constitutes an immediate danger of serious harm to children served by the facility, the secretary shall issue an order of closure terminating operation of the facility. When necessary, the secretary shall place or direct the placement of the children in a residential facility which

has been closed into appropriate facilities. A facility closed by the secretary may not operate pending administrative or judicial review without court order.

***§ 49-2-119 Supervision; consultation; State Fire Marshall to cooperate.***

(a) The secretary shall provide supervision to ascertain compliance with the rules promulgated pursuant to this chapter through regular monitoring, visits to facilities, documentation, evaluation and reporting. The secretary is responsible for training and education, within fiscal limitations, specifically for the improvement of care in family child care homes and facilities. The secretary shall consult with applicants, the personnel of child welfare agencies, and children under care to assure the highest quality child care possible.

(b) The State Fire Marshal shall cooperate with the secretary in the administration of this article by providing reports and assistance as may be requested by the secretary.

***§ 49-2-120 Penalties; injunctions; venue.***

(a) Any individual or corporation which operates a child welfare agency, residential facility or child care center without a license when a license is required is guilty of a misdemeanor and, upon conviction, shall be confined in jail not exceeding one year, or fined not more than $500, or both fined and confined.

(b) Any family child care facility which operates without a license when a license is required is guilty of a misdemeanor and, upon conviction, shall be fined not more than $500.

(c) Where a violation of this article or a legislative rule promulgated by the secretary may result in serious harm to children under care, the secretary may seek injunctive relief against any person, corporation, child welfare agency, child placing agency, child care center, family child care facility, family child care home or governmental official through proceedings instituted by the Attorney General, or the appropriate county prosecuting attorney, in the Circuit Court of Kanawha County or in the circuit court of any county where the children are residing or may be found.

***§ 49-2-121 Rule-making.***

(a) The secretary shall promulgate legislative rules in accordance with §29A-3-1 et seq. of this code regarding the licensure, approval, certification, and registration of child care facilities and the implementation of this article.

(b) The secretary shall review the rules promulgated pursuant to this article at least once every five years, making revisions when necessary or convenient.

(c) The rules shall incorporate, by reference, the requirements of the Integrated Pest Management Program established by legislative rule by the Department of Agriculture under §19-16A-4 of this code.

### *§ 49-2-122 Waivers and variances to rules.*

Waivers or variances of rules may be granted by the secretary if the health, safety or well-being of a child would not be endangered thereby. The secretary shall promulgate by legislative rule criteria and procedures for the granting of waivers or variances so that uniform practices may be maintained throughout the state.

### *§ 49-2-123 Annual reports; directory; licensing reports and recommendations.*

(a) The secretary shall submit on or before January 1, of each year a report to the Governor and the Legislative Oversight Commission on Health and Human Resources Accountability, concerning the regulation of child welfare agencies, child placing agencies, child care centers, family child care facilities, family child care homes, informal family child care homes, relative family child care homes and child care facilities during the year. The report shall include at a minimum, data on the number of children and staff at each facility (except family child care, informal family child care homes and relative family child care), applications received, types of licenses, approvals and registrations granted, denied, made provisional or revoked and any injunctions obtained or facility closures ordered.

(b) The secretary also shall compile annually a directory of licensed, certified and approved child care providers including a brief description of their program and facilities, the program's capacity and a general profile of children served. A listing of family child care homes shall also be compiled annually.

(c) Licensing reports and recommendations for licensure which are a part of the yearly review of each licensed facility shall be sent to the facility director. Copies shall be available to the public upon written request to the secretary.

### *§ 49-2-124 Certificate of need not required; conditions; review.*

A certificate of need, as provided in § 16-2D-1 et seq. of this code, is not required by an entity proposing behavioral health care facilities or behavioral health care services for children who are placed out of their home, or who are at imminent risk of being placed out of their home.

### *§ 49-2-125 Commission to Study Residential Placement of Children; findings; requirements; reports; recommendations.*

(a) The Legislature finds that the state's current system of serving children and families in need of or at risk of needing social, emotional and behavioral health services is fragmented. The existing categorical structure of government programs and their funding streams discourages collaboration, resulting in duplication of efforts and a waste of limited resources. Children are usually involved in multiple child-serving systems, including child welfare, juvenile justice and special education. More than ten percent of children presently in care are presently in out-of-state placements. Earlier efforts at reform have focused on quick fixes for individual components of the system at the expense of the whole. It is the

purpose of this section to establish a mechanism to achieve systemic reform by which all of the state's child-serving agencies involved in the residential placement of at-risk youth jointly and continually study and improve upon this system and make recommendations to their respective agencies and to the Legislature regarding funding and statutory, regulatory and policy changes. It is further the Legislature's intent to build upon these recommendations to establish an integrated system of care for at-risk youth and families that makes prudent and cost-effective use of limited state resources by drawing upon the experience of successful models and best practices in this and other jurisdictions, which focuses on delivering services in the least restrictive setting appropriate to the needs of the child, and which produces better outcomes for children, families and the state.

(b) There is created within the Department of Health and Human Resources the Commission to Study the Residential Placement of Children. The commission consists of the Secretary of the Department of Health and Human Resources, the Commissioner of the Bureau for Children and Families, the Commissioner for the Bureau for Behavioral Health and Health Facilities, the Commissioner for the Bureau for Medical Services, the State Superintendent of Schools, a representative of local educational agencies, the Director of the Office of Institutional Educational Programs, the Director of the Office of Special Education Programs and Assurance, the Director of the Division of Juvenile Services and the Executive Director of the Prosecuting Attorney's Institute. At the discretion of the West Virginia Supreme Court of Appeals, circuit and family court judges and other court personnel, including the Administrator of the Supreme Court of Appeals and the Director of the Juvenile Probation Services Division, may serve on the commission. These statutory members may further designate additional persons in their respective offices who may attend the meetings of the commission if they are the administrative head of the office or division whose functions necessitate their inclusion in this process. In its deliberations, the commission shall also consult and solicit input from families and service providers.

(c) The Secretary of the Department of Health and Human Resources shall serve as chair of the commission, which shall meet on a quarterly basis at the call of the chair.

(d) At a minimum, the commission shall study:

(1) The current practices of placing children out-of-home and into in-residential placements, with special emphasis on out-of-state placements;

(2) The adequacy, capacity, availability and utilization of existing in-state facilities to serve the needs of children requiring residential placements;

(3) Strategies and methods to reduce the number of children who must be placed in out-of-state facilities and to return children from existing out-of-state placements, initially targeting older youth who have been adjudicated delinquent;

(4) Staffing, facilitation and oversight of multidisciplinary treatment planning teams;

(5) The availability of and investment in community-based, less restrictive and less costly alternatives to residential placements;

(6) Ways in which up-to-date information about in-state placement availability may be made readily accessible to state agency and court personnel, including an interactive secure web site;

(7) Strategies and methods to promote and sustain cooperation and collaboration between the courts, state and local agencies, families and service providers, including the use of inter-agency memoranda of understanding, pooled funding arrangements and sharing of information and staff resources;

(8) The advisability of including no-refusal clauses in contracts with in-state providers for placement of children whose treatment needs match the level of licensure held by the provider;

(9) Identification of in-state service gaps and the feasibility of developing services to fill those gaps, including funding;

(10) Identification of fiscal, statutory and regulatory barriers to developing needed services in-state in a timely and responsive way;

(11) Ways to promote and protect the rights and participation of parents, foster parents and children involved in out-of-home care;

(12) Ways to certify out-of-state providers to ensure that children who must be placed out-of-state receive high quality services consistent with this state's standards of licensure and rules of operation; and

(13) Any other ancillary issue relative to foster care placement.

(e) The commission shall report annually to the Legislative Oversight Commission on Health and Human Resources Accountability its conclusions and recommendations, including an implementation plan whereby:

(1) Out-of-state placements shall be reduced by at least ten percent per year and by at least fifty percent within three years;

(2) Child-serving agencies shall develop joint operating and funding proposals to serve the needs of children and families that cross their jurisdictional boundaries in a more seamless way;

(3) Steps shall be taken to obtain all necessary federal plan waivers or amendments in order for agencies to work collaboratively while maximizing the availability of federal funds;

(4) Agencies shall enter into memoranda of understanding to assume joint responsibilities;

(5) System of care components and cooperative relationships shall be incrementally established at the local, state and regional levels, with links to existing resources, such as family resource networks and regional summits, wherever possible; and

(6) Recommendations for changes in fiscal, statutory and regulatory provisions are included for legislative action.

***§ 49-2-126 The Foster Child Bill of Rights.***

(a) Foster children and children in a kinship placement are active and participating members of the child welfare system and have the following rights:

(1) The right to live in a safe and healthy environment, and the least restrictive environment possible;

(2) The right to be free from physical, sexual, or psychological abuse or exploitation including being free from unwarranted physical restraint and isolation.

(3) The right to receive adequate and healthy food, appropriate and seasonally necessary clothing, and an appropriate travel bag;

(4) The right to receive medical, dental, and vision care, mental health services, and substance use treatment services, as needed;

(5) The right to be placed in a kinship placement, when such placement meets the objectives set forth in this article;

(6) The right, when placed with a foster of kinship family, to be matched as closely as possible with a family meeting the child's needs, including, when possible, the ability to remain with siblings; (7) The right, as appropriate to the child's age and development, to be informed on any medication or chemical substance to be administered to the child;

(8) The right to communicate privately, with caseworkers, guardians ad litem, attorneys, Court Appointed Special Advocates (CASA), the prosecuting attorney, and probation officers;

(9) The right to have and maintain contact with siblings as may be reasonably accommodated, unless prohibited by court order, the case plan, or other extenuating circumstances;

(10) The right to contact the department or the foster care ombudsman, regarding violations of rights, to speak to representatives of these offices confidentially, and to be free from threats, retaliation, or punishment for making complaints;

(11) The right to maintain contact with all previous caregivers and other important adults in his or her life, if desired, unless prohibited by court order or determined by the parent, according to the reasonable and prudent parent standard, not to be in the best interests of the child;

(12) The right to participate in religious services and religious activities of his or her choice to the extent possible;

(13) The right to attend school, and, consistent with the finances and schedule of the foster or kinship family, to participate in extracurricular, cultural, and personal enrichment activities, as appropriate to the child's age and developmental level;

(14) The right to work and develop job skills in a way that is consistent with the child's age and developmental level;

(15) The right to attend Independent Living Program classes and activities if the child meets the age requirements;

(16) The right to attend court hearings and speak directly to the judge, in the court's discretion;

(17) The right not to be subjected to discrimination or harassment;

(18) The right to have access to information regarding available educational options;

(19) The right to receive a copy of, and receive an explanation of, the rights set forth in this section from the child's guardian ad litem, caseworker, and attorney;

(20) The right to receive care consistent with the reasonable and prudent foster parent standard; and

(21) The right to meet with the child's department case worker no less frequently than every 30 days.

(b) The rights provided in this section do not create an independent cause of action. Violations of these rights may be reported to and investigated by the foster care ombudsman. On or before December 15, 2021 and on or before December 15 of every year thereafter, the foster care ombudsman shall submit a written summary of the number and nature of reports received, and investigations conducted in response to said reports, to the Joint Standing Committee on Government and Finance, the West Virginia Supreme Court of Appeals, and the Governor: Provided, That the summary required by this section may not include any personally identifying information of a person named in a report, or a person submitting a report to, the ombudsman.

***§ 49-2-127 The Foster and Kinship Parent Bill of Rights.***

(a) Foster parents and kinship parents play an integral, indispensable, and vital role in the state's effort to care for children displaced from their homes, and such parents and persons have the following rights:

(1) The right to be treated professionally and ethically as the primary provider of foster or kinship care in accordance with the terms of the agreement between the foster or kinship parent and the child placing agency and the department;

(2) The right to maintain the parent's or parents' own family values and beliefs, so long as the values and beliefs of the child are not infringed upon;

(3) The right to receive training, as provided in the agreement with the child placing agency and the department at appropriate intervals;

(4) The right to have an emergency contact 24 hours per day, seven days per week, as set forth in the agreement between the foster or kinship parent and the child placing agency and the department;

(5) The right, prior to the placement of a child, to be notified by the department and the child placing agency of any known issues relative to the child that may jeopardize the health and safety of the foster or kinship family or the child, or alter the manner in which foster or kinship care should be administered;

(6) The right to receive from the department and the child placing agency, prior to placement of a child, all known information relating to the child's behavior, family background, health, history, or special needs and to receive updates relevant to the care of the child as information becomes available;

(7) The right to be provided with a written copy of the individual treatment and service plan concerning the child in the foster or kinship parent's home and to discuss such plan with the case manager, and to receive reasonable notice of any changes to that plan, including timely notice of the need to remove a child from the foster or kinship home and the reasons for the removal;

(8) The right to timely and reasonable notice of the department's case planning and decision-making process regarding the child, as provided in §49-4-101 et seq. of this code, and the right to participate in such process, in the discretion of the court;

(9) The right to communicate with professionals who work with the child, including, but not limited to, therapists, physicians, and teachers, as permitted by the case plan or the court;

(10) The right to be notified, in advance, by the department or the court, of any hearing or review where the case plan or permanency of the child is an issue, including initial and periodic reviews held by the court and permanency plan hearings: Provided, That the right of a foster or kinship parent to attend any hearing is in the discretion of the court;

(11) The right to be provided information regarding the final outcome of an investigation of complaints concerning the operation of a foster or kinship home and to receive an explanation of a corrective action plan or policy violation relating to foster or kinship parents;

(12) The right to be provided with information on how to contact the foster care ombudsman, and to contact the foster care ombudsman's office, regarding alleged violations of rights, to speak to representatives of these offices confidentially, and to be free from threats, retaliation, or punishment for making complaints;

(13) The right to write a letter or submit a report to the court regarding a violation of the rights provided in this section or §49-2-126 of this code, or any concerns over the conduct or performance of the guardian ad litem, a representative of the department, or a representative of the child placing agency, which the court may act upon as it deems in its discretion to be appropriate: Provided, That the court may require the clerk to send copies of a letter or report, submitted to the court pursuant to this subdivision, to the parties in the case prior to the court's review or consideration of such communications;

(14) The right to be considered, where appropriate and consistent with the best interests of the child, as a permanent parent or parents for a child who is available for adoption or legal guardianship;

(15) The right to move to intervene in the pending case, without fear of retaliation, once parental rights have been terminated; and

(16) The right to receive, from the department and the child placing agency, a written copy of the rights set forth in this section and a copy of the contract between the department and the child placing agency.

(b) The rights provided in this section do not create an independent cause of action. Violations of these rights may be reported to and investigated by the foster care ombudsman. On or before December 15, 2021 and on or before December 15 of every year thereafter, the foster care ombudsman shall submit a written summary of the number and nature of reports received, and investigations conducted in response to said reports, to the Joint Standing Committee on Government and Finance, the West Virginia Supreme Court of Appeals, and the Governor: Provided, That the summary required by this section may not include any personally identifying information of a person named in a report or a person submitting a report to the ombudsman.

### *§ 49-2-127a Foster and kinship parent duties; foster parent and kinship parent agreements.*

(a) The West Virginia Legislature finds that foster and kinship parents providing care for children who are in the legal custody of the department have duties and contractual rights. The duties and contractual rights shall be set forth in an agreement between the department and the child placing agency and the foster or kinship parent. The duties of the foster or kinship parent shall include, but are not limited to:

(1) The duty not to violate the rights of the child, provided in § 49-2-126 of this code;

(2) The duty to provide all children in the parent's or parents' care with appropriate food, clothing, shelter, supervision, medical attention, and educational opportunities using the reasonable and prudent foster parent standard as defined in § 49-2-128 of this code;

(3) The duty to complete the training required by the department and the child placing agency and the foster or kinship parent;

(4) The duty to support reunification with the biological family unless it has been determined not to be appropriate by the court;

(5) The duty not to divulge any information concerning the child's case or the child's family to anyone except for the child's caseworker, the child's guardian ad litem, the child's attorney, the child's Court Appointed Special Advocate (CASA) worker, the prosecuting attorney, the probation officer, the multidisciplinary team, the foster care ombudsman, or the child's school or health care provider;

(6) The duty to provide information to the caseworker and the guardian ad litem regarding the child's progress, and to attend multi-disciplinary team meetings, case planning sessions, court hearings, and to advise the court of any issues or concerns, in the court's discretion; and

(7) The duty to teach all children placed in their home age appropriate life skills.

(b) The duties of the department and the child placing agency shall include, but are not limited to:

(1) The duty not to infringe upon the rights of the child, provided in § 49-2-126;

(2) The duty not to infringe upon the rights of the kinship or foster parent, provided in § 49-2-127; and

(3) The duty to abide by the provisions of the agreement required by this section.

(c) The terms of the agreement shall include the rights of the foster or kinship parent provided in § 49-2-127 of this code. The terms of the agreement shall also include, but not be limited to:

(1) Provisions addressing what child care will be provided while the foster or kinship parent attends required training;

(2) Provisions informing the foster or kinship parent of applicable laws and guidelines regarding the responsibilities of the foster or kinship parent and provisions requiring that the foster or kinship parent receive regular updates on changes to such laws and guidelines in a timely manner;

(3) Provisions regarding required and available training for the foster or kinship parent;

(4) Provisions addressing payment to the foster or kinship parent;

(5) Provisions naming and addressing the emergency 24-hour contact provided by the child placing agency and the department;

(6) Provisions addressing travel, including out-of-state and overnight travel;

(7) Provisions addressing child care for the child;

(8) Provisions addressing when a placement may be terminated by the foster or kinship parent, the child placing agency, or the department;

(9) Provisions addressing medical care for the child, including how to obtain medical consent for procedures; and

(10) Provisions addressing how complaints against the foster or kinship parent will be handled and adjudicated, including provisions for appeal and review of the adjudication.

(d) The agreement may contain such other terms and provisions, not inconsistent with this article, as may be negotiated by the parties and as may be in the best interests of the child.

(e) The requirements of this section apply to agreements, entered into on or after the effective date of this section. Agreements entered into pursuant to this section shall expire on July 1 of each year and shall be renewed by the parties as necessary.

(f) The duties and requirements provided in this section do not create an independent cause of action, including a cause of action for breach of contract. Violations of these rights may be reported to and investigated by the foster care ombudsman. On or before December 15, 2021 and on or before December 15 of every year thereafter, the foster care ombudsman shall submit a written summary of the number and nature of reports received, and investigations conducted in response to said reports, to the Joint Standing Committee on Government and Finance, the West Virginia Supreme Court of Appeals, and the Governor: Provided, That the summary required by this section may not include any personally identifying information of a person named in a report or a person submitting a report to the ombudsman.

***§ 49-2-128 Reasonable and prudent foster parent standard.***

(a) As used in this section, the following terms have the following meanings:

“Age-appropriate” means activities or items that are generally accepted as suitable for children of the same chronological age or level of maturity. Age-appropriateness is based on the development of cognitive, emotional, physical, and behavioral capacity that is typical for an age or age group.

“Caregiver” means a foster parent, kinship parent, or a designated official in a residential treatment facility.

"Reasonable and prudent foster parent standard" means the standard characterized parental decisions that maintain the child's health, safety, and best interests, while at the same time encouraging the child's emotional and developmental growth, that a caregiver shall use when determining whether to allow a child to participate in extracurricular, enrichment, and social activities.

(b) Each child who comes into care under this chapter is entitled to participate in age-appropriate extracurricular, enrichment, and social activities.

(c) Caregivers shall use a reasonable and prudent foster parent standard in determining whether to give permission for a child in out-of-home care to participate in extracurricular, enrichment, and social activities. When using the reasonable and prudent foster parent standard, the caregiver shall consider:

(1) The child's age, maturity, and developmental level, to maintain the overall health and safety of the child;

(2) The potential risk factors and the appropriateness of the extracurricular, enrichment, and social activity;

(3) The best interest of the child based on information known to the caregiver;

(4) The importance of encouraging the child's emotional and developmental growth;

(5) The importance of providing the child with the most family-like living experience possible; and

(6) The behavioral history of the child and the child's ability to safely participate in the proposed activity, as with any other child.

(d) Child placing agencies and residential treatment facilities shall have policies consistent with this section and shall promote and protect the ability of children to participate in age-appropriate extracurricular, enrichment, and social activities.

(e) A foster or kinship parent may use persons to care for or babysit for the child or permit overnight stays outside of the home using the reasonable and prudent foster parent standard.

(f) There is a rebuttable presumption that a caregiver has acted as a reasonable and prudent foster parent.

(g) A caregiver is not liable for harm caused to a child in his or her care who participates in an activity approved by the caregiver, provided that the caregiver has acted as a reasonable and prudent foster parent, unless the foster parent commits an act or omission that is an intentional tort or conduct that is willful, wanton, grossly negligent, reckless, or criminal.

***§ 49-2-129 Transitional living services, scattered-site living arrangements, and supervised group settings; eligibility criteria.***

(a) The department shall establish minimum standards, by legislative rule, for transitional living services, such as scattered-site living arrangements and supervised group settings, to which all child placing agencies or child welfare agencies who provide this service must conform.

(b) Agencies shall establish eligibility criteria for serving transitioning children and adults and shall require, at a minimum, the following:

(1) That a transitioning child or adult receiving a transitional living placement is between 16 and 26 years of age;

(2) Written permission from the child's parents or guardian for a child less than 18 years of age to enter a scattered-site living arrangement;

(3) A written service agreement with a transitioning adult entering a transitional living arrangement;

(4) A determination by an agency that a transitioning child or adult has shown that he or she is stable, mature, and responsible enough for entry into the determined level of transitional living arrangement;

(5) A life skills assessment by an agency of the transitioning child or adult, prior to placing him or her in a transitional living arrangement, and an annual reassessment; and

(6) A written transition plan, developed with the transitioning child or adult, that provides an educational, training, or employment program or a plan for the child or adult to pursue employment while in transitional living.

(c) The agency and transitioning child or adult shall determine if a roommate is appropriate for the child or adult prior to placement in a transitional living setting. The roommate must be able to support himself or herself and contribute at least a pro rata share of the living expenses for the setting.

(d) An agency shall document face-to-face contact and hours spent with a transitioning child or adult in a transitional living setting in the service plan that meet the child's or adult's needs and program level.

(e) After a child or adult is in a transitional living placement, an agency shall assess the child's or adult's progress in acquiring basic living skills at a minimum of once every six months.

(f) An agency shall develop and implement policies and procedures to ensure that any child or adult in a transitional living setting receives training and guidance on appropriate health screening and services, including medical and dental screening and services.

(g) An agency shall develop policies and procedures for assisting a transitioning child or adult in searching for an appropriate dwelling that will be used as a scattered-site living setting, that meets the following criteria:

(1) The dwelling is safe and affordable;

(2) The dwelling has a working telephone or other means of communication in an emergency;

(3) The dwelling has appropriate equipment for indoor cooking; and

(4) The dwelling has an appropriate water source for cooking, cleaning, and bathing.

(h) The department shall promulgate legislative rules, including emergency rules if necessary, to implement the provisions of this section.

### *§ 49-2-130 Limitation of liability; mandatory errors and omissions insurance.*

(a) Every child welfare agency shall obtain a policy of insurance in an amount not less than $1 million per incident insuring the person or entity and every employee, against loss from the liability imposed by law for damages arising from any error or omission in the provision of child placement services.

(b) A child welfare agency providing programs or services is not liable for civil damages in excess of $1,000,000, per incident, unless the damages or injuries are intentionally or maliciously inflicted.

(c) Every person or entity required by this section to obtain a policy of insurance shall furnish proof of the existence of the policy to the department on or before January 1 of each calendar year.

(d) Any person or entity who fails to secure a policy of insurance before providing child placement services is not entitled to the limited liability created by subsection (b) of this section.

(e) An act of sexual assault or sexual abuse shall constitute an incident.

## PART II. HOME-BASED FAMILY PRESERVATION ACT

### *§ 49-2-201 Findings and purpose.*

The Legislature finds that there exists a need in this state to assist dysfunctional families by providing nurture and care to those families' children as an alternative to removing children from the families.

The Legislature also finds that the family is the primary social institution responsible for meeting the needs of children and that the state has an obligation to assist families in this regard.

The Legislature further finds that children have significant emotional and social ties to the natural or surrogate family beyond basic care and nurture for which the family is responsible.

The purpose of this article is to establish a pilot program to evaluate the utility of providing intensive intervention with the families of children that are at risk of being removed from the home. For these limited purposes, the department is authorized to use available appropriate funds for that intervention service, but only to the extent that moneys would normally be available for the removal and placement of the particular child at risk.

### *§ 49-2-202 When family preservation services required.*

Home-based family preservation services are required in all cases where the removal of a child or children is seriously being considered, whether from a natural home or a surrogate home, wherein a child or children have lived for a substantial period of time. However, those services are not required when the child appears in imminent danger of serious bodily or serious emotional injury.

### *§ 49-2-203 Caseload limits for home-based preservation services.*

For purposes of this article, no contractor employee of the department may exceed three families during any period of time when that contractor employee is engaged in providing intensive, short term home-based family preservation intervention. In addition, no caseload may exceed six families during any period of time when home-based aftercare is provided pursuant to this article. When providing either type of home-based family preservation services to any family, the department or contractor shall provide trained personnel who shall be available during nonworking hours to assist families on an emergency basis.

### *§ 49-2-204 Situational criteria requiring service.*

The services required by this article shall be made available to any dysfunctional family in which there exists an imminent risk of placement of at least one child outside the home as the result of abuse, neglect, dependency or delinquency or any emotional and behavioral problems. Payment for contractual services shall be on a cost-per-family basis. Any renewal of a contract shall be based on performance.

### *§ 49-2-205 Service delivery through service contracts; accountability.*

The services required by this article which are not practically deliverable directly from the department may be subcontracted to professionally qualified private individuals, associations, agencies, corporations, partnerships or groups. The service provider shall be required to submit monthly activity reports as to any services rendered to the

department of human services. The activity reports shall include project evaluation in relation to individual families being served as well as statistical data concerning families that are referred for services which are not served due to unavailability of resources. The costs of program evaluation are an allowable cost consideration in any service contract negotiated in accordance with this article. The department shall conduct a thorough investigation of the contractors utilized by the department pursuant to this article.

### *§ 49-2-206 Special services to be provided.*

The costs of providing special services to families receiving regular services in accordance with this article are allowable to the extent those goods and services are justified pursuant to carrying out the purposes of this article. Those special services may include, but are not limited to, homemaker assistance, food, clothing, educational materials, respite care and recreational or social activities.

### *§ 49-2-207 Development of home-based family preservation services.*

The department is authorized to use appropriate state, federal, and/or private funds within its budget for the provision of family preservation and reunification services. Appropriated state funding made available through capture of additional federal funds shall be utilized to provide family preservation and reunification services as described in this article. Costs of providing home-based services described in this article shall not exceed the costs of out-of-home care which would be incurred otherwise.

## PART VIII. REPORTS OF CHILDREN SUSPECTED OF ABUSE.

### *§ 49-2-801 Purpose.*

It is the purpose of this article through the complete reporting of child abuse and neglect:

(1) To protect the best interests of the child;

(2) To offer protective services in order to prevent any further harm to the child or any other children living in the home;

(3) To stabilize the home environment, to preserve family life whenever possible;

(4) To promote adult responsibility for protecting children; and

(5) To encourage cooperation among the states to prevent future incidents of child abuse and neglect and in dealing with the problems of child abuse and neglect.

***§ 49-2-802 Establishment of child protective services; general duties and powers; administrative procedure; immunity from civil liability; cooperation of other state agencies.***

(a) The department shall establish or designate in every county a local child protective services office to perform the duties and functions set forth in this article.

(b) The local child protective services office shall investigate all reports of child abuse or neglect. Under no circumstances may investigating personnel be relatives of the accused, the child or the families involved. In accordance with the local plan for child protective services, it shall provide protective services to prevent further abuse or neglect of children and provide for or arrange for and coordinate and monitor the provision of those services necessary to ensure the safety of children. The local child protective services office shall be organized to maximize the continuity of responsibility, care, and service of individual workers for individual children and families. Under no circumstances may the secretary or his or her designee promulgate rules or establish any policy which restricts the scope or types of alleged abuse or neglect of minor children which are to be investigated or the provision of appropriate and available services.

(c) Each local child protective services office shall:

(1) Receive or arrange for the receipt of all reports of children known or suspected to be abused or neglected on a 24-hour, seven-day-a-week basis and cross-file all reports under the names of the children, the family, and any person substantiated as being an abuser or neglecter by investigation of the Department of Health and Human Resources, with use of cross-filing of the person's name limited to the internal use of the department: Provided, That local child protective services offices shall disclose the names of alleged abusers pursuant to § 49-2-802(c)(4) of this code;

(2) Provide or arrange for emergency children's services to be available at all times;

(3) Upon notification of suspected child abuse or neglect, commence or cause to be commenced a thorough investigation of the report and the child's environment. As a part of this response, within 14 days there shall be a face-to-face interview with the child or children and the development of a protection plan, if necessary, for the safety or health of the child, which may involve law-enforcement officers or the court;

(4) Make efforts as soon as practicable to determine the military status of parents whose children are subject to abuse or neglect allegations. If the office determines that a parent or guardian is in the military, the department shall notify a Department of Defense family advocacy program that there is an allegation of abuse and neglect that is screened in and open for investigation that relates to that military parent or guardian;

(5) Respond immediately to all allegations of imminent danger to the physical well-being of the child or of serious physical abuse. As a part of this response, within 72 hours there shall be a face-to-face interview with the child or children and the development of a protection plan, which may involve law-enforcement officers or the court; and

(6) In addition to any other requirements imposed by this section, when any matter regarding child custody is pending, the circuit court or family court may refer allegations of child abuse and neglect to the local child protective services office for investigation of the allegations as defined by this chapter and require the local child protective services office to submit a written report of the investigation to the referring circuit court or family court within the time frames set forth by the circuit court or family court.

(d) In those cases in which the local child protective services office determines that the best interests of the child require court action, the local child protective services office shall initiate the appropriate legal proceeding.

(e) The local child protective services office shall be responsible for providing, directing, or coordinating the appropriate and timely delivery of services to any child suspected or known to be abused or neglected, including services to the child's family and those responsible for the child's care.

(f) To carry out the purposes of this article, all departments, boards, bureaus, and other agencies of the state or any of its political subdivisions and all agencies providing services under the local child protective services plan shall, upon request, provide to the local child protective services office any assistance and information as will enable it to fulfill its responsibilities.

(g)(1) In order to obtain information regarding the location of a child who is the subject of an allegation of abuse or neglect, the Secretary of the Department of Health and Human Resources may serve, by certified mail or personal service, an administrative subpoena on any corporation, partnership, business, or organization for the production of information leading to determining the location of the child.

(2) In case of disobedience to the subpoena, in compelling the production of documents, the secretary may invoke the aid of:

(A) The circuit court with jurisdiction over the served party if the person served is a resident; or

(B) The circuit court of the county in which the local child protective services office conducting the investigation is located if the person served is a nonresident.

(3) A circuit court shall not enforce an administrative subpoena unless it finds that:

(A) The investigation is one the Division of Child Protective Services is authorized to make and is being conducted pursuant to a legitimate purpose;

(B) The inquiry is relevant to that purpose;

(C) The inquiry is not too broad or indefinite;

(D) The information sought is not already in the possession of the Division of Child Protective Services; and

(E) Any administrative steps required by law have been followed.

(4) If circumstances arise where the secretary, or his or her designee, determines it necessary to compel an individual to provide information regarding the location of a child who is the subject of an allegation of abuse or neglect, the secretary, or his or her designee, may seek a subpoena from the circuit court with jurisdiction over the individual from whom the information is sought.

(h) No child protective services caseworker may be held personally liable for any professional decision or action taken pursuant to that decision in the performance of his or her official duties as set forth in this section or agency rules promulgated thereupon. However, nothing in this subsection protects any child protective services worker from any liability arising from the operation of a motor vehicle or for any loss caused by gross negligence, willful and wanton misconduct, or intentional misconduct.

***§ 49-2-803 Persons mandated to report suspected abuse and neglect; requirements.***

(a) Any medical, dental, or mental health professional, Christian Science practitioner, religious healer, school teacher or other school personnel, social service worker, child care or foster care worker, emergency medical services personnel, peace officer or law-enforcement official, humane officer, member of the clergy, circuit court judge, family court judge, employee of the Division of Juvenile Services, magistrate, youth camp administrator or counselor, employee, coach or volunteer of an entity that provides organized activities for children, or commercial film or photographic print processor who has reasonable cause to suspect that a child is neglected or abused, including sexual abuse or sexual assault, or observes the child being subjected to conditions that are likely to result in abuse or neglect shall immediately, and not more than 24 hours after suspecting this abuse or neglect, report the circumstances to the Department of Health and Human Resources. In any case where the reporter believes that the child suffered serious physical abuse or sexual abuse or sexual assault, the reporter shall also immediately report to the State Police and any law-enforcement agency having jurisdiction to investigate the complaint. Any person required to report under this article who is a member of the staff or volunteer of a public or private institution, school, entity that provides organized activities for children, facility, or agency shall also immediately notify the person in charge of the institution, school, entity that provides organized activities for children, facility, or agency, or a designated agent thereof, who may supplement the report or cause an additional report to be made: Provided, That notifying a person in charge, supervisor, or superior does not exempt a person from his or her mandate to report suspected abuse or neglect.

(b) County boards of education and private school administrators shall provide all employees with a written statement setting forth the requirements contained in this section and shall obtain and preserve a signed acknowledgment from school employees that they have received and understand the reporting requirement.

(c) Nothing in this article is intended to prevent individuals from reporting suspected abuse or neglect on their own behalf. In addition to those persons and officials specifically required to report situations involving suspected abuse or neglect of children, any other person may make a report if that person has reasonable cause to suspect that a child has been abused or neglected in a home or institution or observes the child being subjected to conditions or circumstances that would reasonably result in abuse or neglect.

(d) The provisions of this section are not applicable to persons under the age of 18.

***§ 49-2-804 Notification of disposition of reports.***

The Department of Health and Human Resources shall continue to develop, update and implement a procedure to notify any person mandated to report suspected child abuse and neglect pursuant to section eight hundred three of this article, of whether an investigation into the reported suspected abuse or neglect has been initiated and when the investigation is completed.

***§ 49-2-805 Educational programs; requirements.***

Subject to appropriation in the budget, the department shall conduct educational and training programs for persons required to report suspected abuse or neglect, and the general public, as well as implement evidence-based programs that reduce incidents of child maltreatment including sexual abuse. Training for persons require to report and the general public shall include:

(1) Indicators of child abuse and neglect;

(2) Tactics used by sexual abusers;

(3) How and when to make a report; and

(4) Protective factors that prevent abuse and neglect in order to promote adult responsibility for protecting children, encourage maximum reporting of child abuse and neglect, and to improve communication, cooperation and coordination among all agencies involved in the identification, prevention and treatment of the abuse and neglect of children.

***§ 49-2-806 Mandatory reporting of suspected animal cruelty by child protective service workers.***

In the event a child protective service worker, in response to a report mandated by section eight hundred two and eight hundred three of this article, forms a reasonable suspicion that an animal is the victim of cruel or inhumane treatment, he or she shall report the suspicion and the basis therefor to the county humane officer provided under section one, article ten, chapter seven of this code within twenty-four hours of the response to the report.

### *§ 49-2-807 Mandatory reporting to medical examiner or coroner; postmortem investigation.*

Any person or official who is required pursuant to section eight hundred three of this article to report cases of suspected child abuse or neglect and who has reasonable cause to suspect that a child has died as a result of child abuse or neglect, shall report that fact to the appropriate medical examiner or coroner. Upon the receipt of that report, the medical examiner or coroner shall cause an investigation to be made and report his or her findings to the police, the appropriate prosecuting attorney, the local child protective service agency and, if the institution making a report is a hospital, to the hospital.

### *§ 49-2-808 Photographs and X rays.*

Any person required to report cases of children suspected of being abused and neglected may take or cause to be taken, at public expense, photographs of the areas of trauma visible on a child and, if medically indicated, cause to be performed radiological examinations of the child. Any photographs or X rays taken shall be sent to the appropriate child protective service as soon as possible.

### *§ 49-2-809 Reporting procedures.*

(a) Reports of child abuse and neglect pursuant to this article shall be made immediately to the department of child protective services by a method established by the Bureau for Social Services: Provided, That if the method for reporting is web-based, the Bureau for Social Services shall maintain a system for addressing emergency situations that require immediate attention and shall be followed by a written report within 48 hours if so requested by the receiving agency. The Bureau for Social Services shall establish and maintain a 24-hour, seven-day-a-week telephone number to receive calls reporting suspected or known child abuse or neglect.

(b) The department shall have a redundancy for its system in the event of an outage to receive reports. This redundancy system shall be transparent, meaning that it shall allow for reporting in the same means as if the outage had not occurred and no time delay shall occur from when the outage occurs to when the redundancy system begins to operate. This redundancy system shall be operational no later than July 1, 2023. If the department contends that it currently has a redundancy system, it shall describe the system, provide an operational date for the system, and explain why calls to centralized intake were unanswered to the Joint Committee on Government and Finance by July 1, 2023.

(c) A copy of any report of serious physical abuse, sexual abuse, or assault shall be forwarded by the department to the appropriate law-enforcement agency, the prosecuting attorney, or the coroner or medical examiner’s office. All reports under this article are confidential. Reports of known or suspected institutional child abuse or neglect shall be made and received as all other reports made pursuant to this article.

(d) The department shall annually submit a report in an electronic format, via the legislative webpage, on July 1 to the Joint Committee on Government and Finance, which shall contain: How many calls were made to centralized intake on a per county basis, how many calls were referred to centralized intake on a per county basis, how many calls were screened out centralized intake on a per county basis, and the time from referral to investigation on a per county basis.

### *§ 49-2-810 Immunity from liability.*

Any person, official, or institution participating in good faith in any act permitted or required by this article is immune from any civil or criminal liability that otherwise might result by reason of those actions, including individuals making good faith reports of suspected or known instances of child abuse or neglect, or who otherwise provide information or assistance, including medical evaluations or consultations, in connection with a report, investigation or legal intervention pursuant to a good faith report of child abuse or neglect.

### *§ 49-2-811 Abrogation of privileged communications; exception.*

The privileged quality of communications between husband and wife and between any professional person and his or her patient or his or her client, except that between attorney and client, is hereby abrogated in situations involving suspected or known child abuse or neglect.

### *§ 49-2-812 Failure to report; penalty.*

(a) Any person, official or institution required by this article to report a case involving a child known or suspected to be abused or neglected, or required by section eight hundred nine of this article to forward a copy of a report of serious injury, who knowingly fails to do so or knowingly prevents another person acting reasonably from doing so, is guilty of a misdemeanor and, upon conviction, shall be confined in jail not more than ninety days or fined not more than $5,000, or both fined and confined.

(b) Any person, official or institution required by this article to report a case involving a child known or suspected to be sexually assaulted or sexually abused, or student known or suspected to have been a victim of any non-consensual sexual contact, sexual intercourse or sexual intrusion on school premises, who knowingly fails to do so or knowingly prevents another person acting reasonably from doing so, is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail not more than six months or fined not more than $10,000, or both.

### *§ 49-2-813 Statistical index; reports.*

The Department of Health and Human Resources shall maintain a statewide child abuse and neglect statistical index of all substantiated allegations of child abuse or neglect cases to include information contained in the reports required under this article and any other information considered appropriate by the Secretary of the Department of

Health and Human Resources. Nothing in the statistical data index maintained by the Department of Health and Human Resources may contain information of a specific nature that would identify individual cases or persons. Notwithstanding section two hundred one, article four of this chapter, the Department of Health and Human Resources shall provide copies of the statistical data maintained pursuant to this subsection to the State Police child abuse and neglect investigations unit to carry out its responsibilities to protect children from abuse and neglect.

***§ 49-2-814 Task Force on Prevention of Sexual Abuse of Children.***

(a) This section may be referred to as “Erin Merryn’s Law”.

(b) The Task Force on Prevention of Sexual Abuse of Children is established. The task force consists of the following members:

(1) The Chair of the West Virginia Senate Committee on Health and Human Resources, or his or her designee;

(2) The Chair of the House of Delegates Committee on Health and Human Resources, or his or her designee;

(3) The Chair of the West Virginia Senate Committee on Education, or his or her designee;

(4) The Chair of the House of Delegates Committee on Education, or his or her designee;

(5) One citizen member appointed by the President of the Senate;

(6) One citizen member appointed by the Speaker of the House of Delegates;

(7) One citizen member, who is a survivor of child sexual abuse, appointed by the Governor;

(8) The President of the State Board of Education, or his or her designee;

(9) The State Superintendent of Schools, or his or her designee;

(10) The Secretary of the Department of Health and Human Resources, or his or her designee;

(11) The Director of the Prosecuting Attorney’s Institute, or his or her designee;

(12) One representative of each statewide professional teachers’ organization, each selected by the leader of his or her respective organization;

(13) One representative of the statewide school service personnel organization, selected by the leader of the organization;

(14) One representative of the statewide school principals' organization, appointed by the leader of the organization;

(15) One representative of the statewide professional social workers' organization, appointed by the leader of the organization;

(16) One representative of a teacher preparation program of a regionally accredited institution of higher education in the state, appointed by the Chancellor of the Higher Education Policy Commission;

(17) The Chief Executive Officer of the Center for Professional Development, or his or her designee;

(18) The Director of Prevent Child Abuse West Virginia, or his or her designee;

(19) The Director of the West Virginia Child Advocacy Network, or his or her designee;

(20) The Director of the West Virginia Coalition Against Domestic Violence, or his or her designee;

(21) The Director of the West Virginia Foundation for Rape Information and Services, or his or her designee;

(22) The Administrative Director of the West Virginia Supreme Court of Appeals, or his or her designee;

(23) The Executive Director of the West Virginia Sheriffs' Association, or his or her designee;

(24) One representative of an organization representing law enforcement, appointed by the Superintendent of the West Virginia State Police; and

(25) One practicing school counselor appointed by the leader of the West Virginia School Counselors Association.

(c) To the extent practicable, members of the task force shall be individuals actively involved in the fields of child abuse and neglect prevention and child welfare.

(d) At the joint call of the House of Delegates and Senate Education Committee Chairs, the task force shall convene its first meeting and by majority vote of members present elect presiding officers. Subsequent meetings shall be at the call of the presiding officer.

(e) The task force shall make recommendations for decreasing incidence of sexual abuse of children in West Virginia. In making those recommendations, the task force shall:

(1) Gather information regarding sexual abuse of children throughout the state;

(2) Receive related reports and testimony from individuals, state and local agencies, community-based organizations, and other public and private organizations;

(3) Create goals for state education policy that would prevent sexual abuse of children;

(4) Create goals for other areas of state policy that would prevent sexual abuse of children; and

(5) Submit a report with its recommendations to the Governor and the Legislature.

(f) The recommendations may include proposals for specific statutory changes and methods to foster cooperation among state agencies and between the state and local governments. The task force shall consult with employees of the Bureau for Children and Family Services, the Division of Justice and Community Services, the West Virginia State Police, the State Board of Education, and any other state agency or department as necessary to accomplish its responsibilities under this section.

(g) Task force members serve without compensation and do not receive expense reimbursement.

## ARTICLE 3. SPECIALIZED ADVOCACY PROGRAMS.

### *§ 49-3-101 Child advocacy centers; services; requirements.*

Child advocacy centers provide the following services to children in the child welfare program in West Virginia:

(1) Operation of a child-appropriate or child-friendly facility that provides a comfortable, private setting that is both physically and psychologically safe for clients.

(2) Participation in a multidisciplinary team for response to child abuse allegations.

(3) Operate a legal entity responsible for program and fiscal operations that has established and implemented basic sound administrative practices.

(4) Promote policies, practices and procedures that are culturally competent and diverse. Cultural competency is defined as the capacity to function in more than one culture, requiring the ability to appreciate, understand and interact with members of diverse populations within the local community.

(5) Conduct forensic interviews in a manner which is of a neutral, fact-finding nature and coordinated to avoid duplicative interviewing.

(6) Provide specialized medical evaluation and treatment made available to clients as part of the team response, either at the CAC or through coordination and referral with other specialized medical providers.

(7) Offer therapeutic intervention through specialized mental health services made available as part of the team response, either at the child advocacy center or through coordination and referral with other appropriate treatment providers.

(8) Victim support and advocacy as part of the team response, either at the child advocacy center or through coordination with other providers, throughout the investigation and subsequent legal proceedings.

(9) Conducting team discussions and providing information sharing regarding the investigation, case status and services needed by the child and family are to occur on a routine basis.

(10) Developing and implementing a system for monitoring case progress and tracking case outcomes for team components.

(11) May establish a safe exchange location for children and families who have a parenting agreement or an order providing for visitation or custody of the children that require a safe exchange location.

***§ 49-3-102 Court appointed special advocate; operations.***

A court appointed special advocate (CASA) shall operate as follows:

(1) Standards: CASA programs shall be members in good standing with the West Virginia Court Appointed Special Advocate Association, Inc., and the National Court Appointed Special Advocates Association and adhere to all standards set forth by these entities.

(2) Organizational capacity: A designated legal entity is responsible for program and fiscal operations has been established and implements basic sound administrative practice.

(3) Cultural competency and diversity: CASA programs shall promote policies, practices and procedures that are culturally competent. “Cultural competency” is defined as the capacity to function in more than one culture, requiring the ability to appreciate, understand and interact with members of diverse populations within the local community.

(4) Case management: CASA programs must utilize a uniform case management system to monitor case progress and track outcomes.

(5) Case review: CASA volunteers shall meet with CASA staff on a routine basis to discuss case status and outcomes.

(6) Training: Court appointed special advocates shall serve as volunteers without compensation and shall receive training consistent with state and nationally developed standards.

## ARTICLE 4. COURT ACTIONS.

## PART I. GENERAL PROVISIONS.

### § 49-4-101 *Exercise of powers and jurisdiction by judge in vacation.*

The powers and jurisdiction of the court, under the provisions of this chapter, may be exercised by the judge in vacation.

### § 49-4-102 *Procedure for appealing decisions.*

Cases under this chapter, if tried in any inferior court, may be reviewed by writ of error or appeal to the circuit court, and if tried or reviewed in a circuit court, by writ of error or appeal to the Supreme Court of Appeals.

### § 49-4-103 *Proceedings may not be evidence against child or be published; adjudication is not a conviction and not a bar to civil service eligibility.*

Any evidence given in any cause or proceeding under this chapter, or any order, judgment or finding therein, or any adjudication upon the status of juvenile delinquent heretofore made or rendered, may not in any civil, criminal or other cause or proceeding whatever in any court, be lawful or proper evidence against the child for any purpose whatsoever except in subsequent cases under this chapter involving the same child; nor may the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court; nor may any adjudication upon the status of any child by a juvenile court operate to impose any of the civil disabilities ordinarily imposed by conviction, nor may any child be deemed a criminal by reason of the adjudication, nor may the adjudication be deemed a conviction, nor may any adjudication operate to disqualify a child in any future civil service examination, appointment, or application.

### § 49-4-104 *General provisions relating to court orders regarding custody; rules.*

(a) The Supreme Court of Appeals, in consultation with the Department of Health and Human Resources and the Division of Juvenile Services in order to eliminate unnecessary state funding of out-of-home placements where federal funding is available, shall develop and disseminate form court orders to effectuate chapter forty-nine of this code which authorize disclosure and transfer of juvenile records between agencies while requiring maintenance of confidentiality, Child Welfare Services, 42 U.S.C. § 620, *et seq.*, and 42 U.S.C. § 670, *et seq.*, relating to the promulgation of uniform court orders for placement of minor children and the rules promulgated thereunder, for use in the courts of the state.

(b) Judges and magistrates, upon being supplied the form orders required by subsection (a) of this section, shall act to ensure the proper form order is entered in the case so as to allow federal funding of eligible out-of-home placements.

### *§ 49-4-105 Hearing required to determine "reasonable efforts."*

A hearing by a circuit court of competent jurisdiction is required to determine whether or not "reasonable efforts" have been made to stabilize and maintain the family situation before any child may be placed outside the home, except that in the event any child appears in imminent danger of serious bodily or emotional injury or death in any home, a post-removal hearing shall be substituted for the pre-removal hearing.

### *§ 49-4-106 Limitation on out-of-home placements.*

Before any child may be directed for placement in a particular facility or for services of a child welfare agency licensed by the department, a court shall make inquiry into the bed space of the facility available to accommodate additional children and the ability of the child welfare agency to meet the particular needs of the child. A court may not order the placement of a child in a particular facility, including status offender facilities operated by the Division of Juvenile Services, if it has reached its licensed capacity or order conditions on the placement of the child which conflict with licensure regulations applicable to the facility promulgated pursuant to article two of this chapter and articles one-a, nine and seventeen, chapter twenty-seven of this code. Further, a child welfare agency is not required to accept placement of a child at a particular facility if the facility remains at licensed capacity or is unable to meet the particular needs of the child. A child welfare agency is not required to make special dispensation or accommodation, reorganize existing child placement, or initiate early release of children in placement to reduce actual occupancy at the facility.

### *§ 49-4-107 Penalties.*

A person who violates an order, rule, or regulation made under the authority of this chapter, or who violates this chapter for which punishment has not been specifically provided, is guilty of a misdemeanor and, upon conviction shall be fined not less than $10 nor more than $100, or confined in jail not less than five days nor more than six months, or both fined and confined.

### *§ 49-4-108 Payment of services.*

(a) At any time during any proceedings brought pursuant to this chapter, the court may upon its own motion, or upon a motion of any party, order the Department of Health and Human Resources to pay the Medicaid rates for professional services rendered by a health care professional to a child or other party to the proceedings. Professional services include, but are not limited to, treatment, therapy, counseling, evaluation, report preparation, consultation and preparation of expert testimony. A health care professional shall be paid by the Department of Health and Human Resources upon completion of services and submission of a final report or other information and documentation as required by the policies implemented by the Department of Health and Human Resources: Provided, That if the service is covered by Medicaid and the service is not provided within 30 days, the court may order the service to be provided by a provider at a rate higher than the Medicaid rate. The department may object and request to be heard,

after which the court shall issue findings of fact and conclusions of law supporting its decision.

(b) At any time during any proceeding brought pursuant to this chapter, the court may upon its own motion, or upon a motion of any party, order the Department of Health and Human Resources to pay for socially necessary services rendered by an entity who has agreed to comply with § 9-2-6(21) of this code. The Department of Health and Human Resources shall set the reimbursement rates for the socially necessary services: Provided, That if services are not provided within 30 days, the court may order a service to be provided by a provider at a rate higher than the department established rate. The department may object and request to be heard, after which the court shall issue findings of fact and conclusions of law supporting its decision.

***§ 49-4-109 Guardianship of estate of child unaffected.***

This chapter may not be construed to give the guardian appointed hereunder the guardianship of the estate of the child, or to change the age of minority for any other purpose except the custody of the child.

The guardian of the estate of a child committed to guardianship hereunder shall furnish, when and in the form as may be required, full information concerning the property of the child to the state department or to the court or judge before whom the case of the child is heard.

***§ 49-4-110 Foster care; quarterly status review; transitioning adults; annual permanency hearings.***

(a) For each child who remains in foster care as a result of a juvenile proceeding or as a result of a child abuse and neglect proceeding, the circuit court with the assistance of the multidisciplinary treatment team shall conduct quarterly status reviews in order to determine the safety of the child, the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to and safety maintained in the home or placed for adoption or legal guardianship. Quarterly status reviews shall commence three months after the entry of the placement order. The permanency hearing provided in subsection (c) of this section may be considered a quarterly status review.

(b) For each transitioning adult as that term is defined in section two hundred two, article one of this chapter who remains in foster care, the circuit court shall conduct status review hearings as described in subsection (a) of this section once every three months until permanency is achieved.

(c) For each child or transitioning adult who continues to remain in foster care, the circuit court shall conduct a permanency hearing no later that twelve months after the date the child or transitioning adult is considered to have entered foster care, and at least

once every twelve months thereafter until permanency is achieved. For purposes of permanency planning for transitioning adults, the circuit court shall make factual findings and conclusions of law as to whether the department made reasonable efforts to finalize a permanency plan to prepare a transitioning adult for emancipation or independence or another approved permanency option such as, but not limited to, adoption or legal guardianship pursuant to the West Virginia Guardianship and Conservatorship Act.

(d) Nothing in this section may be construed to abrogate the responsibilities of the circuit court from conducting required hearings as provided in other provisions of this code, procedural court rules, or setting required hearings at the same time.

***§ 49-4-111 Criteria and procedure for temporary removal of child from foster home; foster care arrangement termination; notice of child's availability for placement; adoption; sibling placements; limitations.***

(a) The department may temporarily remove a child from a foster home based on an allegation of abuse or neglect, including sexual abuse, that occurred while the child resided in the home. If the department determines that reasonable cause exists to support the allegation, the department shall remove all foster children from the arrangement, preclude contact between the children and the foster parents, provide written notice to the multidisciplinary treatment team members and schedule an emergency team meeting to address placement options. If, after investigation, the allegation is determined to be true by the department or after a judicial proceeding a court finds the allegation to be true or if the foster parents fail to contest the allegation in writing within twenty calendar days of receiving written notice of the allegations, the department shall permanently terminate all foster care arrangements with the foster parents. If the department determines that the abuse occurred due to no act or failure to act on the part of the foster parents and that continuation of the foster care arrangement is in the best interests of the child, the department may, in its discretion, elect not to terminate the foster care arrangement or arrangements.

(b) When a child has been placed in a foster care arrangement for a period in excess of eighteen consecutive months, and the department determines that the placement is a fit and proper place for the child to reside, the foster care arrangement may not be terminated unless the termination is in the best interest of the child and:

(1) The foster care arrangement is terminated pursuant to subsection (a) of this section;

(2) The foster care arrangement is terminated due to the child being returned to his or her parent or parents;

(3) The foster care arrangement is terminated due to the child being united or reunited with a sibling or siblings;

(4) The foster parent or parents agree to the termination in writing;

(5) The foster care arrangement is terminated at the written request of a foster child who has attained the age of fourteen; or

(6) A court orders the termination upon a finding that the department has developed a more suitable long-term placement for the child upon hearing evidence in a proceeding brought by the department seeking removal and transfer.

(c) When a child has been residing in a foster home for a period in excess of six consecutive months in total and for a period in excess of thirty days after the parental rights of the child's biological parents have been terminated and the foster parents have not made an application to the department to establish an intent to adopt the child within thirty days of parental rights being terminated, the department may terminate the foster care arrangement if another, more beneficial, long-term placement of the child is developed. If the child is twelve years of age or older, the child shall be provided the option of remaining in the existing foster care arrangement if the child so desires and if continuation of the existing arrangement is in the best interest of the child.

(d)(1) When a child is placed into foster care or becomes eligible for adoption and a sibling or siblings have previously been placed in foster care or have been adopted, the department shall notify the foster parents or adoptive parents of the previously placed or adopted sibling or siblings of the child's availability for foster care placement or adoption to determine if the foster parents or adoptive parents are desirous of seeking a foster care arrangement or adoption of the child.

(2) Where a sibling or siblings have previously been adopted, the department shall also notify the adoptive parents of a sibling of the child's availability for foster care placement in that home and a foster care arrangement entered into to place the child in the home if the adoptive parents of the sibling are otherwise qualified or can become qualified to enter into a foster care arrangement with the department and if the arrangement is in the best interests of the child.

(3) The department may petition the court to waive notification to the foster parents or adoptive parents of the child's siblings. This waiver may be granted, ex parte, upon a showing of compelling circumstances.

(e)(1) When a child is in a foster care arrangement and is residing separately from a sibling or siblings who are in another foster home or who have been adopted by another family and the parents with whom the placed or adopted sibling or siblings reside have made application to the department to establish an intent to adopt or to enter into a foster care arrangement regarding a child so that the child may be united or reunited with a sibling or siblings, the department shall, upon a determination of the fitness of the persons and household seeking to enter into a foster care arrangement or seek an adoption which would unite or reunite siblings, and if termination and new placement are in the best interests of the children, terminate the foster care arrangement and place the child in the household with the sibling or siblings.

(2) If the department is of the opinion based upon available evidence that residing in the same home would have a harmful physical, mental or psychological effect on one or more of the sibling children or if the child has a physical or mental disability which the existing foster home can better accommodate, or if the department can document that the reunification of the siblings would not be in the best interest of one or all of the children, the department may petition the circuit court for an order allowing the separation of the siblings to continue.

(3) If the child is twelve years of age or older, the department shall provide the child the option of remaining in the existing foster care arrangement if remaining is in the best interests of the child. In any proceeding brought by the department to maintain separation of siblings, the separation may be ordered only if the court determines that clear and convincing evidence supports the department's determination.

(4) In any proceeding brought by the department seeking to maintain separation of siblings, notice afforded, in addition to any other persons required by any provision of this code to receive notice, to the persons seeking to adopt a sibling or siblings of a previously placed or adopted child and the persons may be parties to the action.

(f) Where two or more siblings have been placed in separate foster care arrangements and the foster parents of the siblings have made application to the department to enter into a foster care arrangement regarding the sibling or siblings not in their home or where two or more adoptive parents seek to adopt a sibling or siblings of a child they have previously adopted, the department's determination as to placing the child in a foster care arrangement or in an adoptive home shall be based solely upon the best interests of the siblings.

***§ 49-4-112 Subsidized adoption and legal guardianship; conditions.***

(a) From funds appropriated to the Department of Health and Human Resources, the secretary shall establish a system of assistance for facilitating the adoption or legal guardianship of children. An adoption subsidy shall be available for children who are legally free for adoption and who are dependents of the department. A legal guardianship subsidy may not require the surrender or termination of parental rights. For either subsidy, the children must be in special circumstances because one or more of the following conditions inhibit their adoption or legal guardianship placement:

(1) They have a physical or mental disability;

(2) They are emotionally disturbed;

(3) They are older children;

(4) They are a part of a sibling group; or

(5) They are a member of a racial or ethnic minority.

(b)(1) The department shall provide assistance in the form of subsidies or services to parents who are found and approved for adoption or legal guardianship of a child certified as eligible for subsidy by the department, but before the final decree of adoption or order of legal guardianship is entered, there shall be a written agreement between the family entering into the subsidized adoption or legal guardianship and the department.

(2) Adoption or legal guardianship subsidies in individual cases may commence with the adoption or legal guardianship placement and will vary with the needs of the child as well as the availability of other resources to meet the child's needs. The subsidy may be for services, money payments, for a limited period, or for a long term, or for any combination of the foregoing.

(3) The specific financial terms of the subsidy shall be included in the agreement between the department and the adoptive parents or legal guardians. The agreement may recognize and provide for direct payment by the department of attorney's fees to an attorney representing the adoptive parent or legal guardian. Any such payment for attorney's fees shall be made directly to the attorney representing the adoptive parent or legal guardian.

(4) The amount of the subsidy may in no case exceed that which would be allowable for the child under foster family care or, in the case of a service, the reasonable fee for the service rendered.

(5) The department shall provide either Medicaid or other health insurance coverage for any special needs child for whom there is an adoption or legal guardianship assistance agreement, and who the department determines cannot be placed without medical assistance.

(c) The department shall certify the child as eligible for a subsidy to obtain adoption or a legal guardianship if it is in the best interest of the child.

(d) All records regarding subsidized adoptions or legal guardianships are to be held in confidence; however, records regarding the payment of public funds for subsidized adoptions or legal guardianships shall be available for public inspection provided they do not directly or indirectly identify any child or person receiving funds for the child.

(e) A payment may not be made to adoptive parents or legal guardians of child:

(1) Who has attained 18 years of age, unless the department determines that the child has a special need which warrants the continuation of assistance or the child is continuing his or her education or actively engaging in employment;

(2) Who has obtained 21 years of age;

(3) Who has not attained 18 years of age, if the department determines that the adoptive parent or legal guardian is no longer supporting the child by performing actions to maintain a familial bond with the child.

(f) Adoptive parents and legal guardians who receive subsidy payments pursuant to this section shall keep the department informed of circumstances which would, pursuant to § 49-4-112(e) of this code, make them ineligible for the payment.

***§ 49-4-113 Duration of custody or guardianship of children committed to department.***

(a) A child committed to the department for guardianship, after termination of parental rights, shall remain in the care of the department until he or she attains the age of eighteen years, or is married, or is adopted, or guardianship is relinquished through the court.

(b) A child committed to the department for custody shall remain in the care of the department until he or she attains the age of eighteen years, or until he or she is discharged because he or she is no longer in need of care.

***§ 49-4-114 Consent by agency or department to adoption of child; statement of relinquishment by parent; counseling services; petition to terminate parental rights; notice; hearing; court orders.***

(a)(1) Whenever a child welfare agency licensed to place children for adoption or the Department of Health and Human Resources has been given the permanent legal and physical custody of any child and the rights of the mother and the rights of the legal, determined, putative, outside or unknown father of the child have been terminated by order of a court of competent jurisdiction or by a legally executed relinquishment of parental rights, the child welfare agency or the department may consent to the adoption of the child, pursuant to article twenty-two, chapter forty-eight of this code.

(2) Relinquishment for an adoption to an agency or to the department is required of the same persons whose consent or relinquishment is required, under section three hundred one, article twenty-two, chapter forty-eight of this code. The form of any relinquishment so required shall conform as nearly as practicable to the requirements established in section three hundred three, article twenty-two, chapter forty-eight, and all other provisions of that article providing for relinquishment for adoption shall govern the proceedings herein.

(3) For purposes of any placement of a child for adoption by the department, the department shall first consider the suitability and willingness of any known grandparent or grandparents to adopt the child. Once grandparents who are interested in adopting the child have been identified, the department shall conduct a home study evaluation, including home visits and individual interviews by a licensed social worker. If the department determines, based on the home study evaluation, that the grandparents would be suitable adoptive parents, it shall assure that the grandparents are offered the placement of the child prior to the consideration of any other prospective adoptive parents. A circuit judge may determine the placement of a child for adoption by a grandparent or grandparents is in the best interest of the child without the grandparent or grandparents completing or passing a home study evaluation.

(4) The department shall make available, upon request, for purposes of any private or agency adoption proceeding, preplacement and post-placement counseling services by persons experienced in adoption counseling, at no cost, to any person whose consent or relinquishment is required pursuant to article twenty-two, chapter forty-eight of this code.

(b)(1) Whenever the mother has executed a relinquishment, pursuant to this section, and the legal, determined, putative, outsider father, or unknown father, as those terms are defined pursuant to part one, article twenty-two, chapter forty-eight of this code, has not executed a relinquishment, the child welfare agency or the department may, by verified petition, seek to have the father's rights terminated based upon the grounds of abandonment or neglect of the child. Abandonment may be established in accordance with section three hundred six, article twenty-two, chapter forty-eight of this code.

(2) Unless waived by a writing acknowledged as in the case of deeds or by other proper means, notice of the petition shall be served on any person entitled to parental rights of a child prior to its adoption who has not signed a relinquishment of custody of the child.

(3) In addition, notice shall be given to any putative, outsider father, or unknown father who has asserted or exercised parental rights and duties to and with the child and who has not relinquished any parental rights, and the rights have not otherwise been terminated, or who has not had reasonable opportunity before or after the birth of the child to assert or exercise those rights, except that if the child is more than six months old at the time the notice would be required and the father has not asserted or exercised his or her parental rights and he or she knew the whereabouts of the child, then the father shall be presumed to have had reasonable opportunity to assert or exercise any rights.

(c)(1) Upon the filing of the verified petition seeking to have the parental rights terminated, the court shall set a hearing on the petition. A copy of the petition and notice of the date, time, and place of the hearing on the petition shall be personally served on any respondent at least twenty days prior to the date set for the hearing.

(2) The notice shall inform the person that his or her parental rights, if any, may be terminated in the proceeding and that the person may appear and defend any rights within twenty days of the service. In the case of a person who is a nonresident or whose whereabouts are unknown, service shall be achieved: (A) By personal service; (B) by registered or certified mail, return receipt requested, postage prepaid, to the person's last known address, with instructions to forward; or (C) by publication. If personal service is not acquired, then if the person giving notice has any knowledge of the whereabouts of the person to be served, including a last known address, service by mail shall be first attempted as herein provided. Service achieved by mail shall be complete upon mailing and is sufficient service without the need for notice by publication. In the event that no return receipt is received giving adequate evidence of receipt of the notice by the addressee or of receipt of the notice at the address to which the notice was mailed or forwarded, or if the whereabouts of the person are unknown, then the person required to give notice shall file with the court an affidavit setting forth the circumstances of any attempt to serve the notice by mail, and the diligent efforts to ascertain the whereabouts

of the person to be served. If the court determines that the whereabouts of the person to be served cannot be ascertained and that due diligence has been exercised to ascertain the person's whereabouts, then the court shall order service of the notice by publication as a Class II publication in compliance with article three, chapter fifty-nine of this code, and the publication area shall be the county where the proceedings are had, and in the county where the person to be served was last known to reside. In the case of a person under disability, service shall be made on the person and his or her personal representative, or if there be none, a guardian ad litem.

(3) In the case of service by publication or mail or service on a personal representative or a guardian ad litem, the person is allowed thirty days from the date of the first publication or mailing of the service on a personal representative or guardian ad litem in which to appear and defend the parental rights.

(d) A petition under this section may be instituted in the county where the child resides or where the child is living.

(e) If the court finds that the person certified to parental rights is guilty of the allegations set forth in the petition, the court shall enter an order terminating his or her parental rights and shall award the legal and physical custody and control of the child to the petitioner.

***§ 49-4-115 Emancipation.***

(a) A child over the age of sixteen may petition a court to be declared emancipated. The parents or custodians shall be made respondents and, in addition to personal service thereon, there shall be publication as a Class II legal advertisement in compliance with article three, chapter fifty-nine of this code.

(b) Upon a showing that the child can provide for his or her physical and financial well-being and has the ability to make decisions for himself or herself, the court may for good cause shown declare the child emancipated. The child shall thereafter have full capacity to contract in his or her own right and the parents or custodians have no right to the custody and control of the child or duty to provide the child with care and financial support.

(c) A child over the age of sixteen years who marries is emancipated by operation of law. An emancipated child has all of the privileges, rights and duties of an adult, including the right of contract, except that the child remains a child as defined for the purposes of part ten, article two, or part seven, article four of this chapter.

***§ 49-4-116 Voluntary placement; petition; requirements; attorney appointed; court hearing; orders.***

(a) Within ninety days of the date of the signatures to a voluntary placement agreement, after receipt of physical custody, the department shall file with the court a petition for review of the placement. The petition shall include:

(1) A statement regarding the child's situation; and,

(2) The circumstance that gives rise to the voluntary placement.

(b) If the department intends to extend the voluntary placement agreement, the department shall file with the court a copy of the child's case plan.

(c) The court shall appoint an attorney for the child, who shall receive a copy of the case plan as provided in subsection (b) of this section.

(d) The court shall schedule a hearing and give notice of the time and place and right to be present at the hearing to:

(1) The child's attorney;

(2) The child, if twelve years of age or older;

(3) The child's parents or guardians;

(4) The child's foster parents;

(5) Any preadoptive parent or relative providing care for the child; and

(6) Any other persons as the court may in its discretion direct.

The child's presence at the hearing may be waived by the child's attorney at the request of the child or if the child would suffer emotional harm.

(e) At the conclusion of the proceedings, but no later than ninety days after the date of the signatures to the voluntary placement agreement, the court shall enter an order:

(1) Determining whether or not continuation of the voluntary placement is in the best interests of the child;

(2) Specifying under what conditions the child's placement will continue;

(3) Specifying whether or not the department is required to and has made reasonable efforts to preserve and to reunify the family; and

(4) Providing a plan for the permanent placement of the child.

## PART II. EMERGENCY POSSESSION OF CERTAIN RELINQUISHED CHILDREN.

### *§ 49-4-201 Accepting possession of certain relinquished children.*

(a) A hospital or health care facility operating in this state, or a fire department that has been designated a safe-surrender site under § 49-4-206 of this code, shall, without a court order, take possession of a child if the child is voluntarily delivered to the hospital, health care facility, or fire department by the child's parent within 30 days of the child's birth, and the parent did not express an intent to return for the child.

(b) A hospital, health care facility, or fire department that takes possession of a child under this article shall perform any act necessary to protect the physical health or safety of the child. In accepting possession of the child, the hospital, health care facility, or fire department may not require the person to identify himself or herself and shall otherwise respect the person's desire to remain anonymous.

(c) Hospitals, health care facilities, and fire departments designated as safe-surrender sites under § 49-4-206, of this code may install and operate newborn safety devices as defined in this section.

(d) "Newborn safety device" means a device:

(1) Designed to permit a person to anonymously place a child under 30 days of age in the device with the intent to leave the child, and for a licensed emergency medical services provider to remove the child from the device and take custody of him or her;

(2) Equipped with an adequate dual alarm system connected to the physical location where the device is physically installed. The dual alarm system shall:

(A) Be tested at least one time per week to ensure the alarm system is in working order; and

(B) Be visually checked at least two times per day to ensure the alarm system is in working order;

(C) Notify a centralized location in the facility within 30 seconds of a child being placed in the device;

(D) Trigger a 911 call if staff at the facility do not respond within 15 minutes after a child is placed in the device.

(3) Be approved by and physically located, with outside access, at a participating hospital or medical facility, or a fire department that has been designated a safe-surrender site under § 49-4-206 of this code, that:

(A) Is licensed or otherwise legally operating in this state; and

(B) Is staffed continuously on a 24-hour basis every day by a licensed emergency medical services provider; and

(4) Is located in an area that is conspicuous and visible to a hospital, a medical facility, or a fire department.

(d) A person who relinquishes a child in a newborn safety device may remain anonymous and shall not be pursued, and the relinquishment of a child pursuant to the

provisions of this section shall not, in and of itself, be considered child abuse and neglect as that term is defined in § 49-1-201 of this code.

(e) Any emergency medical services provider who physically retrieves a child from a newborn safety device shall immediately arrange for the child to be taken to the nearest hospital emergency room and shall have implied consent to any and all appropriate medical treatment.

(f) By placing a child in a newborn safety device, the person:

(1) Waives the right to notification required by subsequent court proceedings; and

(2) Waives legal standing to make a claim of action against any person who accepts physical custody of the child.

(g) An emergency medical services provider with the duty granted in this article whose actions are taken in good faith is immune from criminal or civil liability, unless his or her actions were the result of gross negligence or willful misconduct. The grant of immunity in this section extends to all employees and administrators of the emergency medical services provider.

(h) The provisions of subsection (d) of this section shall not apply when indicators of child physical abuse or child neglect are present.

***§ 49-4-202 Notification of possession of relinquished child; department responsibilities.***

(a) (1) Not later than the close of the first business day after the date on which a hospital or health care facility takes possession of a child pursuant to § 49-4-201 of this code, the hospital or health care facility shall notify the Child Protective Services Division of the Department of Health and Human Resources that it has taken possession of the child and shall provide the division any information provided by the parent delivering the child. The hospital or health care facility shall refer any inquiries about the child to the Child Protective Services Division.

(2) Upon taking possession of a child pursuant to § 49-4-201 of this code, a fire department shall:

(A) Deliver the child to the nearest hospital or health care facility as soon as possible, but transport may begin no later than 30 minutes upon taking possession of a child; and

(B) Notify the Child Protective Services Division of the Department of Health and Human Resources within two hours of taking possession of a child:

(i) That it has delivered the child and identify the hospital or health care facility to which it delivered the child; and

(ii) Provide the division any information provided by the parent delivering the child.

(3) The fire department shall refer any inquiries about the child to the Child Protective Services Division.

(b) The Department of Health and Human Resources shall assume the care, control, and custody of the child as of the time of delivery of the child to the hospital, health care facility, or fire department, and may contract with a private child care agency for the care and placement of the child after the child leaves the hospital, health care facility, or fire department.

***§ 49-4-203 Filing petition after accepting possession of relinquished child.***

A child of whom the Department of Health and Human Resources assumes care, control and custody under this article is a relinquished child and to be treated in all respects as a child taken into custody pursuant to section three hundred three, article four of this chapter. Upon taking custody of a child under this article, the department, with the cooperation of the county prosecuting attorney, shall cause a petition to be presented pursuant to section six hundred two, article four of this chapter. The department and county prosecuting attorney may not identify in the petition the parent(s) who utilized this article to relinquish his or her child. Thereafter, the department shall proceed in compliance with part six, of this article.

***§ 49-4-204 Immunity from certain prosecutions.***

A parent who relinquishes his or her child in good faith within thirty days of the child's birth under this article is immune from prosecution under subsection (a), section four, article eight-d, chapter sixty-one of this code.

***§ 49-4-205 Adoption eligibility.***

The child is eligible for adoption as an abandoned child under chapter forty-eight of the code.

***§ 49-4-206 Designation of local fire department as a safe-surrender site; posting requirement.***

The governing entity of a local fire department that is staffed 24 hours a day, seven days a week, may designate the premises of its fire department as a safe-surrender site to accept physical custody of a child who is 30 days old or younger from a parent of the child and who surrenders the child pursuant to § 49-4-201 of this code. A local fire department that is designated a safe-surrender site shall post a sign that notifies the public that it is a location where a child 30 days old or younger may be safely surrendered pursuant to this article.

## PART III. EMERGENCY CUSTODY OF CHILDREN PRIOR TO PETITION.

***§ 49-4-301 Custody of a neglected child by law enforcement in emergency situations; protective custody; requirements; notices; petition for appointment of special guardian; discharge; immunity.***

(a) A child believed to be a neglected child or an abused child may be taken into custody without the court order otherwise required by section six hundred two of this article by a law-enforcement officer if:

(1) The child is without supervision or shelter for an unreasonable period of time in light of the child's age and the ability to care for himself or herself in circumstances presenting an immediate threat of serious harm to that child; or

(2) That officer determines that the child is in a condition requiring emergency medical treatment by a physician and the child's parents, parent, guardian or custodian refuses to permit the treatment, or is unavailable for consent. A child who suffers from a condition requiring emergency medical treatment, whose parents, parent, guardian or custodian refuses to permit the providing of the emergency medical treatment, may be retained in a hospital by a physician against the will of the parents, parent, guardian or custodian, as provided in subsection (c) of this section.

(b) A child taken into protective custody pursuant to subsection (a) of this section may be housed by the department or in any authorized child shelter facility. The authority to hold the child in protective custody, absent a petition and proper order granting temporary custody pursuant to section six hundred two of this article, terminates by operation of law upon the happening of either of the following events, whichever occurs first:

(1) The expiration of ninety-six hours from the time the child is initially taken into protective custody; or

(2) The expiration of the circumstances which initially warranted the determination of an emergency situation.

No child may be considered in an emergency situation and custody withheld from the child's parents, parent, guardian or custodian presenting themselves, himself or herself in a fit and proper condition and requesting physical custody of the child. No child may be removed from a place of residence as in an emergency under this section until after:

(1) All reasonable efforts to make inquiries and arrangements with neighbors, relatives and friends have been exhausted; or if no arrangements can be made; and

(2) The state department may place in the residence a home services worker with the child for a period of not less than twelve hours to await the return of the child's parents, parent, guardian or custodian.

Prior to taking a child into protective custody as abandoned at a place at or near the residence of the child, the law-enforcement officer shall post a typed or legibly handwritten

notice at the place the child is found, informing the parents, parent, guardian or custodian that the child was taken by a law-enforcement officer, the name, address and office telephone number of the officer, the place and telephone number where information can continuously be obtained as to the child's whereabouts, and if known, the worker for the state department having responsibility for the child.

(c) A child taken into protective custody pursuant to this section for emergency medical treatment may be held in a hospital under the care of a physician against the will of the child's parents, parent, guardian or custodian for a period not to exceed ninety-six hours. The parents, parent, guardian or custodian may not be denied the right to see or visit with the child in a hospital. The authority to retain a child in protective custody in a hospital as requiring emergency medical treatment terminates by operation of law upon the happening of either of the following events, whichever occurs first:

(1) When the condition, in the opinion of the physician, no longer required emergency hospitalization, or;

(2) Upon the expiration of ninety-six hours from the initiation of custody, unless within that time, a petition is presented and a proper order obtained from the circuit court.

(d) Prior to assuming custody of a child from a law-enforcement officer, pursuant to this section, a physician or worker from the department shall require a typed or legibly handwritten statement from the officer identifying the officer's name, address and office telephone number and specifying all the facts upon which the decision to take the child into protective custody was based, and the date, time and place of the taking.

(e) Any worker for the department assuming custody of a child pursuant to this section shall immediately notify the parents, parent, guardian or custodian of the child of the taking of the custody and the reasons therefor, if the whereabouts of the parents, parent, guardian or custodian are known or can be discovered with due diligence; and if not, notice and explanation shall be given to the child's closest relative, if his or her whereabouts are known or can be discovered with due diligence within a reasonable time. An inquiry shall be made of relatives and neighbors, and if a relative or appropriate neighbor is willing to assume custody of the child, the child will temporarily be placed in custody.

(f) No child may be taken into custody under circumstances not justified by this section or pursuant to section six hundred two of this article without appropriate process. Any retention of a child or order for retention of a child not complying with the time limits and other requirements specified in this article shall be void by operation of law.

(g) *Petition for appointment of special guardian*. -- Upon the verified petition of any person showing:

(1) That any person under the age of eighteen years is threatened with or there is a substantial possibility that the person will suffer death, serious or permanent physical or emotional disability, disfigurement or suffering; and

(2) That disability, disfigurement or suffering is the result of the failure or refusal of any parent, guardian or custodian to procure, consent to or authorize necessary medical treatment, the circuit court of the county in which the person is located may direct the appointment of a special guardian for the purposes of procuring, consenting to and giving authorization for the administration of necessary medical treatment. The circuit court may not consider any petition filed in accordance with this section unless it is accompanied by a supporting affidavit of a licensed physician.

(h) *Notice of petition*. -- So far as practicable, the parents, guardian or custodian of any person for whose benefit medical treatment is sought shall be given notice of the petition for the appointment of a special guardian under this section. Notice is not necessary if it would cause a delay that would result in the death or irreparable harm to the person for whose benefit medical treatment is sought. Notice may be given in a form and manner as may be necessary under the circumstances.

(i) *Discharge of special guardian*. -- Upon the termination of necessary medical treatment to any person under this section, the circuit court order the discharge of the special guardian from any further authority, responsibility or duty.

(j) *Immunity from civil liability*. -- No person appointed special guardian in accordance with this article is civilly liable for any act done by virtue of the authority vested in him or her by order of the circuit court.

***§ 49-4-302 Authorizing a family court judge to order custody of a child in emergency situations; requirements; orders; investigative reports; notification required.***

(a) Notwithstanding the jurisdictional limitations contained in section two, article two-a, chapter fifty-one of this code, family court judges are authorized to order the department to take emergency custody of a child who is in the physical custody of a party to an action or proceeding before the family court, if the family court judge finds that there is clear and convincing evidence that:

(1) There exists an imminent danger to the physical well-being of the child as defined in section two hundred one, article one of this chapter;

(2) The child is not the subject of a pending action before the circuit court alleging abuse and neglect of the child; and

(3) There are no reasonable available alternatives to the emergency custody order.

(b) An order entered pursuant to subsection (a) of this section must include specific written findings.

(c) A copy of the order issued pursuant to subsection (a) of this section shall be transmitted forthwith to the department, the circuit court and the prosecuting attorney.

(d) Upon receipt of an order issued pursuant to subsection (a) of this section, the department shall immediately respond and assist the family court judge in emergency placement of the child.

(e)(1) Upon receipt of an order issued pursuant to subsection (a) of this section, the circuit court shall cause to be entered and served, an administrative order in the name of and regarding the affected child, directing the department to submit, within ninety-six hours from the time the child was taken into custody, an investigative report to both the circuit and family court.

(2) The investigative report shall include a statement of whether the department intends to file a petition pursuant to section six hundred two of this article.

(f)(1) An order issued pursuant to subsection (a) of this section terminates by operation of law upon expiration of ninety-six hours from the time the child is initially taken into protective custody unless a petition is filed with the circuit court under section six hundred two of this article within ninety-six hours from the time the child is initially taken into protective custody.

(2) The filing of a petition within ninety-six hours from the time the child is initially taken into protective custody extends the emergency custody order issued pursuant to subsection (a) of this section until a preliminary hearing is held before the circuit court, unless the circuit court orders otherwise.

(g)(1) Any worker for the department assuming custody of a child pursuant to this section shall immediately notify the parents, parent, grandparents, grandparent, guardian or custodian of the child of the taking of the custody and the reasons therefor if the whereabouts of the parents, parent, grandparents, grandparent, guardian or custodian are known or can be discovered with due diligence and, if not, a notice and explanation shall be given to the child's closest relative if his or her whereabouts are known or can be discovered with due diligence within a reasonable time. An inquiry shall be made of relatives and neighbors and, if an appropriate relative or neighbor is willing to assume custody of the child, the child will temporarily be placed in that person's custody.

(2) In the event no other reasonable alternative is available for temporary placement of a child pursuant to subdivision (1) of this subsection, the child may be housed by the department in an authorized child shelter facility.

***§ 49-4-303 Emergency removal by department before filing of petition; conditions; referee; application for emergency custody; order.***

Prior to the filing of a petition, a child protective service worker may take the child or children into his or her custody (also known as removing the child) without a court order when:

(1) In the presence of a child protective service worker a child or children are in an emergency situation which constitutes an imminent danger to the physical well-being of

the child or children, as that phrase is defined in section two hundred one, article one of this chapter; and

(2) The worker has probable cause to believe that the child or children will suffer additional child abuse or neglect or will be removed from the county before a petition can be filed and temporary custody can be ordered.

After taking custody of the child or children prior to the filing of a petition, the worker shall forthwith appear before a circuit judge or referee of the county where custody was taken and immediately apply for an order. If no judge or referee is available, the worker shall appear before a circuit judge or referee of an adjoining county, and immediately apply for an order. This order shall ratify the emergency custody of the child pending the filing of a petition.

The circuit court of every county in the state shall appoint at least one of the magistrates of the county to act as a referee. He or she serves at the will and pleasure of the appointing court and shall perform the functions prescribed for the position by this subsection.

The parents, guardians or custodians of the child or children may be present at the time and place of application for an order ratifying custody. If at the time the child or children are taken into custody by the worker he or she knows which judge or referee is to receive the application, the worker shall so inform the parents, guardians or custodians.

The application for emergency custody may be on forms prescribed by the Supreme Court of Appeals or prepared by the prosecuting attorney or the applicant, and shall set forth facts from which it may be determined that the probable cause described above in this subsection exists. Upon the sworn testimony or other evidence as the judge or referee deems sufficient, the judge or referee may order the emergency taking by the worker to be ratified. If appropriate under the circumstances, the order may include authorization for an examination as provided in subsection (b), section six hundred three of this article.

If a referee issues an order, the referee shall by telephonic communication have that order orally confirmed by a circuit judge of the circuit or an adjoining circuit who shall, on the next judicial day, enter an order of confirmation. If the emergency taking is ratified by the judge or referee, emergency custody of the child or children is vested in the department until the expiration of the next two judicial days, at which time any child taken into emergency custody shall be returned to the custody of his or her parent or guardian or custodian unless a petition has been filed and custody of the child has been transferred under section six hundred two of this article.

## PART IV. MULTIDISCIPLINARY TEAMS, CASE PLANS, TRANSITION PLANS AND AFTERCARE PLANS.

### *§ 49-4-401 Purpose; system to be a complement to existing programs.*

(a) This article:

(1) Provides a system for evaluation of and coordinated service delivery for children who may be victims of abuse or neglect and children undergoing certain status offense and delinquency proceedings;

(2) Establishes, as a complement to other programs of the Department of Health and Human Resources, a multidisciplinary screening, advisory and planning system to assist courts in facilitating permanency planning, following the initiation of judicial proceedings, to recommend alternatives and to coordinate evaluations and in-community services; and

(3) Ensures that children are safe from abuse and neglect and to coordinate investigation of alleged child abuse offenses and competent criminal prosecution of offenders to ensure that safety, as determined appropriate by the prosecuting attorney.

(b) Nothing in this article precludes any multidisciplinary team from considering any case upon the consent of the members of the team.

***§ 49-4-402 Multidisciplinary investigative teams; establishment; membership; procedures; coordination among agencies; confidentiality.***

(a) The prosecuting attorney of each county shall establish a multidisciplinary investigative team in that county. The multidisciplinary team shall be headed and directed by the prosecuting attorney, or his or her designee, and includes as permanent members:

(1) The prosecuting attorney, or his or her designee;

(2) A local child protective services caseworker from the Department of Health and Human Resources;

(3) A local law-enforcement officer employed by a law-enforcement agency in the county;

(4) A child advocacy center representative, where available;

(5) A health care provider with pediatric and child abuse expertise, where available;

(6) A mental health professional with pediatric and child abuse expertise, where available;

(7) An educator; and

(8) A representative from a licensed domestic violence program serving the county.

The Department of Health and Human Resources and any local law-enforcement agency or agencies selected by the prosecuting attorney shall appoint their representatives to the team by submitting a written designation of the team to the prosecuting attorney of each county within thirty days of the prosecutor’s request that the appointment be made. Within fifteen days of the appointment, the prosecuting attorney shall notify the chief judge of each circuit within which the county is situated of the names

of the representatives so appointed. Any other person or any other appointee of an agency who may contribute to the team's efforts to assist a minor child as may be determined by the permanent members of the team may also be appointed as a member of the team by the prosecutor with notification to the chief judge.

(b) Any permanent member of the multidisciplinary investigative team shall refer all cases of accidental death of any child reported to their agency and all cases when a child dies while in the custody of the state for investigation and review by the team. The multidisciplinary investigative team shall meet at regular intervals at least once every calendar month.

(c) The investigative team shall be responsible for coordinating or cooperating in the initial and ongoing investigation of all civil and criminal allegations pertinent to cases involving child sexual assault, child sexual abuse, child abuse and neglect and shall make a recommendation to the county prosecuting attorney as to the initiation or commencement of a civil petition and/or criminal prosecution.

(d) State, county and local agencies shall provide the multidisciplinary investigative team with any information requested in writing by the team as allowable by law or upon receipt of a certified copy of the circuit court's order directing the agencies to release information in its possession relating to the child. The team shall assure that all information received and developed in connection with this article remains confidential. For purposes of this section, the term "confidential" shall be construed in accordance with article five of this chapter.

***§ 49-4-403 Multidisciplinary treatment planning process; coordination; access to information.***

(a)(1) A multidisciplinary treatment planning process for cases initiated pursuant to part six and part seven of article four of this chapter shall be established within each county of the state, either separately or in conjunction with a contiguous county, by the secretary of the department with advice and assistance from the prosecutor's advisory council as set forth in section four, article four, chapter seven of this code. In each circuit, the department shall coordinate with the prosecutor's office, the public defender's office or other counsel representing juveniles to designate, with the approval of the court, at least one day per month on which multidisciplinary team meetings for that circuit shall be held: Provided, That multidisciplinary team meetings may be held on days other than the designated day or days when necessary. The Division of Juvenile Services shall establish a similar treatment planning process for delinquency cases in which the juvenile has been committed to its custody, including those cases in which the juvenile has been committed for examination and diagnosis.

(2) This section does not require a multidisciplinary team meeting to be held prior to temporarily placing a child or juvenile out-of-home under exigent circumstances or upon a court order placing a juvenile in a facility operated by the Division of Juvenile Services.

(b) The case manager in the Department of Health and Human Resources for the child, family or juvenile or the case manager in the Division of Juvenile Services for a juvenile shall convene a treatment team in each case when it is required pursuant to this article.

(1) Prior to disposition, in each case in which a treatment planning team has been convened, the team shall advise the court as to the types of services the team has determined are needed and the type of placement, if any, which will best serve the needs of the child. If the team determines that an out-of-home placement will best serve the needs of the child, the team shall first consider placement with appropriate relatives then with foster care homes, facilities or programs located within the state. The team may only recommend placement in an out-of-state facility if it concludes, after considering the best interests and overall needs of the child, that there are no available and suitable in-state facilities which can satisfactorily meet the specific needs of the child.

(2) Any person authorized by the provisions of this chapter to convene a multidisciplinary team meeting may seek and receive an order of the circuit court setting such meeting and directing attendance. Members of the multidisciplinary team may participate in team meetings by telephone or video conferencing. This subsection does not prevent the respective agencies from designating a person other than the case manager as a facilitator for treatment team meetings. Written notice shall be provided to all team members of the availability to participate by videoconferencing.

(c) The treatment team shall coordinate its activities and membership with local family resource networks and coordinate with other local and regional child and family service planning committees to assure the efficient planning and delivery of child and family services on a local and regional level.

(d) The multidisciplinary treatment team shall be afforded access to information in the possession of the Department of Health and Human Resources, Division of Juvenile Services, law-enforcement agencies and other state, county and local agencies. Those agencies shall cooperate in the sharing of information as may be provided in article five of this chapter or any other relevant provision of law. Any multidisciplinary team member who acquires confidential information may not disclose the information except as permitted by the provisions of this code or court rules.

### *§ 49-4-404 Court review of service plan; hearing; required findings; order; team member's objections.*

(a) In any case in which a multidisciplinary treatment team develops an individualized service plan for a child or family pursuant to this article, the court shall review the proposed service plan to determine if implementation of the plan is in the child's best interests. If the multidisciplinary team cannot agree on a plan or if the court determines not to adopt the team's recommendations, it shall, upon motion or sua sponte, schedule and hold within ten days of the determination, and prior to the entry of an order placing the child in the custody of the department or in an out-of-home setting, a hearing to consider evidence from the team as to its rationale for the proposed service plan. If, after a hearing held pursuant to this section, the court does not adopt the teams's

recommended service plan, it shall make specific written findings as to why the team's recommended service plan was not adopted.

(b) In any case in which the court decides to order the child placed in an out-of-state facility or program it shall set forth in the order directing the placement the reasons why the child was not placed in an in-state facility or program.

(c) Any member of the multidisciplinary treatment team who disagrees with recommendations of the team may inform the court of his or her own recommendations and objections to the team's recommendations. The recommendations and objections of the dissenting team member may be made in a hearing on the record, made in writing and served upon each team member and filed with the court and indicated in the case plan, or both made in writing and indicated in the case plan. Upon receiving objections, the court will conduct a hearing pursuant to paragraph (a) of this section.

***§ 49-4-405 Multidisciplinary treatment planning process involving child abuse and neglect; team membership; duties; reports; admissions.***

(a) Within thirty days of the initiation of a judicial proceeding pursuant to part six, of this article, the department shall convene a multidisciplinary treatment team to assess, plan and implement a comprehensive, individualized service plan for children who are victims of abuse or neglect and their families. The multidisciplinary team shall obtain and utilize any assessments for the children or the adult respondents that it deems necessary to assist in the development of that plan.

(b) In a case initiated pursuant to part six of this article, the treatment team consists of:

(1) The child or family's case manager in the department;

(2) The adult respondent or respondents;

(3) The child's parent or parents, guardians, any copetitioners, custodial relatives of the child, foster or preadoptive parents;

(4) Any attorney representing an adult respondent or other member of the treatment team;

(5) The child's counsel or the guardian ad litem;

(6) The prosecuting attorney or his or her designee;

(7) A member of a child advocacy center when the child has been processed through the child advocacy center program or programs or it is otherwise appropriate that a member of the child advocacy center participate;

(8) Any court-appointed special advocate assigned to a case;

(9) Any other person entitled to notice and the right to be heard;

(10) An appropriate school official;

(11) The managed care case coordinator; and

(12) Any other person or agency representative who may assist in providing recommendations for the particular needs of the child and family, including domestic violence service providers.

The child may participate in multidisciplinary treatment team meetings if the child's participation is deemed appropriate by the multidisciplinary treatment team. Unless otherwise ordered by the court, a party whose parental rights have been terminated and his or her attorney may not be given notice of a multidisciplinary treatment team meeting and does not have the right to participate in any treatment team meeting.

(c) Prior to disposition in each case which a treatment planning team has been convened, the team shall advise the court as to the types of services the team has determined are needed and the type of placement, if any, which will best serve the needs of the child. If the team determines that an out-of-home placement will best serve the needs of the child, the team shall first consider placement with appropriate relatives then with foster care homes, facilities or programs located within the state. The team may only recommend placement in an out-of-state facility if it concludes, after considering the best interests and overall needs of the child, that there are no available and suitable in-state facilities which can satisfactorily meet the specific needs of the child.

(d) The multidisciplinary treatment team shall submit written reports to the court as required by the rules governing this type of proceeding or by the court, and shall meet as often as deemed necessary but at least every three months until the case is dismissed from the docket of the court. The multidisciplinary treatment team shall be available for status conferences and hearings as required by the court.

(e) If a respondent or copetitioner admits the underlying allegations of child abuse or neglect, or both abuse and neglect, in the multidisciplinary treatment planning process, his or her statements may not be used in any subsequent criminal proceeding against him or her, except for perjury or false swearing.

***§ 49-4-406 Multidisciplinary treatment process for status offenders or delinquents; requirements; custody; procedure; reports; cooperation; inadmissibility of certain statements.***

(a) When a juvenile is adjudicated as a status offender pursuant to § 49-4-711 of this code, the department shall promptly convene a multidisciplinary treatment team and conduct an assessment, utilizing a standard uniform comprehensive assessment instrument or protocol, including a needs assessment, to determine the juvenile's mental and physical condition, maturity and education level, home and family environment,

rehabilitative needs and recommended service plan, which shall be provided in writing to the court and team members. Upon completion of the assessment, the treatment team shall prepare and implement a comprehensive, individualized service plan for the juvenile.

(b) When a juvenile is adjudicated as a delinquent or has been granted a pre-adjudicatory community supervision period pursuant to § 49-4-708 of this code, the court, either upon its own motion or motion of a party, may require the department to convene a multidisciplinary treatment team and conduct an assessment, utilizing a standard uniform comprehensive assessment instrument or protocol, including a needs assessment, to determine the juvenile's mental and physical condition, maturity and education level, home and family environment, rehabilitative needs and recommended service plan, which shall be provided in writing to the court and team members. A referral to the department to convene a multidisciplinary treatment team and to conduct such an assessment shall be made when the court is considering placing the juvenile in the department's custody or placing the juvenile out-of-home at the department's expense pursuant to § 49-4-714 of this code. In any delinquency proceeding in which the court requires the department to convene a multidisciplinary treatment team, the probation officer shall notify the department at least 15 working days before the court proceeding in order to allow the department sufficient time to convene and develop an individualized service plan for the juvenile.

(c) When a juvenile has been adjudicated and committed to the custody of the Director of the Division of Corrections and Rehabilitation, including those cases in which the juvenile has been committed for examination and diagnosis, or the court considers commitment for examination and diagnosis, the Division of Corrections and Rehabilitation shall promptly convene a multidisciplinary treatment team and conduct an assessment, utilizing a standard uniform comprehensive assessment instrument or protocol, including a needs assessment, to determine the juvenile's mental and physical condition, maturity and education level, home and family environment, rehabilitative needs and recommended service plan. Upon completion of the assessment, the treatment team shall prepare and implement a comprehensive, individualized service plan for the juvenile, which shall be provided in writing to the court and team members. In cases where the juvenile is committed as a post-sentence disposition to the custody of the Division of Corrections and Rehabilitation, the plan shall be reviewed quarterly by the multidisciplinary treatment team. Where a juvenile has been detained in a facility operated by the Division of Corrections and Rehabilitation without an active service plan for more than 60 days, the director of the facility may call a multidisciplinary team meeting to review the case and discuss the status of the service plan.

(d)(1) The rules of juvenile procedure shall govern the procedure for obtaining any assessment of a juvenile, preparing an individualized service plan and submitting the plan and any assessment to the court.

(2) In juvenile proceedings conducted pursuant to § 49-4-701 et seq. of this code, the following representatives shall serve as members and attend each meeting of the

multidisciplinary treatment team, so long as they receive notice at least seven days prior to the meeting:

(A) The juvenile;

(B) The juvenile's case manager in the department or the Division of Corrections and Rehabilitation;

(C) The juvenile's parent, guardian or custodian;

(D) The juvenile's attorney;

(E) Any attorney representing a member of the multidisciplinary treatment team;

(F) The prosecuting attorney or his or her designee;

(G) The county school superintendent or the superintendent's designee;

(H) A treatment or service provider with training and clinical experience coordinating behavioral or mental health treatment;

(I) The managed care case coordinator; and

(J) Any other person or agency representative who may assist in providing recommendations for the particular needs of the juvenile and family, including domestic violence service providers. In delinquency proceedings, the probation officer shall be a member of a multidisciplinary treatment team. When appropriate, the juvenile case manager in the department and the Division of Corrections and Rehabilitation shall cooperate in conducting multidisciplinary treatment team meetings when it is in the juvenile's best interest.

(3) Prior to disposition, in each case in which a treatment planning team has been convened, the team shall advise the court as to the types of services the team has determined are needed and type of placement, if any, which will best serve the needs of the child. If the team determines that an out-of-home placement will best serve the needs of the child, the team shall first consider placement at facilities or programs located within the state. The team may only recommend placement in an out-of-state facility if it concludes, after considering the best interests and overall needs of the child, that there are no available and suitable in-state facilities which can satisfactorily meet the specific needs of the child. The multidisciplinary treatment team shall also determine and advise the court as to the individual treatment and rehabilitation plan recommended for the child for either out-of-home placement or community supervision. The plan may focus on reducing the likelihood of reoffending, requirements for the child to take responsibility for his or her actions, completion of evidence-based services or programs or any other relevant goal for the child. The plan may also include opportunities to incorporate the family, custodian or guardian into the treatment and rehabilitation process.

(4) The multidisciplinary treatment team shall submit written reports to the court as required by applicable law or by the court, shall meet with the court at least every three months, as long as the juvenile remains in the legal or physical custody of the state, and shall be available for status conferences and hearings as required by the court. The multidisciplinary treatment team shall monitor progress of the plan identified in subdivision (3) of this subsection and review progress of the plan at the regular meetings held at least every three months pursuant to this section, or at shorter intervals, as ordered by the court, and shall report to the court on the progress of the plan or if additional modification is necessary.

(5) In any case in which a juvenile has been placed out of his or her home except for a temporary placement in a shelter or detention center, the multidisciplinary treatment team shall cooperate with the state agency in whose custody the juvenile is placed to develop an after-care plan. The rules of juvenile procedure and § 49-4-409 of this code govern the development of an after-care plan for a juvenile, the submission of the plan to the court and any objection to the after-care plan.

(6) If a juvenile respondent admits the underlying allegations of the case initiated pursuant to § 49-4-701 through § 49-4-725 of this code, in the multidisciplinary treatment planning process, his or her statements may not be used in any juvenile or criminal proceedings against the juvenile, except for perjury or false swearing.

***§ 49-4-407 Team directors; records; case logs.***

All persons directing any team created pursuant to this article shall maintain records of each meeting indicating the name and position of persons attending each meeting and the number of cases discussed at the meeting, including a designation of whether or not that case was previously discussed by any multidisciplinary team. Further, all investigative teams shall maintain a log of all cases to indicate the number of referrals to that team, whether or not a police report was filed with the prosecuting attorney's office, whether or not a petition was sought pursuant to part six of this article or whether or not a criminal complaint was issued and a case was criminally prosecuted. All treatment teams shall maintain a log of all cases to indicate the basis for failure to review a case for a period in excess of six months.

***§ 49-4-408 Unified child and family case plans; treatment teams; programs; agency requirements.***

(a) The Department of Health and Human Resources shall develop a unified child and family case plan for every family wherein a person has been referred to the department after being allowed an improvement period or where the child is placed in foster care. The case plan must be filed within sixty days of the child coming into foster care or within thirty days of the inception of the improvement period, whichever occurs first. The department may also prepare a case plan for any person who voluntarily seeks child abuse and neglect services from the department, or who is referred to the department by another

public agency or private organization. The case plan provisions shall comply with federal law and the rules of procedure for child abuse and neglect proceedings.

(b) The department shall convene a multidisciplinary treatment team, which shall develop the case plan. Parents, guardians or custodians shall participate fully in the development of the case plan, and the child shall also fully participate if sufficiently mature and the child's participation is otherwise appropriate. The case plan may be modified from time to time to allow for flexibility in goal development, and in each case the modifications shall be submitted to the court in writing. Reasonable efforts to place a child for adoption or with a legal guardian may be made at the same time as reasonable efforts are being made to prevent removal or to make it possible for a child to return safely home. The court shall examine the proposed case plan or any modification thereof, and upon a finding by the court that the plan or modified plan can be easily communicated, explained and discussed so as to make the participants accountable and able to understand the reasons for any success or failure under the plan, the court shall inform the participants of the probable action of the court if goals are met or not met.

(c) In furtherance of the provisions of this article, the department shall, within the limits of available funds, establish programs and services for the following purposes:

(1) For the development and establishment of training programs for professional and paraprofessional personnel in the fields of medicine, law, education, social work and other relevant fields who are engaged in, or intend to work in, the field of the prevention, identification and treatment of child abuse and neglect; and training programs for children, and for persons responsible for the welfare of children, in methods of protecting children from child abuse and neglect;

(2) For the establishment and maintenance of centers, serving defined geographic areas, staffed by multidisciplinary teams and community teams of personnel trained in the prevention, identification and treatment of child abuse and neglect cases, to provide a broad range of services related to child abuse and neglect, including direct support as well as providing advice and consultation to individuals, agencies and organizations which request the services;

(3) For furnishing services of multidisciplinary teams and community teams, trained in the prevention, identification and treatment of child abuse and neglect cases, on a consulting basis to small communities where the services are not available;

(4) For other innovative programs and projects that show promise of successfully identifying, preventing or remedying the causes of child abuse and neglect, including, but not limited to, programs and services designed to improve and maintain parenting skills, programs and projects for parent self help, and for prevention and treatment of drug-related child abuse and neglect; and

(5) Assisting public agencies or nonprofit private organizations or combinations thereof in making applications for grants from, or in entering into contracts with, the federal

Secretary of the Department of Health and Human Services for demonstration programs and projects designed to identify, prevent and treat child abuse and neglect.

(d) Agencies, organizations and programs funded to carry out the purposes of this section shall be structured so as to comply with any applicable federal law, any regulation of the federal Department of Health and Human Services or its secretary, and any final comprehensive plan of the federal advisory board on child abuse and neglect. In funding organizations, the department shall, to the extent feasible, ensure that parental organizations combating child abuse and neglect receive preferential treatment.

***§ 49-4-409 After-care plans; contents; written comments; contacts; objections; courts.***

(a) Prior to the discharge of a child from any out-of-home placement to which the juvenile was committed pursuant to this chapter, the department or the Division of Juvenile Services shall convene a meeting of the multidisciplinary treatment team to which the child has been referred or, if no referral has been made, convene a multidisciplinary treatment team for any child for which a multidisciplinary treatment plan is required by this article and forward a copy of the juvenile's proposed after-care plan to the court which committed the juvenile. A copy of the plan shall also be sent to: (1) The child's parent, guardian or custodian; (2) the child's lawyer; (3) the child's probation officer or community mental health center professional; (4) the prosecuting attorney of the county in which the original commitment proceedings were held; and (5) the principal of the school which the child will attend. The plan shall have a list of the names and addresses of these persons attached to it.

(b) The after-care plan shall contain a detailed description of the education, counseling and treatment which the child received at the out-of-home placement and it shall also propose a plan for education, counseling and treatment for the child upon the child's discharge. The plan shall also contain a description of any problems the child has, including the source of those problems, and it shall propose a manner for addressing those problems upon discharge.

(c) Within twenty-one days of receiving the plan, the child's probation officer or community mental health center professional shall submit written comments upon the plan to the court which committed the child. Any other person who received a copy of the plan pursuant to subsection (a) of this section may submit written comments upon the plan to the court which committed the child. Any person who submits comments upon the plan shall send a copy of those comments to every other person who received a copy of the plan.

(d) Within twenty-one days of receiving the plan, the child's probation officer or community mental health center professional shall contact all persons, organizations and agencies which are to be involved in executing the plan to determine whether they are capable of executing their responsibilities under the plan and to further determine whether they are willing to execute their responsibilities under the plan.

(e) If adverse comments or objections regarding the plan are submitted to the circuit court, it shall, within forty-five days of receiving the plan, hold a hearing to consider the plan and the adverse comments or objections. Any person, organization or agency which has responsibilities in executing the plan, or their representatives, may be required to appear at the hearing unless they are excused by the circuit court. Within five days of the hearing, the circuit court shall issue an order which adopts the plan as submitted or as modified in response to any comments or objections.

(f) If no adverse comments or objections are submitted, a hearing need not be held. In that case, the circuit court shall consider the plan as submitted and shall, within forty-five days of receiving the plan, issue an order which adopts the plan as submitted.

(g) Notwithstanding the provisions of subsections (e) and (f) of this section, the plan which is adopted by the circuit court shall be in the best interests of the child and shall also be in conformity with West Virginia's interest in youths as embodied in this chapter.

(h) The court which committed the child shall appoint the child's probation officer or community mental health center professional to act as supervisor of the plan. The supervisor shall report the child's progress under the plan to the court every sixty days or until the court determines that no report or no further care is necessary.

### *§ 49-4-410 Other agencies of government required to cooperate.*

State, county and local agencies shall provide the multidisciplinary teams with any information requested in writing by the team as allowable by law or upon receipt of a certified copy of the circuit court's order directing the agencies to release information in its possession relating to the child. The team shall assure that all information received and developed in connection with this article remain confidential. For purposes of this section, the term "confidential" shall be construed in accordance with article five of this chapter.

### *§ 49-4-411 Law enforcement; prosecution; interference with performance of duties.*

No multidisciplinary team may take any action which, in the determination of the prosecuting attorney or his or her assistant, impairs the ability of the prosecuting attorney, his or her assistant, or any law-enforcement officer to perform his or her statutory duties.

### *§ 49-4-412 Exemption from multidisciplinary team review before emergency out-of-home placements.*

Notwithstanding any provision of this article to the contrary, a multidisciplinary team meeting may not be required before temporary out-of-home placement of a child in an emergency circumstance or for purposes of assessment as provided by this article. As soon a practicable after the emergency circumstance, the multidisciplinary treatment team shall convene to explore placement options.

***§ 49-4-413 Individualized case planning.***

(a) For any juvenile ordered to probation supervision pursuant to § 49-4-714 of this code, the probation officer assigned to the juvenile shall develop and implement an individualized case plan in consultation with the juvenile's parents, guardian or custodian, and other appropriate parties, and based upon the results of a needs assessment conducted within 90 days prior to the disposition to probation. The probation officer shall work with the juvenile and his or her family, guardian or custodian to implement the case plan following disposition. At a minimum, the case plan shall:

(1) Identify the actions to be taken by the juvenile and, if appropriate, the juvenile's parents, guardian or custodian to ensure future lawful conduct and compliance with the court's disposition order; and

(2) Identify the services to be offered and provided to the juvenile and, if appropriate, the juvenile's parents, guardian or custodian and may include services to address: Mental health and substance abuse issues; education; individual, group and family counseling services; community restoration; or other relevant concerns identified by the probation officer.

(b) For any juvenile disposed to an out-of-home placement with the department, the department shall ensure that the residential service provider develops and implements an individualized case plan based upon the recommendations of the multidisciplinary team pursuant to § 49-4-406 of this code and the results of a needs assessment. At a minimum, the case plan shall include:

(1) Specific treatment goals and the actions to be taken by the juvenile in order to demonstrate satisfactory attainment of each goal;

(2) The services to be offered and provided by the residential service providers; and

(3) A detailed plan designed to assure appropriate reintegration of the juvenile to his or her family, guardian, school and community following the satisfactory completion of the case plan treatment goals, including a protocol and timeline for engaging the parents, guardians or custodians prior to the release of the juvenile.

(c) For any juvenile committed to the Division of Corrections and Rehabilitation, the Division of Corrections and Rehabilitation shall develop and implement an individualized case plan based upon the recommendations made to the court by the multidisciplinary team pursuant to § 49-4-406(c) of this code and the results of a risk and needs assessment. At a minimum, the case plan shall include:

(1) Specific correctional goals and the actions to be taken by the juvenile to demonstrate satisfactory attainment of each goal;

(2) The services to be offered and provided by the Division of Corrections and Rehabilitation and any contracted service providers; and

(3) A detailed plan designed to assure appropriate reintegration of the juvenile to his or her family, guardian, school and community following the satisfactory completion of the case plan treatment goals, including a protocol and timeline for engaging the parents, guardians or custodians prior to the release of the juvenile.

## PART V. DUTIES OF THE PROSECUTING ATTORNEY.

### *§ 49-4-501 Prosecuting attorney representation of the Department of Health and Human Resources; conflict resolution.*

(a) The prosecuting attorney shall render to the Department of Health and Human Resources, without additional compensation, the legal services as the department may require. This section shall not be construed to prohibit the department from developing plans for cooperation with courts, prosecuting attorneys, and other law-enforcement officials in a manner as to permit the state and its citizens to obtain maximum fiscal benefits under federal laws, rules and regulations.

(b) Nothing in this code may be construed to limit the authority of a prosecuting attorney to file an abuse or neglect petition, including the duties and responsibilities owed to its client the Department of Health and Human Resources, in his or her fulfillment of the provisions of this article.

(c) Whenever, pursuant to this chapter, a prosecuting attorney acts as counsel for the Department of Health and Human Resources, and a dispute arises between the prosecuting attorney and the department's representative because an action proposed by the other is believed to place the child at imminent risk of abuse or serious neglect, either the prosecuting attorney or the department's representative may contact the secretary of the department and the executive director of the West Virginia Prosecuting Attorneys Institute for prompt mediation and resolution. The secretary may designate either his or her general counsel or the director of social services to act as his or her designee and the executive director may designate an objective prosecuting attorney as his or her designee.

### *§ 49-4-502 Prosecuting attorney to cooperate with persons other than the department in child abuse and neglect matters; duties.*

It is the duty of every prosecuting attorney to cooperate fully and promptly with persons seeking to apply for relief, including copetitioners with the department, under this article in all cases of suspected child abuse and neglect; to promptly prepare applications and petitions for relief requested by those persons, to investigate reported cases of suspected child abuse and neglect for possible criminal activity; and to report at least annually to the grand jury regarding the discharge of his or her duties with respect thereto.

### *§ 49-4-503 Prosecuting attorney to represent petitioner in juvenile cases.*

The prosecuting attorney shall represent the petitioner in all proceedings under this article before the court judge or magistrate having juvenile jurisdiction.

### *§ 49-4-504 Prosecuting attorney duty to establish multidisciplinary investigative teams.*

The prosecuting attorney of each county shall establish a multidisciplinary investigative team in that county, pursuant to section four hundred two of this article, and section five, article four of chapter seven.

## 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.*

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

(b) *Contents of Petition.* — The petition shall be verified by the oath of some credible person having knowledge of the facts. The petition shall allege specific conduct including time and place, how the conduct comes within the statutory definition of neglect or abuse with references to the statute, any supportive services provided by the department to remedy the alleged circumstances, and the relief sought. Each petition shall name as a party each parent, guardian, custodian, other person standing in loco parentis of or to the child allegedly neglected or abused and state with specificity whether each parent, guardian, custodian, or person standing in loco parentis is alleged to have abused or neglected the child.

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

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

(e) *Notice of hearing.* —

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

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

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

(4) If service cannot be obtained by personal service or by certified mail, notice shall be by publication as a Class II legal advertisement in compliance with § 59-3-1 et seq. of this code.

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

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

(f) *Right to counsel. —*

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

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

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

(A) Have retained counsel; and

(B) Are financially able to retain counsel.

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

(5) Under no circumstances may the same attorney represent both the child and another party. The same attorney may not represent more than one parent or custodian: Provided, That one attorney may represent both parents or custodians where both parents or custodians consent to this representation after the attorney fully discloses to the client the possible conflict and where the attorney advises the court that she or he is

able to represent each client without impairing her or his professional judgment. If more than one child from a family is involved in the proceeding, one attorney may represent all the children.

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

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

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

(g) *Continuing education for counsel.* — Any attorney representing a party under this article shall receive a minimum of eight hours of continuing legal education training per reporting period on child abuse and neglect procedure and practice. In addition to this requirement, any attorney appointed to represent a child must first complete training on representation of children that is approved by the administrative office of the Supreme Court of Appeals. The Supreme Court of Appeals shall develop procedures for approval and certification of training required under this section. Where no attorney has completed the training required by this subsection, the court shall appoint a competent attorney with demonstrated knowledge of child welfare law to represent the parent or child. Any attorney appointed pursuant to this section shall perform all duties required of an attorney licensed to practice law in the State of West Virginia.

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

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

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

period, shall be held as close in time as possible after the end of the improvement period and shall be held within 30 days of the termination of the improvement period.

(k) *Procedural safeguards.* — The petition may not be taken as confessed. A transcript or recording shall be made of all proceedings unless waived by all parties to the proceeding. The rules of evidence apply. Following the court's determination, it shall ask the parents or custodians whether or not appeal is desired and the response transcribed. A negative response may not be construed as a waiver. The evidence shall be transcribed and made available to the parties or their counsel as soon as practicable, if the transcript is required for purposes of further proceedings. If an indigent person intends to pursue further proceedings, the court reporter shall furnish a transcript of the hearing without cost to the indigent person if an affidavit is filed stating that he or she cannot pay for the transcript.

### § 49-4-601a *Preference of child placement.*

When a child is removed from his or her home, placement preference is to be given to relatives or fictive kin of the child. If a child requires out-of-home care, placement of a child with a relative is the least restrictive alternative living arrangement. The department must diligently search for relatives of the child and fictive kin within the first days of a child's removal and must identify and provide notice of the child's need for a placement to relatives and fictive kin who are willing to act as a foster or kinship parent.

(1) After a petition alleging abuse and neglect of a child is filed, the department shall commence a search for every relative and fictive kin of the child.

(2) No later than seven calendar days after the petition for removal has been filed, the department shall file, with the court, a list of all of the relatives and fictive kin of the child known to the department at the time of the filing, whether or not those persons have expressed a willingness to take custody of the child.

(3) Within seven days after the department files the list described in subdivision (2) of this subsection, any party to the case may file, with the court, his or her own list containing names and addresses of relatives and fictive kin of the child.

(4) The department shall investigate and determine whether any of the persons identified in the lists filed pursuant to this section are willing and able to act as foster or kinship parents to the child. The department shall file its determinations with the court within 45 days from the filing of the petition alleging abuse or neglect of a child.

### § 49-4-601b *Substantiation by the department of abuse and neglect; file purging; expungement; exceptions.*

(a) Notwithstanding any provision of this code to the contrary, when the department substantiates an allegation of abuse and/or neglect against a person, but there is no judicial finding of abuse and/or neglect as a result of the allegation, the department shall

provide written notice of the substantiation to the person by certified mail, return receipt requested.

(b) The person against whom an abuse and/or neglect allegation has been substantiated, as described in subsection (a) of this section, has the right to contest the substantiation by filing a grievance with the board of review of the department and has the right to appeal the decision of the board of review to the court, in accordance with the provisions of §29A-5-1 et seq. of this code regarding administrative appeals.

(c) The secretary of the department shall propose legislative rules for promulgation in accordance with §29A-3-1 et seq. of this code, within the applicable time limit to be considered by the Legislature during its regular session in the year 2021, which rules shall include, at a minimum:

(1) Provisions for ensuring that an individual against whom the department has substantiated an allegation of abuse and/or neglect, but against whom there is no judicial finding of abuse and/or neglect, receives written notice of the substantiation in a timely manner. The written notice shall at a minimum, state the following:

(A) The name of the child the person is alleged to have abused and/or neglected, the place or places where the abuse and/or neglect allegedly occurred, and the date or dates on which the abuse and/or neglect is alleged to have occurred;

(B) That the person has a right to file a grievance protesting the substantiation of abuse and/or neglect with the board of review of the department and clear instructions regarding how to file a grievance with the board of review, including a description of any applicable time limits;

(C) That the person has a right to appeal an adverse decision of the board of review of the department to the courts and notice of any applicable time limits; and

(D) A description of any public or nonpublic registry on which the person’s name will be included as a result of a substantiated allegation of abuse and/or neglect and a statement that the inclusion of the person’s name on the registry may prevent the person from holding jobs from which child abusers are disqualified, or from providing foster or kinship care to a child in the future;

(2) Provisions for ensuring that a person against whom an allegation of abuse and/or neglect has been substantiated, but against whom there is no judicial finding of abuse and/or neglect, may file a grievance with the department and provisions guaranteeing that he or she will have a full and fair opportunity to be heard; and

(3) Provisions requiring the department to remove a person’s name from an abuse and/or neglect registry maintained by the department if a substantiated allegation is successfully challenged in the board of review or in a court.

(d) Notwithstanding any provision of this code to the contrary:

(1) Where any allegation of abuse and/or neglect is substantiated and a petition for abuse and/or neglect could be filed and the department does not file a petition, all department records related to the allegation shall be sealed one year after the substantiation determination, unless during the one-year period another allegation of child abuse and/or neglect against the person is substantiated: Provided, That the provisions of this subdivision do not apply to a person against whom an allegation is substantiated but the circumstances do not allow for the filing of a petition for abuse and/or neglect;

(2) Where an allegation of child abuse and/or neglect is substantiated and a petition is filed with the circuit court which does not end in an adjudication that abuse and/or neglect occurred, the allegation shall be considered to have been unsubstantiated.

(3)(A) Where an allegation of child abuse and/or neglect is substantiated and a judicial determination of child abuse and/or neglect is found, a person may petition the circuit court which found the person to be an abusing parent to have his or her department record sealed after no less than five years have elapsed since the finding of abuse and/or neglect is rendered: Provided, That a petition may not be filed if the person had been the subject of a substantiated allegation of abuse and/or neglect during the period of time after the finding and prior to the filing of the petition; and

(B) In its consideration of a petition filed under this subdivision, the court, in its discretion, may look at all relevant factors related to the petition, including, but not limited to, efforts at rehabilitation and family reunification.

(e) The sealing of a record pursuant to subsection (d) of this section means that any inquiry of the department about a person having a record of child abuse and/or neglect for purposes of possible employment shall be answered in the negative.

(f) The secretary is directed to propose legislative rules pursuant to §29A-1-1 et seq. of this code to effectuate the amendments to this section enacted during the regular session of the Legislature, 2023.

***§ 49-4-602 Petition to court when child believed neglected or abused; temporary care, custody, and control of child at different stages of proceeding; temporary care; orders; emergency removal; when reasonable efforts to preserve family are unnecessary.***

(a)(1) *Temporary care, custody, and control upon filing of the petition*. -- Upon the filing of a petition, the court may order that the child alleged to be an abused or neglected child be delivered for not more than ten days into the care, custody, and control of the department or a responsible person who is not the custodial parent or guardian of the child, if it finds that:

(A) There exists imminent danger to the physical well-being of the child; and

(B) There are no reasonably available alternatives to removal of the child, including, but not limited to, the provision of medical, psychiatric, psychological or homemaking services in the child's present custody.

(2) Where the alleged abusing person, if known, is a member of a household, the court shall not allow placement pursuant to this section of the child or children in the home unless the alleged abusing person is or has been precluded from visiting or residing in the home by judicial order.

(3) In a case where there is more than one child in the home, or in the temporary care, custody or control of the alleged offending parent, the petition shall so state. Notwithstanding the fact that the allegations of abuse or neglect may pertain to less than all of those children, each child in the home for whom relief is sought shall be made a party to the proceeding. Even though the acts of abuse or neglect alleged in the petition were not directed against a specific child who is named in the petition, the court shall order the removal of the child, pending final disposition, if it finds that there exists imminent danger to the physical well-being of the child and a lack of reasonable available alternatives to removal.

(4) The initial order directing custody shall contain an order appointing counsel and scheduling the preliminary hearing, and upon its service shall require the immediate transfer of care, custody, and control of the child or children to the department or a responsible relative, which may include any parent, guardian, or other custodian. The court order shall state:

(A) That continuation in the home is contrary to the best interests of the child and why; and

(B) Whether or not the department made reasonable efforts to preserve the family and prevent the placement or that the emergency situation made those efforts unreasonable or impossible. The order may also direct any party or the department to initiate or become involved in services to facilitate reunification of the family.

(b) *Temporary care, custody and control at preliminary hearing*. -- Whether or not the court orders immediate transfer of custody as provided in subsection (a) of this section, if the facts alleged in the petition demonstrate to the court that there exists imminent danger to the child, the court may schedule a preliminary hearing giving the respondents at least five days' actual notice. If the court finds at the preliminary hearing that there are no alternatives less drastic than removal of the child and that a hearing on the petition cannot be scheduled in the interim period, the court may order that the child be delivered into the temporary care, custody, and control of the department or a responsible person or agency found by the court to be a fit and proper person for the temporary care of the child for a period not exceeding sixty days. The court order shall state:

(1) That continuation in the home is contrary to the best interests of the child and set forth the reasons therefor;

(2) Whether or not the department made reasonable efforts to preserve the family and to prevent the child's removal from his or her home;

(3) Whether or not the department made reasonable efforts to preserve the family and to prevent the placement or that the emergency situation made those efforts unreasonable or impossible;

(4) Whether or not the department made reasonable accommodations in accordance with the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq*., to parents with disabilities in order to allow them meaningful access to reunification and family preservation services; and

(5) What efforts should be made by the department, if any, to facilitate the child's return home. If the court grants an improvement period as provided in section six hundred ten of this article, the sixty-day limit upon temporary custody is waived.

(c) *Emergency removal by department during pendency of case*. -- Regardless of whether the court has previously granted the department care and custody of a child, if the department takes physical custody of a child during the pendency of a child abuse and neglect case (also known as removing the child) due to a change in circumstances and without a court order issued at the time of the removal, the department must immediately notify the court and a hearing shall take place within ten days to determine if there is imminent danger to the physical well-being of the child, and there is no reasonably available alternative to removal of the child. The court findings and order shall be consistent with subsections (a) and (b) of this section.

(d) *Situations when reasonable efforts to preserve the family are not required*. -- For purposes of the court's consideration of temporary custody pursuant to subsection (a), (b), or (c) of this section, the department is not required to make reasonable efforts to preserve the family if the court determines:

(1) The parent has subjected the child, another child of the parent or any other child residing in the same household or under the temporary or permanent custody of the parent to aggravated circumstances which include, but are not limited to, abandonment, torture, chronic abuse and sexual abuse;

(2) The parent has:

(A) Committed murder of the child's other parent, guardian or custodian, another child of the parent or any other child residing in the same household or under the temporary or permanent custody of the parent;

(B) Committed voluntary manslaughter of the child's other parent, guardian or custodian, another child of the parent or any other child residing in the same household or under the temporary or permanent custody of the parent;

(C) Attempted or conspired to commit murder or voluntary manslaughter or been an accessory before or after the fact to either crime;

(D) Committed unlawful or malicious wounding that results in serious bodily injury to the child, the child's other parent, guardian or custodian, to another child of the parent or any other child residing in the same household or under the temporary or permanent custody of the parent;

(E) Committed sexual assault or sexual abuse of the child, the child's other parent, guardian or custodian, another child of the parent or any other child residing in the same household or under the temporary or permanent custody of the parent; or

(F) Has been required by state or federal law to register with a sex offender registry, and the court has determined in consideration of the nature and circumstances surrounding the prior charges against that parent, that the child's interests would not be promoted by a preservation of the family; or

(3) The parental rights of the parent to another child have been terminated involuntarily.

***§ 49-4-603 Medical and mental examinations; limitation of evidence; probable cause; testimony; judge or referee.***

(a)(1) At any time during proceedings under this article the court may, upon its own motion or upon motion of the child or other parties, order the child or other parties to be examined by a physician, psychologist or psychiatrist, and may require testimony from the expert, subject to cross-examination and the rules of evidence.

(2) The court may not terminate parental or custodial rights of a party solely because the party refuses to submit to the examination, nor may the court hold a party in contempt for refusing to submit to an examination.

(3) The physician, psychologist or psychiatrist shall be allowed to testify as to the conclusions reached from hospital, medical, psychological or laboratory records provided the same are produced at the hearing.

(4) If the child, parent or custodian is indigent, the witnesses shall be compensated out of the Treasury of the State, upon certificate of the court wherein the case is pending.

(5) No evidence acquired as a result of an examination of the parent or any other person having custody of the child may be used against the person in any subsequent criminal proceedings against the person.

(b)(1) If a person with authority to file a petition under this article shall have probable cause to believe that evidence exists that a child has been abused or neglected and that the evidence may be found by a medical examination, the person may apply to a judge or juvenile referee for an order to take the child into custody for delivery to a physician or hospital for examination.

(2) The application may be on forms prescribed by the Supreme Court of Appeals or prepared by the prosecuting attorney or the applicant, and shall set forth facts from which it may be determined that probable cause exists for the belief.

(3) Upon sworn testimony or other evidence as the judge or referee deems sufficient, the judge or referee may order any law-enforcement officer to take the child into custody and deliver the child to a physician or hospital for examination.

(4) If a referee issues an order the referee shall by telephonic communication have such order orally confirmed by a circuit judge of the circuit or an adjoining circuit who shall, on the next judicial day, enter an order of confirmation.

(5) Any child protection worker and the child's parents, guardians or custodians may accompany the officer for examination.

(6) After the examination the officer may return the child to the custody of his or her parent, guardian or custodian, retain custody of the child or deliver custody to the state department until the end of the next judicial day, at which time the child shall be returned to the custody of his or her parent, guardian or custodian unless a petition has been filed and custody of the child has been transferred to the department under section six hundred two of this article.

***§ 49-4-604 Disposition of neglected or abused children; case plans; dispositions; factors to be considered; reunification; orders; alternative dispositions.***

(a) *Child and family case plans*. - Following a determination pursuant to § 49-4-602 of this code wherein the court finds a child to be abused or neglected, the department shall file with the court a copy of the child's case plan, including the permanency plan for the child. The term "case plan" means a written document that includes, where applicable, the requirements of the family case plan as provided in § 49-4-408 of this code and that also includes, at a minimum, the following:

(1) A description of the type of home or institution in which the child is to be placed, including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to assure that the child receives proper care and that services are provided to the parents, child, and foster or kinship parents in order to improve the conditions that made the child unsafe in the care of his or her parent(s), including any reasonable accommodations in accordance with the Americans with Disabilities Act of 1990, 42 U. S. C. §12101 et seq. to parents with disabilities in order to allow them meaningful access to reunification and family preservation services;

(2) A plan to facilitate the return of the child to his or her own home or the concurrent permanent placement of the child; and address the needs of the child while in kinship or foster care, including a discussion of the appropriateness of the services that have been provided to the child.

The term “permanency plan” refers to that part of the case plan which is designed to achieve a permanent home for the child in the least restrictive setting available. The plan must document efforts to ensure that the child is returned home within approximate time lines for reunification as set out in the plan. Reasonable efforts to place a child for adoption or with a legal guardian should be made at the same time, or concurrent with, reasonable efforts to prevent removal or to make it possible for a child to return to the care of his or her parent(s) safely. If reunification is not the permanency plan for the child, the plan must state why reunification is not appropriate and detail the alternative, concurrent permanent placement plans for the child to include approximate time lines for when the placement is expected to become a permanent placement. This case plan shall serve as the family case plan for parents of abused or neglected children. Copies of the child’s case plan shall be sent to the child’s attorney and parent, guardian or custodian or their counsel at least five days prior to the dispositional hearing. The court shall forthwith proceed to disposition giving both the petitioner and respondents an opportunity to be heard.

(b) *Requirements for a Guardian ad litem*. -

A guardian ad litem appointed pursuant to § 49-4-601(f)(1) of this code, shall, in the performance of his or her duties, adhere to the requirements of the Rules of Procedure for Child Abuse and Neglect Proceedings and the Rules of Professional Conduct and such other rules as the West Virginia Supreme Court of Appeals may promulgate, and any appendices thereto, and must meet all educational requirements for the guardian ad litem. A guardian ad litem may not be paid for his or her services without meeting the certification and educational requirements of the court. The West Virginia Supreme Court of Appeals is requested to provide guidance to the judges of the circuit courts regarding supervision of said guardians ad litem. The West Virginia Supreme Court of Appeals is requested to review the Rules of Procedure for Child Abuse and Neglect Proceedings and the Rules of Professional Conduct specific to guardians ad litem.

(c) *Disposition decisions*. - The court shall give precedence to dispositions in the following sequence:

(1) Dismiss the petition;

(2) Refer the child, the abusing parent, the battered parent or other family members to a community agency for needed assistance and dismiss the petition;

(3) Return the child to his or her own home under supervision of the department;

(4) Order terms of supervision calculated to assist the child and any abusing parent or battered parent or parents or custodian which prescribe the manner of supervision and care of the child and which are within the ability of any parent or parents or custodian to perform;

(5) Upon a finding that the abusing parent or battered parent or parents are presently unwilling or unable to provide adequately for the child’s needs, commit the child

temporarily to the care, custody, and control of the department, a licensed private child welfare agency, or a suitable person who may be appointed guardian by the court. The court order shall state:

(A) That continuation in the home is contrary to the best interests of the child and why;

(B) Whether or not the department has made reasonable efforts, with the child's health and safety being the paramount concern, to preserve the family, or some portion thereof, and to prevent or eliminate the need for removing the child from the child's home and to make it possible for the child to safely return home;

(C) Whether the department has made reasonable accommodations in accordance with the Americans with Disabilities Act of 1990, 42 U. S. C. § 12101 et seq., to parents with disabilities in order to allow them meaningful access to reunification and family preservation services;

(D) What efforts were made or that the emergency situation made those efforts unreasonable or impossible; and

(E) The specific circumstances of the situation which made those efforts unreasonable if services were not offered by the department. The court order shall also determine under what circumstances the child's commitment to the department are to continue. Considerations pertinent to the determination include whether the child should:

(i) Be considered for legal guardianship;

(ii) Be considered for permanent placement with a fit and willing relative; or

(iii) Be placed in another planned permanent living arrangement, but only in cases where the child has attained 16 years of age and the department has documented to the circuit court a compelling reason for determining that it would not be in the best interests of the child to follow one of the options set forth in subparagraphs (i) or (ii) of this paragraph. The court may order services to meet the special needs of the child. Whenever the court transfers custody of a youth to the department, an appropriate order of financial support by the parents or guardians shall be entered in accordance with § 49-4-801 through § 49-4-803 of this code;

(6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child, terminate the parental, custodial and guardianship rights and responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency. The court may award sole custody of the child to a nonabusing battered parent. If the court shall so find, then in fixing its dispositional order the court shall consider the following factors:

(A) The child's need for continuity of care and caretakers;

(B) The amount of time required for the child to be integrated into a stable and permanent home environment; and

(C) Other factors as the court considers necessary and proper. Notwithstanding any other provision of this article, the court shall give consideration to the wishes of a child 14 years of age or older or otherwise of an age of discretion as determined by the court regarding the permanent termination of parental rights. No adoption of a child shall take place until all proceedings for termination of parental rights under this article and appeals thereof are final. In determining whether or not parental rights should be terminated, the court shall consider the efforts made by the department to provide remedial and reunification services to the parent. The court order shall state:

(i) That continuation in the home is not in the best interest of the child and why;

(ii) Why reunification is not in the best interests of the child;

(iii) Whether or not the department made reasonable efforts, with the child's health and safety being the paramount concern, to preserve the family, or some portion thereof, and to prevent the placement or to eliminate the need for removing the child from the child's home and to make it possible for the child to safely return home, or that the emergency situation made those efforts unreasonable or impossible; and

(iv) Whether or not the department made reasonable efforts to preserve and reunify the family, or some portion thereof, including a description of what efforts were made or that those efforts were unreasonable due to specific circumstances.

(7) For purposes of the court's consideration of the disposition custody of a child pursuant to this subsection, the department is not required to make reasonable efforts to preserve the family if the court determines:

(A) The parent has subjected the child, another child of the parent or any other child residing in the same household or under the temporary or permanent custody of the parent to aggravated circumstances which include, but are not limited to, abandonment, torture, chronic abuse, and sexual abuse;

(B) The parent has:

(i) Committed murder of the child's other parent, guardian or custodian, another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent;

(ii) Committed voluntary manslaughter of the child's other parent, guardian, or custodian, another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent;

(iii) Attempted or conspired to commit murder or voluntary manslaughter, or been an accessory before or after the fact to either crime;

(iv) Committed a malicious assault that results in serious bodily injury to the child, the child's other parent, guardian, or custodian, to another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent;

(v) Attempted or conspired to commit malicious assault, as outlined in subparagraph (iv), or been an accessory before or after the fact to the same;

(vi) Committed sexual assault or sexual abuse of the child, the child's other parent, guardian, or custodian, another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent; or

(vii) Attempted or conspired to commit sexual assault or sexual abuse, as outlined in subparagraph (vi), or been an accessory before or after the fact to the same.

(C) The parental rights of the parent to another child have been terminated involuntarily;

(D) A parent has been required by state or federal law to register with a sex offender registry, and the court has determined in consideration of the nature and circumstances surrounding the prior charges against that parent, that the child's interests would not be promoted by a preservation of the family.

(d) As used in this section, "No reasonable likelihood that conditions of neglect or abuse can be substantially corrected" means that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help. Those conditions exist in the following circumstances, which are not exclusive:

(1) The abusing parent or parents have habitually abused or are addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and the person or persons have not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning;

(2) The abusing parent or parents have willfully refused or are presently unwilling to cooperate in the development of a reasonable family case plan designed to lead to the child's return to their care, custody and control;

(3) The abusing parent or parents have not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health, or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare, or life of the child;

(4) The abusing parent or parents have abandoned the child;

(5) The abusing parent or parents have repeatedly or seriously injured the child physically or emotionally, or have sexually abused or sexually exploited the child, and the degree of family stress and the potential for further abuse and neglect are so great as to preclude the use of resources to mitigate or resolve family problems, or assist the abusing parent or parents in fulfilling their responsibilities to the child; and

(6) The battered parent's parenting skills have been seriously impaired and the person has willfully refused or is presently unwilling or unable to cooperate in the development of a reasonable treatment plan, or has not adequately responded to or followed through with the recommended and appropriate treatment plan.

(e) The court may, as an alternative disposition, allow the parents or custodians an improvement period not to exceed six months. During this period the court shall require the parent to rectify the conditions upon which the determination was based. The court may order the child to be placed with the parents, or any person found to be a fit and proper person, for the temporary care of the child during the period. At the end of the period, the court shall hold a hearing to determine whether the conditions have been adequately improved and at the conclusion of the hearing shall make a further dispositional order in accordance with this section.

(f) The court may not terminate the parental rights of a parent on the sole basis that the parent is participating in a medication-assisted treatment program, as regulated in §16-5Y-1 et seq., for substance use disorder, as long as the parent is successfully fulfilling his or her treatment obligations in the medication-assisted treatment program.

***§ 49-4-605 When department efforts to terminate parental rights are required.***

(a) Except as provided in § 49-4-605(b) of this code, the department shall file or join in a petition or otherwise seek a ruling in any pending proceeding to terminate parental rights:

(1) If a child has been in foster care for 15 of the most recent 22 months as determined by the earlier of the date of the first judicial finding that the child is subjected to abuse or neglect or the date which is 60 days after the child is removed from the home;

(2) If a court has determined the child is abandoned, tortured, sexually abused, or chronically abused;

(3) If a court has determined the parent has committed murder or voluntary manslaughter of another of his or her children, another child in the household, or the other parent of his or her children; has attempted or conspired to commit murder or voluntary manslaughter or has been an accessory before or after the fact of either crime; has committed unlawful or malicious wounding resulting in serious bodily injury to the child or to another of his or her children, another child in the household or to the other parent of his or her children; has committed sexual assault or sexual abuse of the child, the child's other parent, guardian or custodian, another child of the parent or any other child residing

in the same household or under the temporary or permanent custody of the parent; or the parental rights of the parent to another child have been terminated involuntarily; or

(4) If a parent whose child has been removed from the parent's care, custody, and control by an order of removal voluntarily fails to have contact or attempt to have contact with the child for a period of 18 consecutive months: Provided, That failure to have, or attempt to have, contact due to being incarcerated, being in a medical or drug treatment or recovery facility, or being on active military duty shall not be considered voluntary behavior.

(b) The department may determine not to file a petition to terminate parental rights when:

(1) At the option of the department, the child has been placed permanently with a relative by court order;

(2) The department has documented in the case plan made available for court review a compelling reason, including, but not limited to, the child's age and preference regarding termination or the child's placement in custody of the department based on any proceedings initiated under part seven of this article, that filing the petition would not be in the best interests of the child; or

(3) The department has not provided, when reasonable efforts to return a child to the family are required, the services to the child's family as the department deems necessary for the safe return of the child to the home.

***§ 49-4-606 Modification of dispositional orders; hearings; treatment team; unadopted children.***

(a) Upon motion of a child, a child's parent or custodian or the department alleging a change of circumstances requiring a different disposition, the court shall conduct a hearing pursuant to section six hundred four of this article and may modify a dispositional order if the court finds by clear and convincing evidence a material change of circumstances and that the modification is in the child's best interests. A dispositional order may not be modified after the child has been adopted, except as provided in subsections (b) and (c) of this section. Adequate and timely notice of any motion for modification shall be given to the child's counsel, counsel for the child's parent or custodian, the department and any person entitled to notice and the right to be heard. The circuit court of origin has exclusive jurisdiction over placement of the child, and the placement may not be disrupted or delayed by any administrative process of the department.

(b) If the child is removed or relinquished from an adoptive home or other permanent placement after the case has been dismissed, any party with notice thereof and the receiving agency shall promptly report the matter to the circuit court of origin, the department and the child's counsel, and the court shall schedule a permanency hearing within sixty days of the report to the circuit court, with notice given to any appropriate

parties and persons entitled to notice and the right to be heard. The department shall convene a multidisciplinary treatment team meeting within thirty days of the receipt of notice of permanent placement disruption.

(c) If a child has not been adopted, the child or department may move the court to place the child with a parent or custodian whose rights have been terminated and/or restore the parent's or guardian's rights. Under these circumstances, the court may order the placement and/or restoration of a parent's or guardian's rights if it finds by clear and convincing evidence a material change of circumstances and that the placement and/or restoration is in the child's best interests.

***§ 49-4-607 Consensual termination of parental rights.***

An agreement of a natural parent in termination of parental rights is valid if made by a duly acknowledged writing, and entered into under circumstances free from duress and fraud. Where during the pendency of an abuse and neglect proceeding, a parent offers voluntarily to relinquish of his or her parental rights, and the relinquishment is accepted by the circuit court, the relinquishment may, without further evidence, be used as the basis of an order of adjudication of abuse and neglect by that parent of his or her children.

***§ 49-4-608 Permanency hearing; frequency; transitional planning; out-of-state placements; findings; notice; permanent placement review.***

(a) *Permanency hearing when reasonable efforts are not required.* — If the court finds pursuant to this article that the department is not required to make reasonable efforts to preserve the family, then notwithstanding any other provision a permanency hearing must be held within 30 days following the entry of the court order so finding, and a permanent placement review hearing must be conducted at least once every 90 days thereafter until a permanent placement is achieved.

(b) *Permanency hearing every 12 months until permanency is achieved.* — If 12 months after receipt by the department or its authorized agent of physical care, custody, and control of a child either by a court-ordered placement or by a voluntary agreement the department has not placed a child in an adoptive home, placed the child with a natural parent, placed the child in legal guardianship, or permanently placed the child with a fit and willing relative, the court shall hold a permanency hearing. The department shall file a progress report with the court detailing the efforts that have been made to place the child in a permanent home and copies of the child's case plan, which shall include the permanency plan as defined in § 49-1-201 and § 49-4-604 of this code. Copies of the report shall be sent to the parties and all persons entitled to notice and the right to be heard. The court shall schedule a hearing giving notice and the right to be present to the child's attorney; the child; the child's parents; the child's guardians; the child's foster parents; any preadoptive parent, or any relative providing care for the child; any person entitled to notice and the right to be heard; and other persons as the court may, in its discretion, direct. The child's presence may be waived by the child's attorney at the request of the child or if the child is younger than 12 years-of-age and would suffer emotional harm. The purpose of the hearing is to review the child's case, to determine

whether and under what conditions the child's commitment to the department shall continue, to determine what efforts are necessary to provide the child with a permanent home, and to determine if the department has made reasonable efforts to finalize the permanency plan. The court shall conduct another permanency hearing within 12 months thereafter for each child who remains in the care, custody, and control of the department until the child is placed in an adoptive home, returned to his or her parents, placed in legal guardianship, or permanently placed with a fit and willing relative.

(c) *Transitional planning for older children.* — In the case of a child who has attained 16 years of age, the court shall determine the services needed to assist the child to make the transition from foster care to independent living. The child's case plan should specify services aimed at transitioning the child into adulthood. When a child turns 17, or as soon as a child aged 17 comes into a case, the department must immediately provide the child with assistance and support in developing a transition plan that is personalized at the direction of the child. The plan must include specific options on housing, health insurance, education, local opportunities for mentors, continuing support services, work force support, and employment services, and the plan should be as detailed as the child may elect. In addition to these requirements, when a child with special needs turns 17, or as soon as a child aged 17 with special needs comes into a case, he or she is entitled to the appointment of a department adult services worker to the multidisciplinary treatment team, and coordination between the multidisciplinary treatment team and other transition planning teams, such as special education individualized education planning (IEP) teams.

(d) *Out-of-state placements.* — A court may not order a child to be placed in an out-of-state facility unless the child is diagnosed with a health issue that no in-state facility or program serves unless a placement out of state is in closer proximity to the child's family for the necessary care or the services are able to be provided more timely. If the child is to be placed with a relative or other responsible person out of state, the court shall use judicial leadership to help expedite the process under the Interstate Compact for the Placement of Children provided in § 49-7-101 and § 49-7-102 of this code and the Uniform Child Custody Jurisdiction and Enforcement Act provided in § 48-20-101 et seq. of this code.

(e) *Findings in order.* — At the conclusion of the hearing the court shall, in accordance with the best interests of the child, enter an order containing all the appropriate findings. The court order shall state:

(1) Whether or not the department made reasonable efforts to preserve the family and to prevent out-of-home placement or that the specific situation made the effort unreasonable;

(2) Whether or not the department made reasonable efforts to finalize the permanency plan and concurrent plan for the child;

(3) The appropriateness of the child's current placement, including its distance from the child's home and whether or not it is the least restrictive one (or most family-like one) available;

(4) The appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement;

(5) Services required to meet the child's needs and achieve permanency; and

(6) In addition, in the case of any child for whom another planned permanent living arrangement is the permanency plan the court shall: (A) Inquire of the child about the desired permanency outcome for the child; (B) make a judicial determination explaining why, as of the date of the hearing, another planned permanent living arrangement is the best permanency plan for the child; and (C) provide in the court order compelling reasons why it continues to not be in the best interest of the child to: (i) return home, (ii) be placed for adoption, (iii) be placed with a legal guardian, or (iv) be placed with a fit and willing relative.

(f) The department shall annually report to the court the current status of the placements of children in the care, custody, and control of the state department who have not been adopted.

(g) The department shall file a report with the court in any case where any child in the custody of the state receives more than three placements in one year no later than 30 days after the third placement. This report shall be provided to all parties and persons entitled to notice and the right to be heard. Upon motion by any party, the court shall review these placements and determine what efforts are necessary to provide the child with a permanent home. No report may be provided to any parent or parent's attorney whose parental rights have been terminated pursuant to this article.

(h) The department shall give actual notice, in writing, to the court, the child, the child's attorney, the parents, and the parents' attorney at least 48 hours prior to the move if this is a planned move, or within 48 hours of the next business day after the move if the child is in imminent danger in the child's current placement, except where the notification would endanger the child or the foster family. A multidisciplinary treatment team shall convene as soon as practicable after notice to explore placement options. This requirement is not waived by placement of the child in a home or other residence maintained by a private provider. No notice may be provided pursuant to this provision to any parent or parent's attorney whose parental rights have been terminated pursuant to this article.

(i) Nothing in this article precludes any party from petitioning the court for review of the child's case at any time. The court shall grant the petition upon a showing that there is a change in circumstance or needs of the child that warrants court review.

(j) Any foster parent, preadoptive parent or relative providing care for the child shall be given notice of and the right to be heard at the permanency hearing provided in this section.

(k) Once an adoption case is assigned to a child placing agency, all related court hearing notices shall be sent to the child placing agency as an interested party.

***§ 49-4-609 Conviction for offenses against children.***

In any case where a person is convicted of an offense against a child described in section twelve, article eight, chapter sixty-one of this code or articles eight-b or eight-d of that chapter and the person has custodial, visitation or other parental rights to the child who is the victim of the offense or to any child who resides in the same household as the victim, the court shall, at the time of sentencing, find that the person is an abusing parent within the meaning of this chapter as to the child victim, and may find that the person is an abusing parent as to any child who resides in the same household as the victim, and the court shall take further steps as are required by this article.

***§ 49-4-610 Improvement periods in cases of child neglect or abuse; findings; orders; extensions; hearings; time limits.***

In any proceeding brought pursuant to this article, the court may grant any respondent an improvement period in accord with this article. During the period, the court may require temporary custody with a responsible person which has been found to be a fit and proper person for the temporary custody of the child or children or the state department or other agency during the improvement period. An order granting an improvement period shall require the department to prepare and submit to the court a family case plan in accordance with section four hundred eight, of this article. The types of improvement periods are as follows:

(1) *Preadjudicatory improvement period*. -- A court may grant a respondent an improvement period of a period not to exceed three months prior to making a finding that a child is abused or neglected pursuant to section six hundred one of this article only when:

(A) The respondent files a written motion requesting the improvement period;

(B) The respondent demonstrates, by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period and the court further makes a finding, on the record, of the terms of the improvement period;

(C) In the order granting the improvement period, the court:

(i) Orders that a hearing be held to review the matter within sixty days of the granting of the improvement period; or

(ii) Orders that a hearing be held to review the matter within ninety days of the granting of the improvement period and that the department submit a report as to the respondents progress in the improvement period within sixty days of the order granting the improvement period; and

(D) The order granting the improvement period requires the department to prepare and submit to the court an individualized family case plan in accordance with section four hundred eight of this article;

(2) *Post-adjudicatory improvement period*. -- After finding that a child is an abused or neglected child pursuant to section six hundred one of this article, a court may grant a respondent an improvement period of a period not to exceed six months when:

(A) The respondent files a written motion requesting the improvement period;

(B) The respondent demonstrates, by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period and the court further makes a finding, on the record, of the terms of the improvement period;

(C) In the order granting the improvement period, the court:

(i) orders that a hearing be held to review the matter within thirty days of the granting of the improvement period; or

(ii) orders that a hearing be held to review the matter within ninety days of the granting of the improvement period and that the department submit a report as to the respondent's progress in the improvement period within sixty days of the order granting the improvement period;

(D) Since the initiation of the proceeding, the respondent has not previously been granted any improvement period or the respondent demonstrates that since the initial improvement period, the respondent has experienced a substantial change in circumstances. Further, the respondent shall demonstrate that due to that change in circumstances the respondent is likely to fully participate in a further improvement period; and

(E) The order granting the improvement period requires the department to prepare and submit to the court an individualized family case plan in accordance with section four hundred eight of this article.

(3) *Post-dispositional improvement period*. -- The court may grant an improvement period not to exceed six months as a disposition pursuant to section six hundred four of this article when:

(A) The respondent moves in writing for the improvement period;

(B) The respondent demonstrates, by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period and the court further makes a finding, on the record, of the terms of the improvement period;

(C) In the order granting the improvement period, the court:

(i) Orders that a hearing be held to review the matter within sixty days of the granting of the improvement period; or

(ii) Orders that a hearing be held to review the matter within ninety days of the granting of the improvement period and that the department submit a report as to the respondent's progress in the improvement period within sixty days of the order granting the improvement period;

(D) Since the initiation of the proceeding, the respondent has not previously been granted any improvement period or the respondent demonstrates that since the initial improvement period, the respondent has experienced a substantial change in circumstances. Further, the respondent shall demonstrate that due to that change in circumstances, the respondent is likely to fully participate in the improvement period; and

(E) The order granting the improvement period shall require the department to prepare and submit to the court an individualized family case plan in accordance with section four hundred eight of this article.

(4) *Responsibilities of the respondent receiving improvement period*. --

(A) When any improvement period is granted to a respondent pursuant to this section, the respondent shall be responsible for the initiation and completion of all terms of the improvement period. The court may order the state department to pay expenses associated with the services provided during the improvement period when the respondent has demonstrated that he or she is unable to bear the expenses.

(B) When any improvement period is granted to a respondent pursuant to this section, the respondent shall execute a release of all medical information regarding that respondent, including, but not limited to, information provided by mental health and substance abuse professionals and facilities. The release shall be accepted by a professional or facility regardless of whether the release conforms to any standard required by that facility.

(5) *Responsibilities of the department during improvement period*. -- When any respondent is granted an improvement period pursuant to this article, the department shall monitor the progress of the person in the improvement period. This section may not be construed to prohibit a court from ordering a respondent to participate in services designed to reunify a family or to relieve the department of any duty to make reasonable efforts to reunify a family required by state or federal law.

(6) *Extension of improvement period*. -- A court may extend any improvement period granted pursuant to subdivision (2) or (3) of this section for a period not to exceed three months when the court finds that the respondent has substantially complied with the terms of the improvement period; that the continuation of the improvement period will not substantially impair the ability of the department to permanently place the child; and that the extension is otherwise consistent with the best interest of the child.

(7) *Termination of improvement period*. -- Upon the motion by any party, the court shall terminate any improvement period granted pursuant to this section when the court finds that respondent has failed to fully participate in the terms of the improvement period or has satisfied the terms of the improvement period to correct any behavior alleged in the petition or amended petition to make his or her child unsafe.

(8) *Hearings on improvement period*. --

(A) Any hearing scheduled pursuant to this section may be continued only for good cause upon a written motion properly served on all parties. When a court grants a continuance, the court shall enter an order granting the continuance specifying a future date when the hearing will be held.

(B) Any hearing to be held at the end of an improvement period shall be held as nearly as practicable on successive days and shall be held as close in time as possible after the end of the improvement period and shall be held no later than thirty days of the termination of the improvement period.

(9) *Time limit for improvement periods*. -- Notwithstanding any other provision of this section, no combination of any improvement periods or extensions thereto may cause a child to be in foster care more than fifteen months of the most recent twenty-two months, unless the court finds compelling circumstances by clear and convincing evidence that it is in the child's best interests to extend the time limits contained in this paragraph.

## PART VIII. SUPPORT AND SUPPORT ORDERS.

### *§ 49-4-801 Support of a child removed from home pursuant to this chapter; order requirements.*

(a) It is the intent of the Legislature that to the extent practicable, this article should encourage and require a child's parents to meet the obligation of providing that child with adequate food, shelter, clothing, education, and health and child care.

(b) This article shall be construed to be consistent with articles one, eleven, twelve, thirteen, fourteen, fifteen, sixteen, eighteen, nineteen and twenty four of chapter forty-eight of this code, and those articles apply to actions pursuant to this chapter unless expressly stated otherwise.

(c) When a child is removed from his or her home pursuant to this chapter, the court shall issue a support order payable by the child's mother. If the child's legal father has

been determined, the court shall issue a child support order payable by the legal father. If no legal father has been determined, the court shall issue an order establishing paternity prior to or simultaneously with establishing a support order payable by the child's legal father. Copies of the orders shall be provided to the Department of Health and Human Resources, Bureau of Child Support Enforcement.

(d) The order establishing a child support obligation must use the Guidelines for Child Support Awards that are set forth in article thirteen, chapter forty-eight of this code.

(e) In addition to the reasons for deviation listed in section seven hundred two, article thirteen, chapter forty-eight of this code, deviation from the child support guidelines is appropriate when the court finds that:

(1) It may assist the parent in successful completion of an improvement period;

(2) It may be in the best interest of the minor child to issue a zero child support order; and/or

(3) The parent temporarily or permanently has no gross income as defined in section two hundred twenty eight, article one, chapter forty-eight of this code.

***§ 49-4-802 General provisions for support orders; contempt.***

(a) Any pre-existing support order from any other court or administrative agency with authority to issue a support order shall remain in full force and effect until a superseding order is issued.

(b) If a child is returned to the physical custody of a parent, that parent is not responsible for paying child support for the duration of time that parent has physical custody of the child without the necessity of entry of another court order terminating that parent's child support obligation.

(c) If the action is dismissed for failure to prove the allegations of abuse or neglect, any support provision issued pursuant to this chapter are void ab initio. Any adjudication of paternity shall remain in full force and effect.

(d) The support obligation shall automatically continue beyond the termination of the payor's parental rights, unless the support obligation is explicitly ended in an order.

***§ 49-4-803 Enforcement of support orders.***

(a) Support orders may be enforced through any manner provided in chapters thirty-eight and forty-eight of this code.

(b) An action for contempt for nonpayment of support may be brought by the Department of Health and Human Resources, Bureau for Children and Families or Bureau for Child Support Enforcement; the child's physical custodian; the child's guardian ad litem; or the prosecuting attorney.

## ARTICLE 7. INTERSTATE COOPERATION.

## PART I. INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN.

### § 49-7-101 *Adoption of compact.*

The interstate compact on the placement of children is hereby enacted into law and entered into with all other jurisdictions legally joining therein in form substantially as follows:

### *ARTICLE I. PURPOSE AND POLICY.*

It is the purpose and policy of the party states to cooperate with each other in the interstate placement of children to the end that:

(a) Each child requiring placement shall receive the maximum opportunity to be placed in a suitable environment and with persons or institutions having appropriate qualifications and facilities to provide a necessary and desirable degree and type of care.

(b) The appropriate authorities in a state where a child is to be placed may have full opportunity to ascertain the circumstances of the proposed placement, thereby promoting full compliance with applicable requirements for the protection of the child.

(c) The proper authorities of the state from which the placement is made may obtain the most complete information on the basis of which to evaluate a projected placement before it is made.

(d) Appropriate jurisdictional arrangements for the care of children will be promoted.

### *ARTICLE II. DEFINITIONS.*

As used in this compact:

(a) “Child” means a person who, by reason of minority is legally subject to parental, guardianship or similar control.

(b) “Sending agency” means a party state, officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a court of a party state; a person, corporation, association, charitable agency or other entity which sends, brings, or causes to be sent or brought any child to another party state.

(c) “Receiving state” means the state to which a child is sent, brought, or caused to be sent or brought, whether by public authorities or private persons or agencies, and whether for placement with state or local public authorities or for placement with private agencies or persons.

(d) “Placement” means the arrangement for the care of a child in a family free home or boarding home or in a child-caring agency or institution but does not include any institution

caring for the mentally ill, mentally defective or epileptic or any institution primarily educational in character, and any hospital or other medical facility.

***ARTICLE III. CONDITIONS FOR REPLACEMENT.***

(a) No sending agency shall send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein.

(b) Prior to sending, bringing or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption, the sending agency shall furnish the appropriate public authorities in the receiving state written notice of the intention to send, bring, or place the child in the receiving state. The notice shall contain:

(1) The name, date and place of birth of the child.

(2) The identity and address or addresses of the parents or legal guardian.

(3) The name and address of the person, agency or institution to or with which the sending agency proposes to send, bring, or place the child.

(4) A full statement of the reasons for the proposed action and evidence of the authority pursuant to which the placement is proposed to be made.

(c) Any public officer or agency in a receiving state which is in receipt of a notice pursuant to paragraph (b) of this article may request of the sending agency, or any other appropriate officer or agency of or in the sending agency's state, and shall be entitled to receive therefrom, the supporting or additional information as it may deem necessary under the circumstances to carry out the purpose and policy of this compact.

(d) The child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child.

***ARTICLE IV. PENALTY FOR ILLEGAL REPLACEMENT.***

The sending, bringing, or causing to be sent or brought into any receiving state of a child in violation of the terms of this compact shall constitute a violation of the laws respecting the placement of children of both the state in which the sending agency is located or from which it sends or brings the child and of the receiving state. A violation may be punished or subjected to penalty in either jurisdiction in accordance with its laws. In addition to liability for any punishment or penalty, a violation shall constitute full and sufficient grounds for the suspension or revocation of any license, permit, or other legal

authorization held by the sending agency which empowers or allows it to place, or care for children.

***ARTICLE V. RETENTION OF JURISDICTION.***

(a) The sending agency shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment and disposition of the child which it would have had if the child had remained in the sending agency's state, until the child is adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state. The jurisdiction shall also include the power to effect or cause the return of the child or its transfer to another location and custody pursuant to law. The sending agency shall continue to have financial responsibility for support and maintenance of the child during the period of the placement. Nothing contained herein shall defeat a claim of jurisdiction by a receiving state sufficient to deal with an act of delinquency or crime committed therein.

(b) When the sending agency is a public agency, it may enter into an agreement with an authorized public or private agency in the receiving state providing for the performance of one or more services in respect of the case by the latter as agent for the sending agency.

(c) Nothing in this compact shall be construed to prevent a private charitable agency authorized to place children in the receiving state from performing services or acting as agent in that state for a private charitable agency of the sending state; nor to prevent the agency in the receiving state from discharging financial responsibility for the support and maintenance of a child who has been placed on behalf of the sending agency without relieving the responsibility set forth in paragraph (a) hereof.

***ARTICLE VI. INSTITUTIONAL CARE OF DELINQUENT CHILDREN.***

A child adjudicated delinquent may be placed in an institution in another party jurisdiction pursuant to this compact but no placement shall be made unless the child is given a court hearing on notice to the parent or guardian with opportunity to be heard, prior to his or her being sent to the other party jurisdiction for institutional care and the court finds that:

1. Equivalent facilities for the child are not available in the sending agency's jurisdiction; and

2. Institutional care in the other jurisdiction is in the best interest of the child and will not produce undue hardship.

***ARTICLE VII. COMPACT ADMINISTRATOR.***

The executive head of each jurisdiction party to this compact shall designate an officer who shall be general coordinator of activities under this compact in his or her jurisdiction and who, acting jointly with like officers of other party jurisdictions, shall have power to

promulgate rules and regulations to carry out more effectively the terms and provisions of this compact.

***ARTICLE VIII. LIMITATIONS.***

This compact shall not apply to:

(a) The sending or bringing of a child into a receiving state by his or her parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or his or her guardian and leaving the child with a relative or nonagency guardian in the receiving state.

(b) Any placement, sending or bringing of a child into a receiving state pursuant to any other interstate compact to which both the state from which the child is sent or brought and the receiving state are party, or to any other agreement between the states which has the force of law.

***ARTICLE IX. ENACTMENT AND WITHDRAWAL.***

This compact shall be open to joinder by any state, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and, with the consent of Congress, the government of Canada or any province thereof. It shall become effective with respect to those jurisdictions when that other jurisdiction has enacted the same into law. Withdrawal from this compact shall be by the enactment of a statute repealing the same, but shall not take effect until two years after the effective date of the statute and until written notice of the withdrawal has been given by the withdrawing state to the Governor of each other party jurisdiction. Withdrawal of a party state shall not affect the rights, duties and obligations under this compact of any sending agency therein with respect to a placement made prior to the effective date of withdrawal.

***ARTICLE X. CONSTRUCTION.***

The provisions of this compact shall be liberally construed to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the Constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the Constitution of any state party thereto, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

***§ 49-7-102 Definitions; implementation.***

(a) Financial responsibility for any child placed pursuant to the provisions of the Interstate Compact on the Placement of Children shall be determined in accordance with the provisions of Article V thereof in the first instance. However, in the event of partial or

complete default of performance thereunder, section one hundred one, article two of this chapter may be invoked.

(b) The "appropriate public authorities" as used in Article III of the Interstate Compact on the Placement of Children shall, with reference to this state, mean the Department of Health and Human Resources and the agency shall receive and act with reference to notices required by Article III.

(c) As used in paragraph (a) of Article V of the Interstate Compact on the Placement of Children, the phrase "appropriate authority in the receiving state" with reference to this state shall mean the Department of Health and Human Resources.

(d) The officers and agencies of this state and its subdivisions having authority to place children are hereby empowered to enter into agreements with appropriate officers or agencies of or in other party states pursuant to paragraph (b) of Article V of the Interstate Compact on the Placement of Children. An agreement which contains a financial commitment or imposes a financial obligation on this state or subdivision or agency thereof is not binding unless it has the approval in writing of the Auditor in the case of the state and of the chief local fiscal officer in the case of a subdivision of the state.

(e) Any requirements for visitation, inspection or supervision of children, homes, institutions or other agencies in another party state which may apply under sections one hundred eight and one hundred eleven, article two of this chapter shall be deemed to be met if performed pursuant to an agreement entered into by appropriate officers or agencies of this state or a subdivision thereof as contemplated by paragraph (b) of Article V of the Interstate Compact on the Placement of Children.

(f) Section one hundred nine, article two of this chapter does not apply to placements made pursuant to the Interstate Compact on the Placement of Children.

(g) Any court having jurisdiction to place delinquent children may place a child in an institution of or in another state pursuant to Article VI of the Interstate Compact on the Placement of Children and shall retain jurisdiction as provided in Article V thereof.

(h) As used in Article VII of the interstate compact on the placement of children, the term "executive head" means the Governor. The Governor is hereby authorized to appoint a compact administrator in accordance with the terms of that Article VII.

## PART II. INTERSTATE ADOPTION ASSISTANCE COMPACT.

### *§ 49-7-201 Interstate adoption assistance compact; findings and purpose.*

(a) The Legislature finds that:

(1) Finding adoptive families for children, for whom state assistance is desirable pursuant to section one hundred twelve, article four, of this chapter and assuring the protection of the interests of the children affected during the entire assistance period,

require special measures when the adoptive parents move to other states or are residents of another state; and

(2) Provision of medical and other necessary services for children, with state assistance, encounters special difficulties when the provision of services takes place in other states.

(b) The purposes of sections two hundred one through two hundred four of this article are to:

(1) Authorize the Department of Health and Human Resources to enter into interstate agreements with agencies of other states for the protection of children on behalf of whom adoption assistance is being provided by the Department of Health and Human Resources; and

(2) Provide procedures for interstate children's adoption assistance payments, including medical payments.

***§ 49-7-202 Interstate adoption assistance compacts authorized; definitions.***

(a) The Department of Health and Human Resources is authorized to develop, participate in the development of, negotiate and enter into one or more interstate compacts on behalf of this state with other states to implement one or more of the purposes set forth in sections two hundred one through two hundred four of this article. When so entered into, and for so long as it shall remain in force, the compact shall have the force and effect of law.

(b) For the purposes of sections two hundred one through two hundred four of this article, the term "state" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, or a Territory or Possession of or administered by the United States.

(c) For the purposes of sections two hundred one through two hundred four of this article, the term "adoption assistance state" means the state that is signatory to an adoption assistance agreement in a particular case.

(d) For the purposes of sections two hundred one through two hundred four of this article, the term "residence state" means the state of which the child is a resident by virtue of the residence of the adoptive parents.

***§ 49-7-203 Interstate adoption assistance compact; contents of compact.***

A compact entered into pursuant to the authority conferred by sections two hundred one through two hundred four of this article shall have the following content:

(1) A provision making it available to joinder by all states.

(2) A provision or provisions for withdrawal from the compact upon written notice to the parties, but with a period of one year between the date of the notice and the effective date of the withdrawal.

(3) A requirement that the protections afforded by or pursuant to the compact continue in force for the duration of the adoption assistance and be applicable to all children and their adoptive parents who on the effective date of the withdrawal are receiving adoption assistance from a party state other than the one in which they are resident and have their principal place of abode.

(4) A requirement that each instance of adoption assistance to which the compact applies be covered by an adoption assistance agreement in writing between the adoptive parents and the state department which undertakes to provide the adoption assistance, and further, that the agreement be expressly for the benefit of the adopted child and enforceable by the adoptive parents, and the state agency providing the adoption assistance.

(5) Other provisions as may be appropriate to implement the proper administration of the compact.

***§ 49-7-204 Medical assistance for children with special needs; rule-making; penalties.***

(a) A child with special needs resident in this state who is the subject of an adoption assistance agreement with another state shall be entitled to receive a medical assistance identification from this state upon the filing in the Division of Human Services of a certified copy of the adoption assistance agreement obtained from the adoption assistance state. In accordance with regulations of the Department of Health and Human Resources the adoptive parents shall be required at least annually to show that the agreement is still in force or has been renewed.

(b) The Department of Health and Human Resources shall consider the holder of a medical assistance identification pursuant to this section as any other holder of a medical assistance identification under the laws of this state and shall process and make payment on claims on account of the holder in the same manner and pursuant to the same conditions and procedures as for other recipients of medical assistance.

(c) The Department of Health and Human Resources shall provide coverage and benefits for a child who is in another state and who is covered by an adoption assistance agreement made by the Department of Health and Human Resources for the coverage or benefits, if any, not provided by the residence state. To this end, the adoptive parents acting for the child may submit evidence of payment for services or benefit amounts not payable in the residence state and shall be reimbursed therefor. However, there may be no reimbursement for services or benefit amounts covered under any insurance or other third party medical contract or arrangement held by the child or the adoptive parents. The Department of Health and Human Resources shall propose rules in accordance with article three, chapter twenty-nine-a of this code that are necessary to effectuate the

requirements and purposes of this section. The additional coverages and benefit amounts provided pursuant to this section shall be for services to the cost of which there is no federal contribution, or which, if federally aided, are not provided by the residence state. Among other things, the regulations shall include procedures to be followed in obtaining prior approvals for services in those instances where required for the assistance.

(d) Any person who submits a claim for payment or reimbursement for services or benefits pursuant to this section or the making of any statement in connection therewith, which claim of statement the maker knows or should know to be false, misleading or fraudulent is guilty of a felony and, upon conviction, shall be fined not more than $10,000, or incarcerated in a correctional facility not more than two years, or both fined and incarcerated.

(e) This section applies only to medical assistance for children under adoption assistance agreements from states that have entered into a compact with this state under which the other state provides medical assistance to children with special needs under adoption assistance agreements made by this state. All other children entitled to medical assistance pursuant to adoption assistance agreements entered into by this state shall be eligible to receive it in accordance with the laws and procedures applicable thereto.

## ARTICLE 9. FOSTER CARE OMBUDSMAN PROGRAM.

### *§ 49-9-101 The Foster Care Ombudsman.*

(a) There is continued within the Office of the Inspector General the position of the West Virginia Foster Care Ombudsman. The Office of the Inspector General shall employ a Foster Care Ombudsman to affect the purposes of this article.

(b) In addition to the duties provided in §9-5-27 of this code, the duties of the Foster Care Ombudsman include, but are not limited to, the following:

(1) Establishing a statewide procedure to receive, investigate, and resolve complaints:

(A) Filed on behalf of a child who is subject to a reported allegation of abuse and neglect, a child who has died or sustained a critical incident, a child in the juvenile justice system, a foster child, foster parent, or kinship parent;

(B) On the Foster Care Ombudsman's own initiative, of a child who is subject to a reported allegation of abuse and neglect, a child who has died or sustained a critical incident, a child in the juvenile justice system; or

(C) On the Foster Care Ombudsman's own initiative, on behalf of a foster child, relating to action, inaction, or decisions of the state agency, child-placing agency, or residential care facility which may adversely affect the foster child, foster parent, or kinship parent;

(2) Review periodically and make appropriate recommendations for the policies and procedures established by any state agency providing services to the child welfare system;

(3) Pursuant to an investigation, provide assistance to an individual who the Foster Care Ombudsman determines is in need of assistance, including, but not limited to, collaborating with an agency, provider, or others on behalf of the best interests of the child;

(4) Recommend action when appropriate, including, but not limited to, undertaking legislative advocacy and making proposals for systemic reform and formal legal action, in order to secure and ensure the legal, civil, and special rights of children in the child welfare system and the juvenile justice system;

(5) Conduct programs of public education when necessary and appropriate;

(6) Have input into the creation of, and thereafter make recommendations consistent with, the foster children, foster parents, and kinship parents bill of rights;

(7) Take appropriate steps to advise the public of the services of the Foster Care Ombudsman, the purpose of the ombudsman, and procedures to contact the office; and

(8) Make inquiries and obtain assistance and information from other state governmental agencies or persons as the Foster Care Ombudsman requires for the discharge of his or her duties.

(c)(1) The Foster Care Ombudsman or his or her staff may not be compelled to testify or produce evidence in any judicial or administrative proceeding with respect to the identity of an individual providing information to the ombudsman as part of an official investigation, or the substance of that person's report to the ombudsman as part of an official investigation. All memoranda, work product, notes, or case files developed and maintained as part of an official investigation of the Foster Care Ombudsman Office are confidential and are not subject to discovery, subpoena, or other means of legal compulsion, and are not admissible as evidence in a judicial or administrative proceeding.

(2) The ombudsman may be compelled to provide testimony by a court or administrative body of competent jurisdiction related to any action carried out by the office that is unrelated to the substance of a specific official investigation, or reports submitted to the Legislative Oversight Commission on Health and Human Resources Accountability provided for in §9-5-27 and § 49-9-102 of this code. Should the ombudsman be compelled to testify, provide evidence in discovery, respond to a subpoena, or otherwise divulge testimony or evidence in any judicial, administrative, or legislative proceeding, the ombudsman may not be compelled to provide testimony or evidence concerning the identity of any complainant or any individual providing information to the ombudsman as part of an official investigation, or the substance of any complaint or report unless the ombudsman should decline to exercise that privilege. The purpose of this provision is to

ensure a level of confidentiality between the ombudsman and a person reporting to, complaining to, or providing other evidence to the ombudsman as part of an official investigation carried out by the office.

(3) Any objection by the ombudsman to the disclosure of any testimony, documentary, or physical evidence shall be reviewed by the presiding official of such tribunal, in camera, upon the request of the ombudsman, and the presiding official shall prevent the disclosure of the identity of any complainant, witness, or reporter as well as the substance of their complaint, testimony, or report.

***§ 49-9-102 Investigation of complaints.***

(a) Upon receipt of a complaint or by court order within the scope of the Foster Care Ombudsman Program, the Foster Care Ombudsman shall investigate, except as provided in § 49-9-102(c) of this code, any act, practice, policy, or procedure of any state agency, child-placing agency, juvenile facility, or residential care facility which affects the health, safety, welfare, or rights of a foster child, a foster parent, a child who is subject to a reported allegation of abuse and neglect, a child who has died or sustained a critical incident, a child in the juvenile justice system, or a kinship parent.

(b) Investigative activities of the Foster Care Ombudsman include, but are not limited to: information gathering, mediation, negotiation, informing parties of the status of the investigation, notification to any aggrieved party of alternative processes, reporting of suspected violations to a licensing or certifying agency, and the reporting of suspected criminal violations to the appropriate authorities.

(c) The Foster Care Ombudsman need not investigate any complaint upon determining that:

(1) The complaint is trivial, frivolous, vexatious, or not made in good faith;

(2) The complaint has been too long delayed to justify present investigation;

(3) The resources available, considering the established priorities, are insufficient for an adequate investigation;

(4) The matter complained of is not within the investigatory authority of the Foster Care Ombudsman; or

(5) A real or apparent conflict of interest exists and no other person within the office is available to investigate the complaint in an impartial manner.

(d) The Office of the Inspector General and other appropriate state governmental agencies may establish and implement cooperative agreements for receiving, processing, responding to, and resolving complaints involving state governmental agencies under the provisions of this section.

(e) The Foster Care Ombudsman shall submit an annual written report to the Governor containing:

(1) The number of complaints;

(2) The types of complaints;

(3) The location of the complaints;

(4) How the complaints are resolved; and

(5) Any other information the Foster Care Ombudsman feels is appropriate.

(f) The Foster Care Ombudsman shall summarize the reports and present that information to the Legislative Oversight Commission on Health and Human Resources Accountability. Nothing shall preclude the Foster Care Ombudsman office from submitting data, findings, or reports beyond this annual report.

(g) Another office, department, agency, or official may not prohibit the release of an ombudsman's recommendations to the Governor and the Legislature.

***§ 49-9-103 Access to foster care children.***

(a) The Foster Care Ombudsman shall, with proper identification, have access to a foster family home, a state agency, a child-placing agency, or a residential care facility for the purposes of investigations of a complaint. The Foster Care Ombudsman may enter a foster family home, a state agency, a child-placing agency, or a residential care facility at a time appropriate to the complaint. The visit may be announced in advance or be made unannounced as appropriate to the complaint under investigation. Upon entry, the Foster Care Ombudsman shall promptly and personally advise the person in charge of his or her presence. If entry is refused by the person in charge, the Foster Care Ombudsman may apply to the magistrate court of the county in which a foster family home, a state agency, a child-placing agency, or a residential care facility is located for a warrant authorizing entry, and the court shall issue an appropriate warrant if it finds good cause therefor.

(b) For activities other than those specifically related to the investigation of a complaint, the Foster Care Ombudsman, upon proper identification, shall have access to a foster family home, a state agency, a child-placing agency, or a residential care facility between the hours of 8:00 a.m. and 8:00 p.m. in order to:

(1) Provide information on the Foster Care Ombudsman Program to a foster child, foster parents, or kinship parents;

(2) Inform a foster child, a foster parent, or a kinship parent of his or her rights and entitlements, and his or her corresponding obligations, under applicable federal and state laws; and

(3) Direct the foster child, the foster parents, or the kinship parents to appropriate legal resources;

(c) Access to a foster family home, a state agency, a child-placing agency, or a residential care facility under this section shall be deemed to include the right to private communication with the foster child, the foster parents, or the kinship parents.

(d) A Foster Care Ombudsman who has access to a foster family home, a state agency, a child-placing agency, or a residential care facility under this section shall not enter the living area of a foster child, foster parent, or kinship parent without identifying himself or herself to the foster child, foster parent, or kinship parent. After identifying himself or herself, an ombudsman shall be permitted to enter the living area of a foster child, foster parent, or kinship parent unless that foster child, foster parent, or kinship parent communicates on that particular occasion the foster child, foster parents', or kinship parents' desire to prevent the ombudsman from entering. A foster child, foster parent, or kinship parent has the right to terminate, at any time, any visit by the Foster Care Ombudsman.

(e) Access to a foster family home, a state agency, a child-placing agency, or a residential care facility pursuant to this section includes the right to tour the facility unescorted.

***§ 49-9-104 Access to records.***

(a) The Foster Care Ombudsman is allowed access to any foster child's, foster parents' or kinship parents' records, including medical records reasonably necessary to any investigation, without fee.

(b) The Foster Care Ombudsman is allowed access to all records of any foster family home, state agency, child-placing agency, or residential care facility that is reasonably necessary for the investigation of a complaint, including, but not limited to, incident reports; dietary records; policies and procedures that a foster family home, a state agency, a child-placing agency, or a residential care facility are required to maintain under federal or state law; admission agreements; staffing schedules; or any document depicting the actual staffing pattern.

***§ 49-9-105 Subpoena powers.***

(a) The Foster Care Ombudsman may, in the course of any investigation:

(1) Apply to the circuit court of the appropriate county or the Circuit Court of Kanawha County for the issuance of a subpoena to compel at a specific time and place, by subpoena, the appearance, before a person authorized to administer oaths, the sworn

testimony of any person whom the Foster Care Ombudsman reasonably believes may be able to give information relating to a matter under investigation; or

(2) Apply to the circuit court of the appropriate county or the Circuit Court of Kanawha County for the issuance of a subpoena duces tecum to compel any person to produce at a specific time and place, before a person authorized to administer oaths, any documents, books, records, papers, objects, or other evidence which the Foster Care Ombudsman reasonably believes may relate to a matter under investigation.

(b) A subpoena or subpoena duces tecum applied for by the Foster Care Ombudsman may not be issued until a circuit court judge in term or vacation thereof has personally reviewed the application and accompanying affidavits and approved, by a signed order entered by the judge, the issuance of the subpoena or subpoena duces tecum. Subpoenas or subpoenas duces tecum applied for pursuant to this section may be issued on an ex parte basis following review and approval of the application by the judge in term or vacation thereof.

(c) The Attorney General shall, upon request, provide legal counsel and services to the Foster Care Ombudsman in all administrative proceedings and in all proceedings in any circuit court and the West Virginia Supreme Court of Appeals.

***§ 49-9-106 Cooperation among government departments or agencies.***

(a) The Foster Care Ombudsman shall have access to the records of any state government agency reasonably necessary to any investigation. The Foster Care Ombudsman shall be notified of and be allowed to observe any survey conducted by a government agency affecting the health, safety, welfare, or rights of the foster child, the foster parents, or the kinship parents.

(b) The Foster Care Ombudsman shall develop procedures to refer any complaint to any appropriate state government department, agency, or office.

(c) When abuse, neglect, or exploitation of a foster child is suspected, the Foster Care Ombudsman shall make a referral to the Bureau for Children and Families, Office of Health Facility Licensure and Certification, or both.

(d) Any state government department, agency, or office that responds to a complaint referred to it by the Foster Care Ombudsman Program shall make available to the Foster Care Ombudsman copies of inspection reports and plans of correction, and notices of any citations and sanctions levied against the foster family home, the child-placing agency, or the residential care facility identified in the complaint.

***§ 49-9-107 Confidentiality of investigations.***

(a) Information relating to any investigation of a complaint that contains the identity of the complainant, a child who is subject to a reported allegation of abuse and neglect, a

child who has died or sustained a critical incident, a child in the juvenile justice system, a foster child, foster parent, or kinship parent shall remain confidential except:

(1) Where imminent risk of serious harm is communicated directly to the Foster Care Ombudsman or his or her staff;

(2) Where disclosure is necessary to the bureau in order for such office to determine the appropriateness of initiating an investigation regarding potential abuse, neglect, or emergency circumstances; or

(3) Where disclosure is necessary to the Office of Health Facility Licensure and Certification in order for such office to determine the appropriateness of initiating an investigation to determine facility compliance with applicable rules of licensure, certification, or both.

(b) The Foster Care Ombudsman shall maintain confidentiality with respect to all matters including the identities of complainants, witnesses, or others from whom information is acquired, except insofar as disclosures may be necessary to enable the Foster Care Ombudsman to carry out duties of the office or to support recommendations.

(c) Notwithstanding any other section within this article, all information, records, and reports received by or developed by the Foster Care Ombudsman Program which relate to a foster child, foster parent, or kinship parent, including written material identifying a foster child, foster parent, or a child who is subject to a reported allegation of abuse and neglect, a child who has died or sustained a critical incident, a child in the juvenile justice system, or kinship parent, are confidential pursuant to § 49-5-101 et seq. of this code and are not subject to the provisions of § 29B-1-1 et seq. of this code, and may not be disclosed or released by the Foster Care Ombudsman Program, except under the circumstances enumerated in this section.

(d) Nothing in this section prohibits the preparation and submission by the Foster Care Ombudsman of statistical data and reports, as required to implement the provisions of this article or any applicable federal law, exclusive of any material that identifies any foster child, foster parent, kinship parent, or complainant.

(e) The Inspector General shall have access to the records and files of the Foster Care Ombudsman Program to verify its effectiveness and quality where the identity of any complainant, a child who is subject to a reported allegation of abuse and neglect, a child who has died or sustained a critical incident, a child in the juvenile justice system, or foster child, foster parent, or kinship parent is not disclosed.

***§ 49-9-108 Limitations on liability.***

(a) The Foster Care Ombudsman participating in an investigation carried out pursuant to this article who is performing his or her duties is immune from civil liability that otherwise might result by reason of his or her participation in the investigation, as long as such

participation is not violative of any applicable law, rule, or regulation, and done within the scope of his or her employment and in good faith.

(b) If an act or omission by the Foster Care Ombudsman or an act in good faith pursuant to a specific foster child, foster parent, or kinship parent complaint causes a foster child's, foster parents', or kinship parents' rights to be violated, no foster family home, state agency, child-placing agency, or residential care facility, its owners, administrators, officers, director, agents, consultants, employees, or any member of management may be held civilly liable as a result of the act or omission.

***§ 49-9-109 Willful interference; retaliation; penalties.***

(a) An individual who willfully interferes with or impedes the Foster Care Ombudsman in the performance of his or her official duties shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $100.

(b) An individual who institutes or commits a discriminatory, disciplinary, retaliatory, or reprisal action against a foster child, foster parent, or kinship parent for having filed a complaint with or provided information in good faith to the Foster Care Ombudsman in carrying out the duties pursuant to this article is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $100.

(c) An individual violating the provisions of subsection (a) or (b) of this section is, for the second or any subsequent offense under either of these subsections, guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $250. Each day of a continuing violation after conviction shall be considered a separate offense.

(d) Nothing in this section infringes upon the rights of an employer to supervise, discipline, or terminate an employee for other reasons.

***§ 49-9-110 Funding for Foster Care Ombudsman Program.***

The Foster Care Ombudsman Program shall receive such funds appropriated by the Legislature for the operation of the program.

# CHAPTER 8:
# RULES OF PROCEDURE FOR CHILD ABUSE AND NEGLECT PROCEEDINGS

(including amendments through 9/1/21)

*Chapter Contents*

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**Rule 1. Scope of child abuse and neglect rules.**

These rules set forth procedures for circuit courts in child abuse and neglect proceedings instituted pursuant to W. Va. Code § 49-4-601, *et seq*. If these rules conflict with other rules or statutes, these rules shall apply.

**Rule 2. Purposes of child abuse and neglect rules; construction and enforcement.**

These rules shall be liberally construed to achieve safe, stable, secure permanent homes for abused and/or neglected children and fairness to all litigants. These rules are not to be applied or enforced in any manner which will endanger or harm a child. These rules are designed to accomplish the following purposes:

(a) To provide fair, timely and efficient disposition of cases involving suspected child abuse or neglect;

(b) To provide for judicial oversight of case planning;

(c) To ensure a coordinated decision-making process;

(d) To reduce unnecessary delays in court proceedings through strengthened court case management; and

(e) To encourage the involvement of all parties, including children, in the litigation as well as the involvement of all community agencies and resource personnel providing services to any party.

**Rule 3. Definitions.**

As used in these rules, these terms are defined as follows:

(a) "Adjudicatory hearing" shall mean the hearing contemplated by W. Va. Code § 49-4-601 to determine whether a child has been abused and/or neglected as alleged in the petition;

(b) "CASA" shall mean Court-Appointed Special Advocate as set forth in Rule 52;

(c) "Child's case plan" shall mean the plan prepared by the Department pursuant to W. Va. Code §§ 49-4-408 and 49-4-604 following an adjudication by the court that the child is an abused and/or neglected child;

(d) "Civil petition" shall mean the petition instituting child abuse and/or neglect proceedings under W. Va. Code § 49-4-601;

(e) "Child abuse and neglect proceedings" shall mean proceedings instituted by the filing of a civil petition under W. Va. Code § 49-4-601;

(f) "Department" shall mean the West Virginia Department of Health and Human Resources and any subdivision or any successor or assignee designated by law carrying out the statutory functions of the Department or agency thereof involved in the investigation, adjudication, or dispositional aspects of child abuse and/or neglect proceedings under W. Va. Code § 49-4-601, *et seq*.;

(g) "Preliminary hearing" shall mean the hearing contemplated by W. Va. Code § 49-4-602 that is held within ten days of service of the petition when the court finds that the petition alleges facts demonstrating the existence of imminent danger to the child, whether or not the court has ordered immediate transfer of custody of the child to the Department or a responsible person. The hearing is held for the purpose of determining (1) whether there is reasonable cause to believe that the child is in imminent danger; (2) whether continuation in the home is contrary to the welfare of the child, setting forth the reasons; (3) whether the Department made reasonable efforts to preserve the family and to prevent the child's removal from his or her home or whether an emergency situation made such efforts unreasonable or impossible; (4) whether efforts should be made by the Department to facilitate the child's return, and if so, what efforts should be made; and (5)

whether the child's school placement is in his or her school of origin, and if not, whether the change of school placement is in the child's best interests.

(h) "Permanency hearing" shall mean the hearing contemplated by W. Va. Code § 49-4-608 to determine the permanency plan for the child. The hearing shall be conducted in accordance with Rule 36a;

(i) "Disposition hearing" shall mean the hearing contemplated by W. Va. Code § 49-4-604 that is held after a child has been adjudged to be abused and/or neglected, at which the court reviews the child and family case plan filed by the Department and determines the appropriate disposition of the case and permanency plan for the family;

(j) "Family case plan" shall mean the plan prepared by the Department pursuant to W. Va. Code §§ 49-4-408 and 49-4-604 following the grant of an improvement period;

(k) "Guardian *ad Litem*" means the attorney appointed to represent a child or children as set forth in Rule 18a of the Rules of Procedure for Child Abuse and Neglect Proceedings;

(l) "Parent" or "parents" means an individual defined as a parent by law or on the basis of a biological relationship, marriage to a person with a biological relationship, legal adoption or other recognized grounds, pursuant to W. Va. Code § 49-1-204;

(m) "Parties" means the petitioner, co-petitioner, respondent, adjudicated battered parent, and child;

(n) "Permanent placement" of a child shall mean:

(1) The petition has been dismissed and the child has been returned to the home or to a relative with no custodial supervision by the Department;

(2) The child has been placed in the permanent custody of a non-abusive parent; or

(3) A permanent out-of-home placement of the child has been achieved following entry of a final disposition order. A permanent out-of-home placement has been achieved only when the child has been adopted, placed in a legal guardianship, placed in another planned permanent living arrangement (APPLA), or emancipated; and

(o) "Persons entitled to notice and the right to be heard" are persons other than parties who include the CASA when appointed, foster parents, preadoptive parents, or custodial relatives providing care for the child.

(p) A "qualified residential treatment program" shall mean a residential treatment program which includes a trauma-informed treatment model that addresses the needs of a child with serious emotional or behavioral disorders and shall implement the individualized treatment plan identified in the required assessment.

**Rule 3a. Pre-Petition Investigations.**

(a) *Administrative Order Regarding Investigation*. Upon receiving a written referral from a family court pursuant to Rule 48 of the Rules of Practice and Procedure for Family Courts, a circuit court shall forthwith cause to be entered and served an administrative order in the name of and regarding the affected child or children directing the Department to submit to the court an investigation report or appear before the court in not more than 45 days, at a scheduled hearing, to show cause why the Department's investigation report has not been submitted to the circuit court and referring family court. If a circuit court, based upon a review of the written referral from family court, determines that the allegations or other information present reason to believe a child may be in imminent danger, the circuit court may shorten the time for the Department to act upon the referral and appear before the circuit court. The scheduled hearing may be mooted by the Department's earlier submission of the investigation report or, in the alternative, the filing of an abuse and neglect petition under Chapter 49 of the West Virginia Code relating to the matters which were the subject of the family court referral and circuit court administrative order. The duties of the Department under this rule shall be in addition to the Department's obligations pursuant to W. Va. Code § 49-2-804 regarding notification of disposition to persons mandated to report suspected child abuse and neglect.

(b) *Mandamus Relief*. Following review of an investigation report in which the Department concludes that a civil petition is unnecessary, if the circuit court believes that the information in the family court's written referral and the Department's investigation report, considered together, suggest circumstances upon which the Department would have a duty to file a civil petition, the court shall treat the written referral as a petition for a writ of mandamus in the name of and regarding the affected child or children. A show-cause order shall issue by the court setting a prompt hearing to determine whether the respondent Department has a duty to file a civil petition under the particular circumstances set forth in the written referral and investigation report. If it is determined by the court that the Department has a nondiscretionary duty pursuant to W. Va. Code § 49-4-605 to file a petition seeking to terminate parental rights, the Department shall be directed by writ to file such petition within a time period set by the court. If it is determined that the circumstances bring the filing decision within the Department's discretionary authority, no such writ shall issue unless the court specifically finds aggravated circumstances, consistent with the meaning and usage of that term in W. Va. Code § 49-4-602(d)(1), and that the Department acted arbitrarily and capriciously in the exercise of its discretion.

(c) *Service and Notice*. Orders and other documents issued pursuant to this rule shall be served on the Department by mail or facsimile transmission directed to the Department's local child protective services office. Copies of such orders shall also be delivered to the prosecuting attorney.

(d) *Confidentiality*. All orders and other documents pertaining to matters arising under this rule, and docket entries regarding the same, shall be treated as confidential records concerning a child consistent with W. Va. Code § 49-5-101; and any hearings conducted pursuant to this rule may be attended by those persons provided notice under

subsection (c) above, but shall be closed to the general public except that persons whom the circuit court determines have a legitimate interest in the proceedings may attend. If the case in family court that gave rise to the referral to the Department was a domestic violence proceeding, staff from any involved licensed family protection program is entitled access to circuit court proceedings under this rule to the same extent such access is afforded under statutes and rules pertaining to domestic violence proceedings.

(e) *Transfer of Administrative Proceedings*. Within 10 days following service of an administrative order issued by a circuit court pursuant to subdivision (a), the Department may file a motion with the issuing court seeking transfer of the administrative proceedings to the circuit court of another county based upon reasons relating to a more appropriate venue for the administrative proceedings and any abuse and neglect case which may result from such proceedings. Unless the court finds the basis for the motion to be clearly unreasonable under the particular circumstances presented, the administrative proceedings shall be transferred as requested. If the administrative proceedings are transferred, the Department's obligations pursuant to W. Va. Code § 49-2-804 and Rule 48(c) of the Rules of Practice and Procedure for Family Court regarding the investigation and providing a copy of any investigative report remain applicable to the referring family court. The circuit clerk shall send certified copies of the order granting or denying the transfer motion to the referring family court and the prosecuting attorney. If the order grants the motion, certified copies shall also be sent to the circuit court and prosecuting attorney in the county where the administrative proceeding is transferred.

**Rule 4. Transfer and consolidation.**

A circuit court before which a civil petition is filed pursuant to W. Va. Code § 49-4-601, *et seq*., may order any other proceeding pending before another circuit court, family court, or magistrate court which arises out of the same facts alleged in the civil petition or involves the question of whether such abuse and neglect occurred transferred to the court where the civil petition is pending and may consolidate such proceedings, except criminal and delinquency proceedings, all in accordance with Rule 42 of the Rules of Civil Procedure and W. Va. Code § 56-9-1.

**Rule 4a. Venue.**

Pursuant to W. Va. Code § 49-4-601(a), the Department or a reputable person may file a petition to initiate a child abuse and neglect proceeding in the circuit court in the county where the child resides. If the Department is a petitioner, the petition may also be filed where the alleged abuse and/or neglect occurred, where the custodial respondent or one of the other respondents resides, or to the judge of the court in vacation. Under no circumstances may a party file a petition in more than one county based on the same set of facts.

**Rule 5. Contemporaneous civil, criminal, and other proceedings.**

Under no circumstances shall a child abuse and neglect proceeding be delayed pending the initiation, investigation, prosecution, or resolution of any other proceeding, including, but not limited to, criminal proceedings.

**Rule 6. Maintaining case on court docket.**

Each child abuse and neglect proceeding shall be maintained on the circuit court's docket until permanent placement of the child has been achieved. The court retains exclusive jurisdiction over placement of the child while the case is pending, as well as over any subsequent requests for modification, including, but not limited to, changes in permanent placement or visitation, except that (1) if the petition is dismissed for failure to state a claim under Chapter 49 of the W. Va. Code, or (2) if the petition is dismissed, and the child is thereby ordered placed in the legal and physical custody of both of his/her cohabitating parents without any visitation or child support provisions, then any future child custody, visitation, and/or child support proceedings between the parents may be brought in family court. However, should allegations of child abuse and/or neglect arise in the family court proceedings, then the matter shall proceed in compliance with Rule 3a.

**Rule 6a. Confidentiality of Proceedings and Records; Access by Family Court.**

(a) *Hearings and Reviews*. Attendance at all proceedings brought pursuant to W. Va. Code § 49-4-601, *et seq.* shall be limited to the parties, counsel, persons entitled to notice and the right to be heard, witnesses while testifying, multidisciplinary treatment team members, and other persons whom the circuit court determines have a legitimate interest in the proceedings.

(b) *Court Records*. All records and information maintained by the courts in child abuse and neglect proceedings shall be kept confidential except as otherwise provided in W. Va. Code, Chapter 49 and this rule. In the interest of assuring that any determination made in proceedings before a family court arising under W. Va. Code, Chapter 48, or W. Va. Code § 44-10-3, does not contravene any determination made by a circuit court in a related prior or pending child abuse and neglect case arising under W. Va. Code, Chapter 49, family courts and staff shall have access to all circuit court orders and case indexes in this State in all such related Chapter 49 proceedings.

**Rule 7. Time computation; extensions of time and continuances.**

Time frames prescribed in these rules shall be computed in accord with Rule 6(a) of the W. Va. Rules of Civil Procedure.

Except as provided for in Rule 5, extensions of time and continuances beyond the times specified in these rules or by other applicable law shall be granted only for good cause, regardless of whether the parties are in agreement. If a continuance is granted in accordance with this rule, the court shall set forth in a written order its reasons for finding good cause.

**Rule 8. Testimony of children; inclusion of children in hearings and multidisciplinary treatment team meetings.**

(a) *Restrictions on the testimony of children*. Notwithstanding any limitation on the ability to testify imposed by this rule, all children remain competent to testify in any proceeding before the court as determined by the Rules of Evidence and the Rules of Civil Procedure. However, there shall be a rebuttable presumption that the potential psychological harm to the child outweighs the necessity of the child's testimony and the court shall exclude this testimony if the potential psychological harm to the child outweighs the necessity of the child's testimony. Further, the court may exclude the child's testimony if (A) the equivalent evidence can be procured through other reasonable efforts; (B) the child's testimony is not more probative on the issue than the other forms of evidence presented; and (C) the general purposes of these rules and the interest of justice will best be served by the exclusion of the child's testimony.

(b) *Procedure for taking testimony from children.* The court may conduct in camera interviews of a minor child, outside the presence of the parent(s). The parties' attorneys shall be allowed to attend such interviews, except when the court determines that the presence of attorneys will be especially intimidating to the child witness. When attorneys are not allowed to be present for in camera interviews of a child, the court shall, unless otherwise agreed by the parties, have the interview electronically or stenographically recorded and make the recording available to the attorneys before the evidentiary hearing resumes. Under exceptional circumstances, the court may elect not to make the recording available to the attorneys but must place the basis for a finding of exceptional circumstances on the record. Under these exceptional circumstances, the recording only will be available for review by the Supreme Court of Appeals. When attorneys are present for an in camera interview of a child, the court may, before the interview, require the attorneys to submit questions for the court to ask the child witness rather than allow the attorneys to question the child directly, and the court may require the attorney to sit in an unobtrusive manner during the in camera interview. Whether or not the parties' attorneys are permitted to attend the in camera interview, they may submit interview questions and/or topics for consideration by the court.

(c) *Sealing of child's testimony*. If an interview was recorded and disclosed to the attorneys, the record of the child's testimony thereafter shall be sealed and shall not be opened unless:

(1) Ordered by the court for good cause shown; or

(2) For purposes of appeal.

(d) A child subject to a case may attend all or portions of hearings, unless the court deems such attendance inappropriate, and may attend all or portions of multidisciplinary treatment team meetings, unless the multidisciplinary treatment team deems such participation inappropriate. Consideration shall be given to the child's preferences and developmental maturity.

**Rule 9. Use of closed circuit television testimony.**

(a) In any case governed by these rules in which a child eleven (11) years old or less is to be a witness, the court, upon order of its own or upon motion of a party, may permit the child witness to testify through live, one-way, closed-circuit television whereby there shall be no transmission into the room from which the child witness is testifying.

(b) In any case in which a child over the age of eleven (11) years is to be a witness, the court, upon order of its own or upon motion of a party, and upon a finding of good cause, shall permit the child witness to testify through live, one-way, closed-circuit television whereby there shall be no transmission into the room from which the child witness is testifying.

(c) The testimony of the child witness shall be taken in any room, separate and apart from the courtroom, from which testimony of the child witness can be transmitted to the courtroom by means of live, one-way, closed-circuit television. The testimony shall be deemed as given in open court.

(d) The judge, the attorneys for the parties, and any other person the court permits for the purpose of providing support for the child in order to promote the ability of the child to testify shall be present in the testimonial room at all times during the testimony of the child witness. The judge may permit liberal consultation between counsel and the parties by adjournment, electronic means, or otherwise.

(e) The image and voice of the child witness, as well as the image of all other persons present in the testimony room, other than the operator, shall be transmitted live by means of live, one-way, closed-circuit television in the courtroom. The courtroom shall be equipped with monitors sufficient to permit the parties to observe the demeanor of the child witness during his or her testimony.

(f) The operator shall place herself or himself and the closed-circuit television equipment in a position that permits the entire testimony of the child witness to be transmitted to the courtroom.

(g) The child witness shall testify under oath, and the examination and cross-examination of the child witness shall, in all other respects, be conducted in the same manner as if the child witness testified in the courtroom.

(h) When the testimony of the child witness is transmitted from the testimonial room into the courtroom, the court stenographer shall record the testimony in the same manner as if the child witness testified in the courtroom.

(i) Under all circumstances, the image of the child witness transmitted shall include the entirety of his or her person ordinarily subject to observation by the human eye, subject to such limitations as may be unavoidable by reason of standard courtroom furnishings.

(j) Should it be required, for the purposes of identification that the person to be identified and the child witness be present in the courtroom at the same time, the court shall ensure that this meeting takes place after the child witness has completed his or her testimony; and this confrontation shall, to the extent possible, be accomplished in a manner that is nonthreatening to the child witness.

**Rule 10. Discovery.**

(a) The attorney for the child shall have access to the file kept by the Department and the file kept by the attorney for the petitioner, including all information set forth in W. Va. Code § 49-5-101 and the attorney may make such use thereof as may be appropriate to the case, subject to such limitations as the order of the court shall require;

(b) Unless otherwise ordered by the court pursuant to Rule 12, within three (3) days of the filing of the petition, the attorney for the petitioner shall provide to counsel for the respondent(s) or to the respondent(s) personally, if not represented by counsel, the attorney for the child, and all other persons entitled to notice and the opportunity to be heard, the following information, as is within the possession, custody, or control of the attorney for the petitioner, the existence of which is known, or by some exercise of due diligence may become known, to the attorney for the petitioner:

(1) Any relevant written or recorded statements made by the respondents (or any one of them), or copies thereof, and the substance of any oral statements which the petitioner intends to offer in evidence at the trial made by the respondents (or any one of them);

(2) Copies of the respondent's prior criminal records, if any;

(3) Copies of books, papers, documents, photographs, tangible objects, buildings, or places which are material to the preparation of the respondent's case or are intended for use by the attorney for the petitioner as evidence in chief at the trial or were obtained from or belonging to the respondent;

(4) Copies of results or reports of physical and/or mental examinations, if any, and copies of scientific tests and/or experiments, if any, which are material to the preparation of the respondent's case or are intended for use by the attorney for the petitioner as evidence in chief at the trial; and

(5) A written list of names and addresses of all witnesses whom the attorney for the petitioner intends to call in the presentation of the case-in-chief, together with any record of prior convictions of any such witnesses;

(c) Not less than five (5) days prior to any hearing wherein the respondent intends to introduce evidence, the respondent shall provide to the attorney for the petitioner, the attorney for the child, and all other persons entitled to notice and the right to be heard, the following information:

(1) Copies of books, papers, documents, photographs, tangible objects, buildings, or places which are within the possession, custody, or control of the respondent and which the respondent intends to introduce as evidence in chief at the trial;

(2) Copies of any results and reports of physical and/or mental examinations, if any, and copies of scientific tests and/or experiments, if any, made in connection with the particular case, if any of such copies are within the possession or control of the respondent, which the respondent intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the respondent intends to call at the trial when the results and/or reports relate to his or her testimony; and

(3) A written list of the names and addresses of the witnesses the respondent intends to call in the presentation of the case-in-chief.

(d) The disclosure provided for in this rule is not intended to limit the amount or nature of disclosure in these cases. This rule merely establishes the minimum amount of disclosure required.

(e) If, prior to or during any hearing, a party discovers additional evidence or material that should have been disclosed, that party shall promptly notify all other parties and their counsel, persons entitled to notice and the right to be heard, and the court of the existence of the additional evidence or material.

**Rule 11. Motion to compel, limit, or deny discovery.**

(a) Any party receiving a written request to make information, documents, records, or evidence available for inspection, testing, copying, or photographing shall, within two (2) days, excluding weekends and holidays, comply with the request or provide a written explanation of the reasons for noncompliance to the parties and the court;

(b) A party whose request for discovery is not fully complied with may file a motion for an order compelling discovery. A motion to compel discovery shall set forth the request for discovery, describe why the items or information sought are discoverable, and specify how the request was not in compliance;

(c) A party receiving a discovery request may file a motion to deny discovery or permit a limited response. The motion shall set forth the request for discovery and set forth reasons why the discovery should be denied or the response should be permitted to be limited or subject to conditions; and

(d) The court shall hear and rule on a discovery motion within seven (7) days after it is filed. Among other things, the court may:

(1) Grant the requested discovery and specify the time within which it must be provided;

(2) Order reciprocal discovery;

(3) Order appropriate sanctions for any clear misuse of discovery or arbitrary delay or refusal to comply with a discovery request; and

(4) Deny, limit, or set conditions on the requested discovery.

**Rule 12. Judicial management of discovery.**

(a) Upon its own motion or upon the request of a party, the court may limit discovery methods and specify its overall timing and sequence provided that each party shall be allowed a reasonable opportunity to obtain information needed for the preparation of his or her case.

(b) Any party moving for a continuance on the ground that discovery is likely to delay a hearing set by the court shall promptly send written notice to the court stating the need for the discovery and the extent of the likely delay.

**Rule 13. Preservation of records and exhibits.**

The proceedings shall be recorded and transcripts produced according to the provisions of W. Va. Code § 49-4-601(k). Exhibits admitted into evidence shall be retained by the court for two (2) years or until dismissal of the proceedings from the court's docket, whichever occurs later, unless preservation of the exhibit is impractical or the parties agree that it is no longer necessary.

**Rule 14. Telephone or video conferences.**

The court may hear motions and conduct conferences relating to discovery, service of process, or case scheduling by telephone or video conference call. By agreement of the parties or motion filed in accord with Rule 17(c), the court may hear testimony by telephone or video conference call.

**Rule 15. Visitation and other communication with child.**

If at any time the court orders a child removed from the custody of his or her parent(s) and placed in the custody of the Department or of some other responsible person, the court may make such provision for reasonable visitation, telephone or video calls, letters, email, or other communication as is consistent with the child's well-being and best interests. The court shall assure that any supervised visitation shall occur in surroundings and in a safe place, dignified, and suitable for visitation, taking into account the child's age and condition. The person requesting visitation shall set forth his or her relationship to the child and the degree of personal contact previously existing with the child. In determining the appropriateness of granting visitation rights to the person seeking visitation, the court shall consider whether or not the granting of visitation would interfere with the child's case plan and the overall effect granting or denying visitation will have on the child's best interests. The visitation order of the circuit court shall be enforceable upon entry unless a stay of execution of said order is issued by the circuit court or the Supreme Court of Appeals. The effect of entry of an order of termination of parental rights shall be,

*inter alia*, to prohibit all contact and visitation between the child who is the subject of the petition and the parent who is the subject of the order and the respective grandparents,[36] unless the Court finds the child consents and it is in the best interest of the child to retain a right of visitation. Visitation between the child and his siblings shall continue, and a plan for regular contact between siblings, where they are not placed together, shall be incorporated into the permanent plan for the child whenever possible, unless the court finds it is not in the best interest of both the child and his siblings to retain a right of visitation.

**Rule 16. Emergency custody.**

(a) *Emergency custody pending filing of petition*. Proceedings for emergency custody of a child before a petition is filed and without a circuit court order shall be governed by the provisions of W. Va. Code §§ 49-4-301 (emergency custody by law enforcement), 49-4-302 (emergency custody ordered by family court), and 49-4-303 (emergency removal by the Department).

(b) *Continuation or transfer of emergency custody upon filing of petition*. Proceedings for continuation of or temporary transfer of emergency custody at the time the petition is filed shall be governed by the provisions of W. Va. Code § 49-4-602.

(c) *Transfer of custody following filing of petition*. If at any time during the pendency of child abuse and/or neglect proceedings, the court determines the child is in imminent danger, as defined by W. Va. Code § 49-1-201, the court may order the child placed into the custody of the Department or a responsible person in accordance with the provisions of W. Va. Code § 49-4-602. If custody has been taken pursuant to this provision after the conclusion of the final adjudicatory hearing, custody of the child may continue in the Department or a responsible person pending conclusion of the final disposition hearing.

(d) *Requirement of hearing on emergency custody taken during the pendency of child abuse and neglect proceeding*. Regardless of whether the court has previously granted the Department legal custody of a child, if the Department takes physical custody of a child during the pendency of a child abuse and neglect case (also known as removing the child) due to a change in circumstances and without a court order issued at the time of the removal, the Department must immediately notify the court, and a hearing shall take place within 10 days to determine if (1) there is imminent danger to the physical well-being of the child and (2) there is no reasonably available alternative to removal of the child.

(e) *Findings in removal order*. An order removing a child from his or her home and placing the child in the custody of the Department must state (1) that there is reasonable cause to believe that the child is in imminent danger; (2) that continuation in the home is contrary to the welfare of the child, setting forth the reasons; (3) whether the Department made reasonable efforts to preserve the family and to prevent the child's removal from

[36] This rule is intended to neither increase nor decrease any rights of the grandparents as set forth in W. Va. Code §§ 49-4-601, et seq. and 48-10-101, et seq.

his or her home or that an emergency situation made such efforts unreasonable or impossible; and (4) whether efforts should be made by the Department to facilitate the child's return, and if so, what efforts should be made.

**Rule 16a. Required Entry of Support Orders.**

(a) *Entry of Support Orders*. Every order in a child abuse and neglect proceeding that alters the custodial and decision-making responsibility for a child and/or commits the child to the custody of the Department of Health and Human Resources must impose a support obligation upon one or both parents for the support, maintenance and education of the child, pursuant to W. Va. Code § 49-4-801, *et seq.*

(b) *Use of Guidelines*. Any order establishing a child support obligation in an abuse and neglect proceeding must use the *Guidelines for Child Support Awards* found in W. Va. Code § 48-13-101, *et seq*. The *Guidelines* may be disregarded, or the calculation of an award under the *Guidelines* may be adjusted, only if the court makes specific findings that use of the *Guidelines* is inappropriate.

(c) *Modifications*. Any order establishing a child support obligation in a child abuse and neglect proceeding may be modified by the court upon motion of any party. An order granting modification of a support obligation must use the *Guidelines for Child Support Awards* found in W. Va. Code § 48-13-101, *et seq*.

(d) *Transfer to family court prohibited*. No portion of a child abuse and neglect proceeding may be transferred or remanded to a family court for assessment of a child support obligation.

**Rule 17. Pleadings allowed, Form of motions and other papers.**

(a) *Pleadings*. There shall be a verified petition and a verified answer. Upon consent of the co-petitioners, the verified petition may have co-petitioners, in which case each petitioner must indicate which allegation(s) he/she verifies in the petition. If one of the petitioners is a parent, then that parent shall be appointed counsel pursuant to W. Va. Code § 49-4-601(f), separate from the prosecuting attorney. The Department, a parent, or reputable person may move to be joined as a co-petitioner after the filing of the initial petition. No other pleading shall be allowed except by permission of the court. The petition shall not be taken as confessed. Other than in a criminal prosecution for false swearing, evidence shall not be given against an accused of any statement made by him in any pleadings filed pursuant to these rules.

(b) *Verified answer*. Each respondent shall file and serve a verified answer upon the petitioner or counsel therefor and all other persons entitled to notice and the right to be heard no later than 10 days after being served with the notice and petition required by law except that a respondent served by publication or other substituted service shall file and serve such answer within the time prescribed by such substituted service. The child or children are not required to file or serve an answer.

Each answer shall admit or controvert the allegations of the petition, state the relationship of the child or children to the respondent and respond to such other matters as are alleged therein.

No preliminary hearing need be continued because an answer has not been served nor shall any appearance at a preliminary hearing or the service or contents of any answer filed prevent a respondent from raising in the answer or by timely motion any issue formerly raised by special appearance or by a pleading filed before an answer.

(c) *Motions and other papers*. (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is made in a written notice of the hearing on the motion.

(2) The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) All motions shall be signed in accordance with Rule 11 of the Rules of Civil Procedure.

(4) All motions must be accompanied by or contained within a notice of hearing setting forth the date and time of hearing on the motion.

(5) At the time of first hearing, the court shall require the parents to complete financial statement forms for determination of Title IV-D and Title IV-E eligibility, the necessary forms to be provided by the Department of Health and Human Resources, and those forms necessary to determine both indigence and/or possible child support obligations. No portion of the case may be transferred or remanded to family court for this purpose.

**Rule 18. Contents of petition.**

The petition shall be verified in accordance with W. Va. Code § 49-4-601(b) and shall include the following:

(a) Citations to statutes relied upon in requesting the intervention of the court and how the alleged misconduct or incapacity comes within the statutory definition of neglect and/or abuse;

(b) A description of all of the children in the home or in the temporary care, custody, or control of the alleged offending parent(s), including name, age, sex, and current location, unless stating the location would endanger the child or seriously risk disruption of the current placement;

(c) A statement of facts justifying court intervention which is definite and particular and describes:

(1) The specific misconduct, including time and place, if known, or incapacity of the parent(s) and other person(s) responsible for the child's care; and

(2) Any supportive services provided by the Department or others to remedy the alleged circumstances.

(d) The relief sought; and

(e) Information as required by the Uniform Child Custody Jurisdiction and Enforcement Act, W. Va. Code § 48-20-101 *et seq*.

**Rule 18a. Appointments; responsibilities of guardian ad litem.**

(a) *Appointment*. W. Va. Code § 49-4-601(f) and the Guidelines for Children's Guardians *Ad Litem* in Child Abuse and Neglect Proceedings set forth in Appendix A of these Rules govern the appointment of a child's guardian *ad litem* in a child abuse and neglect proceeding. In the initial order resulting from the filing of an abuse and neglect petition, the circuit court appoints a guardian *ad litem* to represent a child from a list of qualified attorneys who have completed the required guardian *ad litem* training. A guardian *ad litem* may be appointed to represent more than one child unless the representation of more than one child creates a conflict of interest.

(b) *Responsibilities of guardian ad litem*. A guardian *ad litem* should adhere to the Guidelines for Children's Guardians *Ad Litem* in Child Abuse and Neglect Proceedings set forth in Appendix A of these Rules and submit a written report to the court and provide a copy to all parties at least five (5) days prior to the disposition hearing that complies with the requirements set forth in Section D(8) of the Guidelines and Appendix B of these Rules. Upon petition of the guardian *ad litem*, the court, in its discretion, may seal the report or redact information contained in the report.

**Rule 19. Amendments to petition.**

(a) *Amendments prior to adjudicatory hearing*. The court may allow the petition to be amended at any time until the final adjudicatory hearing begins, provided that an adverse party is granted sufficient time to respond to the amendment.

(b) *Amendments after the adjudicatory hearing*. If new allegations arise after the final adjudicatory hearing, the allegations should be included in an amended petition rather than in a separate petition in a new civil action, and the final adjudicatory hearing shall be re-opened for the purpose of hearing evidence on the new allegations in the amended petition.

(c) *Amendments based on allegations against a co-petitioner*. If allegations arise against a co-petitioner during the pendency of the case, then the petition may be amended, including a realignment of the parties.

(d) *Amendments after preliminary hearing in which the Department has been given temporary custody*. If the petition is amended after the conclusion of a preliminary hearing

in which custody has been temporarily transferred to the Department or a responsible person, it shall be unnecessary to conduct another preliminary hearing.

**Rule 20. Notice of first hearing.**

The petition and notice of the first hearing shall provide at least ten (10) days notice, unless the first hearing is a preliminary hearing regarding emergency custody pursuant to W. Va. Code § 49-4-602, in which case the parties and all persons entitled to notice and the right to be heard must be provided at least five (5) days actual notice. The notice of hearing shall specify the time and place of the first hearing, the right of parties to counsel, and the fact that the proceeding can result in the permanent termination of parental, custodial or guardianship rights. The court shall send a copy of the petition and notice of first hearing to the appropriate CASA representative, if one is appointed.

**Rule 21. Effect of personal service on only one parent.**

The judge may permit the child abuse and neglect proceeding to go forward after one parent personally is served, if it is established on the record that there have been diligent but unsuccessful efforts to serve all other parties and requisites of W. Va. Code § 49-4-601 have been met. When a child is found in this state and is under the protection of the court and no parent or custodian has been found within this jurisdiction, the court may order service of the notice by publication and proceed with the proceeding. No adjudicatory hearing may be held until the time for answer is set forth in the order of publication shall have expired. Such a proceeding shall be effective against the interests to parents and custodians to the extent permissible under general law.

**Rule 22. Preliminary hearing.**

(a) *Timing of preliminary hearing*. If at the time the petition was filed, the court placed or continued the child in the emergency custody of the Department or a responsible person, a preliminary hearing on emergency custody shall be initiated within ten (10) days after the continuation or transfer of custody is ordered as required by W. Va. Code § 49-4-602.

(b) *Transfer of custody after the filing of the petition*. If the court does not transfer custody at the time the petition is filed, but believes at any time in the proceeding that the child is in imminent danger, as defined in W. Va. Code § 49-1-201, the court may transfer temporary custody as provided in W. Va. Code § 49-4-602 or Rule 16(c). If the court has continued or transferred temporary custody to the Department or a responsible person following the preliminary hearing and further amendments and additions are made to the petition or further facts are developed which support temporary custody, another preliminary hearing is not required.

(c) *Waiver or stipulation of preliminary hearing*. A preliminary hearing may be waived or stipulated if the court determines (1) that the parties and persons entitled to notice and the right to be heard understand the content and consequences of the waiver or stipulation and voluntarily consent, and (2) that the waiver or stipulation of the

preliminary hearing meets the purposes of these rules and controlling statutes and is in the best interests of the child. The court shall hear any objection to the waiver or stipulation of the preliminary hearing by any party or person entitled to notice and the right to be heard. The waiver or specific stipulations shall be incorporated into the order reflecting the preliminary hearing.

**Rule 23. Preadjudicatory improvement period; family case plan; status conference.**

(a) *Preadjudicatory improvement period*. At any time prior to the final adjudicatory hearing, including at the preliminary hearing or emergency custody proceedings, a respondent may move for a pre-adjudicatory improvement period in accordance with W. Va. Code § 49-4-610. If the motion is granted, the court shall order the Department to submit the family case plan within thirty (30) days of such order, which family case plan shall contain the information required by W. Va. Code §§ 49-4-408 and 49-4-604. The family case plan shall be formulated with the assistance of all parties, counsel, and the multi-disciplinary treatment team. The family case plan and improvement period order should closely track one another and taken together should constitute a program designed to remedy the circumstances which led to the filing of the petition. Reasonable efforts to place a child for adoption, or with a legal guardian or other permanent placement may be made at the same time.

(b) *Preadjudicatory improvement period status conferences*. For the duration of the preadjudicatory improvement period, in accordance with W. Va. Code § 49-4-610, the court shall convene a status conference within sixty (60) days of the granting of the improvement period or within ninety (90) days of the granting of the improvement period if the court orders the Department to submit a report as to the respondent's progress in the improvement period within sixty (60) days of the order granting the improvement period. At the status conference, the multidisciplinary treatment team shall attend and report as to progress and developments in the case. The court may require or accept progress reports or statements from other persons, including the parties, service providers, and persons entitled to notice and the right to be heard, provided that such reports or statements are provided to all parties. Pursuant to W. Va. Code § 49-4-610, a preadjudicatory improvement period shall not exceed three months. If the respondent(s) fail to comply with the terms and conditions of the improvement period or evidence an inability to remediate the circumstances giving rise to the abuse and/or neglect, any party may file a motion to revoke the improvement period.

**Rule 24. Adjudicatory prehearing conference.**

(a) *Adjudicatory prehearing conference*. Prior to the final adjudicatory hearing, the court may convene a prehearing conference on its own motion or upon the request of any party.

(b) *Subjects of adjudicatory subjects prehearing conference*. At the adjudicatory prehearing conference, the court may

(1) Review efforts to locate and serve all the parties;

(2) Advise unrepresented parties concerning their right to counsel and to appointed counsel, in which case the conference shall be reconvened at a later date;

(3) Determine whether the child shall be present and testify at adjudication and, if so, under what conditions;

(4) Conclude any unresolved discovery matters;

(5) Identify issues of law and fact for adjudication;

(6) Require the parties to develop a list of possible witnesses and brief summaries of their testimony;

(7) Determine the needs of out-of-town witnesses regarding scheduling; and

(8) Confirm the date and estimate the length of the adjudicatory hearing.

(c) *Additional information*. The parties shall have a continuing obligation to update information provided during the adjudicatory prehearing conference. If the additional information constitutes surprise, the court shall allow the surprised party adequate time and opportunity to prepare and respond.

(d) *Time frame*. The court may schedule a final prehearing conference within five (5) days of the adjudicatory hearing to determine whether the parties or other persons entitled to notice and the right to be heard have notice of the hearing, the number and identity of the witnesses that each party intends to call and the estimated length of their testimony, and any other matter which may affect the conduct of the adjudicatory hearing.

**Rule 25. Time of final adjudicatory hearing.**

When a child is placed in the temporary custody of the Department or a responsible person pursuant to W. Va. Code § 49-4-602, the final adjudicatory hearing shall commence within thirty (30) days of the temporary custody order entered following the preliminary hearing and must be given priority on the docket unless a preadjudicatory improvement period has been ordered. In all other cases, the final adjudicatory hearing shall commence within thirty (30) days of the filing of the petition or, if a preadjudicatory improvement period has been ordered, as soon as possible, but no later than thirty (30) days, after the conclusion of such preadjudicatory improvement period. Where a respondent has been served, no order adjudicating that such respondent has abused or neglected the child concerned until the time for answer for such respondent has expired and, if the answer is timely served, the respondent has been afforded at least 20 days from the date the answer was filed to prepare for adjudication or has waived such opportunity to prepare. The final adjudicatory hearing shall be conducted in accordance with the provisions of W. Va. Code § 49-4-601(i).

**Rule 26. Stipulated adjudication, uncontested petitions, contents of written reports and admissions.**

(a) *Required information*. Any stipulated or uncontested adjudication shall include the following information:

(1) Agreed upon facts supporting court involvement regarding the respondent's problems, conduct, or condition; and

(2) A statement of respondent's problems or deficiencies to be addressed at the final disposition.

(b) *Voluntariness of consent*. Before accepting a stipulated or uncontested adjudication, the court shall determine that the parties understand the content and consequences of the admission or stipulation, the parties voluntarily consent, and that the stipulation or uncontested adjudication meets the purposes of these rules and controlling statute and is in the best interests of the child.

(c) *Contents of written reports*. The court may take judicial notice of written reports which constitute public records and, when so admitted into evidence, give thereto such weight as may be appropriate. Any party may request the opportunity to be heard with respect to such reports under Rule 201(e) of the Rules of Evidence. Reasonable efforts should be made by parties and the court to inform all parties and all other persons entitled to notice and the right to be heard of the intention to submit or consider such reports to the end that those parties and other persons desiring to be heard with respect thereto may adequately prepare.

(d) *Effect of admissions by respondents*. Admissions by a respondent properly contained in an answer and any written stipulations made by a respondent may be admitted into evidence at any stage of the proceedings and given such weight by the court as may be appropriate if the court finds that such admissions or stipulations are reliable. If the reliability of such admissions or stipulations is challenged for fraud, duress or other like cause, the court shall determine the issues thus drawn on the record. Extra judicial admissions by a respondent shall be admitted into evidence under any circumstances permitted by the rules of evidence.

**Rule 27. Findings; adjudication order.**

At the conclusion of the adjudicatory hearing, the court shall make findings of fact and conclusions of law, in writing or on the record, as to whether the child is abused and/or neglected in accordance with W. Va. Code § 49-4-601(i). The court shall enter an order of adjudication, including findings of fact and conclusions of law, within ten (10) days of the conclusion of the hearing, and the parties and all other persons entitled to notice and the right to be heard shall be given notice of the entry of this order.

**Rule 28. Disposition report by Department -- The child's case plan; contents of the child's case plan.**

(a) The Department shall prepare a child's case plan as required by W. Va. Code §§ 49-4-408 and 49-4-604, in the format approved by the Supreme Court of Appeals of West Virginia and the Department. If parental rights have not been terminated, the plan should include, where applicable, the requirements of the family case plan. Parents, children capable of expressing their preferences, foster parents or relative caregivers, and members of the multidisciplinary treatment team should be included in the case plan development. The case plan should include, but need not be limited to, the following:

(1) A statement of the changes needed to correct the problems necessitating Department intervention, with timetables for accomplishing them;

(2) A description of services for the child, parents, and foster parents or relative caregivers that will assist the family in remedying the identified problems, including an explanation of the appropriateness, availability of suggested services, and reasonable accommodations in accordance with the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq., to parents with disabilities in order to allow them meaningful access to reunification and family preservation services;

(3) A description of behavioral changes that must be evidenced by the respondents to correct the identified problems;

(4) The permanency plan and concurrent plan for the child, which are designed to achieve timely permanency for the child in the least restrictive setting available. Unless reasonable efforts to prevent removal or to preserve the family are not required, documentation must be provided to show reasonable efforts to prevent removal or to ensure reunification within the timeframes set in the plan, as well as reasonable efforts to work toward the concurrent plan, which may be adoption, minor guardianship, another planned permanent living arrangement (APPLA), or emancipation; and

(5) When the child's permanency plan is APPLA, the Department shall document the efforts to place the child permanently with a parent, relative, or in a guardianship or adoptive placement and the steps taken to ensure that the foster family follows the "reasonable and prudent parent standard" to allow the child regular opportunities to engage in age- or developmentally-appropriate normal childhood activities.

(b) When the child has been in emergency protective care or temporary custody during the proceedings or the Department's recommendation includes placement of the child away from home, the report also shall include the following:

(1) A description of the efforts made by the Department to prevent the need for placement or the circumstances which made the offer of such efforts an unviable option; and

(2) A description of the efforts since placement to reunify the family, including services which were offered or provided or the reasons why such efforts would be unavailing or not in the best interest of the child.

(c) When the Department's recommendation includes placement of the child away from home, whether temporarily or permanently, the report also shall include the following:

(1) An explanation why the child cannot be protected from the identified problems in the home even with the provision of services or why placement in the home is not in the best interest of the child;

(2) Identification of relatives or friends who were contacted about providing a suitable and safe permanent placement for the child;

(3) A description of the recommended placement or type of home or institutional placement in which the child is to be placed, including its distance from the child's home and whether or not it is the least restrictive (most family-like) one available and including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to assure that the child receives proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parent's/respondent's home, facilitate return of the child to his or her own home or the permanent placement of the child;

(4) Assurances that the placement of the child takes into account the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement; that the Department has coordinated with appropriate local education agencies to ensure that the child remains enrolled in the school in which the child was enrolled at the time of placement, including provision for reasonable travel; and if remaining in the same school is not in the child's best interests, that the Department and local education agencies have provided immediate and appropriate enrollment in a new school, with all of the education records of the child provided to the school;

(5) A suggested visitation plan including an explanation of any conditions to be placed on the visits;

(6) A statement of the child's special needs and the ways they should be met while in placement, including a plan for how the child will have regular opportunities to engage in age- or developmentally-appropriate normal childhood activities;

(7) The location of any siblings and, if siblings are separated, a statement of the reasons for the separation and the steps required to unite them as quickly as possible and to maintain regular contact during the separation if it is in each child's best interest;

(8) For children aged 14 or older, the plan should specify services aimed at transitioning the child into adulthood. When a child turns 17, or as soon as a child aged

17 comes into a case, the Department must immediately provide the child with assistance and support in developing a transition plan that is personalized at the direction of the child. The plan must include specific options on housing, health insurance, education, local opportunities for mentors, continuing support services, work force support, and employment services, and the plan should be as detailed as the child may elect. In addition to these requirements, when a child with special needs turns 17, or as soon as a child aged 17 with special needs comes into a case, he or she is entitled to the appointment of a Department adult services worker to the multidisciplinary treatment team and coordination between the multidisciplinary treatment team and other transition planning teams, such as special education individualized education planning (IEP) teams;

(9) The ability of the parent(s) to contribute financially to placement; and

(10) The current address and telephone number of the parties or a statement why such information is not provided.

(d) When the Department's recommendation is for termination of parental rights, the report shall include those items set forth in subsections (b) and (c) above and also the following:

(1) A description of the efforts made by the Department to prevent the need for placement or the circumstances which made the offer of such efforts an unviable option;

(2) A description of the efforts since placement to reunify the family, including services which were offered or provided or the reasons why such efforts would be unavailing; and

(3) Any objections by any party to the contents of the child's case plan may be raised at the disposition hearing.

**Rule 29. Notice of the child's case plan.**

Copies of the child's case plan shall be provided to the parties, their counsel, and persons entitled to notice and the right to be heard, at least five (5) judicial days prior to the disposition hearing.

**Rule 30. Exchange of information before disposition hearing.**

At least five (5) judicial days prior to the disposition hearing, each party shall provide the other parties, persons entitled to notice and the right to be heard, and the court a list of possible witnesses, with a brief summary of the testimony to be presented at the disposition hearing, and a list of issues of law and fact. Parties shall have a continuing obligation to update information until the time of the disposition hearing.

**Rule 31. Notice of disposition hearing.**

Notice of the date, time, and place of the disposition hearing shall be given to all parties, their counsel, and persons entitled to notice and the right to be heard.

**Rule 32. Time of disposition hearing.**

(a) *Time frame*. The disposition hearing shall commence within forty-five (45) days of the entry of the final adjudicatory order unless an improvement period is granted pursuant to W. Va. Code § 49-4-610(2) and then no later than thirty (30) days after the end of the improvement period.

(b) *Accelerated disposition hearing.* The disposition hearing immediately may follow the adjudication hearing if:

(1) All the parties agree;

(2) A child's case plan meeting the requirements of W. Va. Code §§ 49-4-408 and 49-4-604 was completed and provided to the court or the party or the parties have waived the requirement that the child's case plan be submitted prior to disposition; and

(3) Notice of the disposition hearing was provided to or waived by all parties as required by these Rules.

**Rule 33. Stipulated disposition, contents of stipulation, voluntariness.**

(a) *Required information*. Unless otherwise ordered by the court, any stipulated or uncontested disposition shall include the following information:

(1) The legal custody and placement of the child;

(2) The changes needed to end the court's involvement;

(3) Services to be provided to the child and family;

(4) The terms and conditions of the family case plan, unless the stipulated disposition terminates parental rights or places the child in legal guardianship or permanent foster care;

(5) The schedule of multidisciplinary treatment team meetings and permanent placement review conferences, including the first date and time of each;

(6) Restraining orders controlling the conduct of any party who is likely to frustrate the dispositional order;

(7) If a child is to be placed away from home, the proposed stipulated disposition shall also address:

(A) The type of placement;

(B) Terms of visitation and other parental involvement, including information about the child to be provided to the parents;

(C) Steps to meet the child's special needs while in placement; and

(D) If the child is separated from siblings, steps to unite them and/or to maintain regular contact during the separation;

(8) Any other aspect of the case plan the parties want included in the court's order.

(9) A stipulated disposition involving a temporary out-of-house placement cannot be permitted beyond the time allowable by statute for an improvement period.

(b) *Voluntariness of consent.* Before determining whether or not to accept a stipulation of disposition, the court shall determine that the parties and persons entitled to notice and the right to be heard, understand the contents of the stipulation and its consequences, and that the parties voluntarily consent to its terms. The court must ultimately decide whether the stipulation of disposition meets the purposes of these rules, controlling statutes and is in the best interests of the child. The court shall hear any objection to the stipulation of disposition made by any party or persons entitled to notice and the right to be heard. The stipulations shall be specifically incorporated in their entirety into the court's order reflecting disposition of the case.

**Rule 34. Rulings on objections to the child's case plan.**

If objections to the child's case plan are raised at the disposition hearing, the court shall enter an order:

(a) Approving the plan;

(b) Ordering compliance with all or part of the plan;

(c) Modifying the plan in accordance with the evidence presented at the hearing; or

(d) Rejecting the plan and ordering the Department to submit a revised plan with thirty (30) days. If the court rejects the child's case plan, the court shall schedule another disposition hearing within forty-five (45) days.

**Rule 35. Uncontested termination of parental rights and contested termination and contests to the case plan.**

(a) *Uncontested termination of parental rights.* If a parent voluntarily relinquishes parental rights or fails to contest termination of parental rights, the court shall make the following inquiry at the disposition hearing:

(1) If the parent is present at the hearing but fails to contest termination of parental rights, the court shall determine whether the parent fully understands the consequences of a termination of parental rights, is aware of possible less drastic alternatives than termination, and was informed of the right to a hearing and to representation by counsel.

(2) If the parent is not present in court and has not relinquished parental rights but has failed to contest the termination, the petitioner shall make a prima facie ("on its face") showing that there is a legal basis for the termination of parental rights and the court shall determine whether the parent was given proper notice of the proceedings.

(3) If the parent is present in court and voluntarily has signed a relinquishment of parental rights, the court shall determine whether the parent fully understands the consequences of a termination of parental rights, is aware of possible less drastic alternatives than termination, and was informed of the right to a hearing and to representation by counsel.

(4) If the parent is not present in court but has signed a relinquishment of parental rights, the court shall determine whether there was compliance with all state law requirements regarding a written voluntary relinquishment of parental rights and whether the parent was thoroughly advised of and understood the consequences of a termination of parental rights, is aware of possible less drastic alternatives than termination, and was informed of the right to a hearing and to representation by counsel.

(b) *Contested terminations and contests to case plan.*

(1) When termination of parental rights is sought and resisted, the court shall hold an evidentiary hearing on the issues thus made, including the issues specified by statute and make such findings with respect thereto as the evidence shall justify. Upon making such findings, the court shall then determine if the case plan or plans before the court require amendment by reason of the findings of the court and require such modification of the plan or plans as may be appropriate.

(2) The guardian *ad litem* for the children, the respondents and their counsel, and persons entitled to notice and the right to be heard, shall advise at the dispositional hearing and, where termination is sought after the court's findings on the factual issues surrounding termination are announced, whether any such persons seek a modification of the child's case plan as submitted or desire to offer a substitute child's case plan for consideration by the court. The court shall require any proposed modifications or substitute plans to be promptly laid before the court and take such action, including the receipt of evidence with respect thereto, as the circumstances shall require. It shall be the duty of all the parties to the proceeding and their counsel to co-operate with the court in making this information available to the court as early as possible. It shall also be appropriate for the court to require alternative provisions of a case plan to be submitted prior to the taking of evidence in a dispositional hearing to suit alternative possible findings of the court after evidence is taken on any contested issues. Except as to the establishment of grounds for termination and the establishment of other necessary facts, dispositional hearings are not intended to be confrontational hearings; rather such are concerned with the best interests of the abused or neglected children involved.

**Rule 36. Findings; disposition order.**

(a) *Findings of fact and conclusions of law; time frame*. At the conclusion of the disposition hearing, the court shall make findings of fact and conclusions of law, in writing or on the record, as to the appropriate disposition in accordance with the provisions of W. Va. Code § 49-4-604. The court shall enter a disposition order, including findings of fact and conclusions of law, within ten (10) days of the conclusion of the hearing.

(b) *Permanent placement review conference.* In the disposition order the court also shall state the date and time of the first permanent placement review conference required under these rules.

(c) *Contents of disposition order*. The court also may include in the disposition order the following information:

(1) Terms of visitation;

(2) Services to be provided to the child and family;

(3) Restraining orders controlling the conduct of any party who is likely to frustrate the disposition order;

(4) Actions to be taken by the parent(s) to correct the identified problems;

(5) Conditions regarding the child's placement, including steps to meet the child's special needs while in placement;

(6) If the child is separated from siblings, steps to unite them and/or to maintain regular contact during the separation if it is in the best interest of each child; and

(7) Terms and conditions of the family case plan or the child's case plan.

(d) *Notice of permanency hearing*. If a permanency hearing must be conducted pursuant to W. Va. Code § 49-4-608, then the disposition order shall state the date and time of the permanency hearing.

(e) *Interaction with administrative processes of the Department.* The court has exclusive jurisdiction to determine the permanent placement of a child. Placement of a child shall not be disrupted or delayed by any administrative process of the Department, including an adoption review committee or grievance procedure.

**Rule 36a. Permanency hearing.**

(a) If the court finds at any hearing that the Department is not required to make reasonable efforts to preserve the family, then a permanency hearing must be held within 30 days following entry of the order so finding. The purpose of the permanency hearing is to determine the appropriate permanent placement and plan for the child. All parties,

counsel, and persons entitled to notice and the right to be heard, shall be given notice of this hearing at least 5 judicial days in advance thereof.

(b) If the Court finds, at any stage of the proceeding, that reasonable efforts must be made by the Department to preserve the family or any part of it, then a permanency hearing must be conducted within one year from the date the child entered foster care which shall be deemed to be the earlier of the following:

(i) The date of the first judicial finding that the child has been subjected to child abuse or neglect; or

(ii) The date that is 60 days after the date on which the child is removed from the home.

(c) In accordance with Rules 39 to 42, the court shall conduct permanent placement review conferences at least every three months thereafter to determine if the Department has made reasonable efforts to finalize the permanency plan for the child.

**Rule 37. Improvement period; status conference.**

If an improvement period is ordered following the final adjudicatory hearing or as an alternative disposition pursuant to W. Va. Code §§ 49-4-604(d) and 49-4-610(2) or (3), the court shall order the Department to submit a family case plan within thirty (30) days of such order containing the information required by W. Va. Code §§ 49-4-408 and 49-4-604. The family case plan shall be formulated with the assistance of all parties, counsel and the multi-disciplinary treatment team. Reasonable efforts to place a child for adoption or with a legal guardian or other permanent placement may be made at the same time. In accord with W. Va. Code §§ 49-4-610(2) and (3), the court shall convene a status conference within sixty (60) days of the granting of the improvement period or within ninety (90) days of the granting of the improvement period if the court orders the Department to submit a report as to the respondent's progress in the improvement period within sixty (60) days of the order granting the improvement period. The court shall thereafter convene a status conference at least once every three months for the duration of each improvement period, with notice given to any party and persons entitled to notice and the right to be heard. At the status conference, the multidisciplinary treatment team shall attend and report as to progress and developments in the case. The court may require or accept progress reports or statements from other persons, including the parties, service providers, and the CASA representative provided that such reports or statements are given to all parties.

**Rule 38. Hearing after improvement period; final disposition.**

No later than thirty (30) days after the end of the alternative disposition improvement period, the court shall hold a hearing to determine the final disposition of the case, including whether the conditions of abuse and/or neglect have been adequately improved in accordance with W. Va. Code § 49-4-604(d). Any party and persons entitled to notice and the right to be heard shall receive notice of the hearing. The court also shall

determine the necessary disposition consistent with the best interests of the child. Within ten (10) days of the conclusion of the hearing, the court shall enter a final disposition order in accordance with the provisions of Rule 37.

**Rule 39. Permanent placement review.**

Rule 6 requires the court to maintain the case on the docket until permanent placement is achieved. Permanent placement is defined in Rule 3(n).

(a) *Court monitoring of permanency plan*. Following entry of a permanency hearing order, the court, with the assistance of the multidisciplinary treatment team, shall continue to monitor implementation of the court-ordered permanency plan for the child.

(b) *Time frame*. At least once every three months until permanent placement is achieved as defined in Rule 6, the court shall conduct a permanent placement review conference, requiring the multidisciplinary treatment team to attend and report as to progress and development in the case, for the purpose of reviewing the progress in the permanent placement of the child.

(c) *Notice of hearing*. Notice of the time and place of the permanent placement review conference shall be given to counsel of record, and all other persons entitled to notice and the right to be heard at least fifteen (15) days prior to the conference unless otherwise provided by court order. Neither a party whose parental rights have been terminated by the final disposition order nor his or her attorney shall be given notice of or participate in post-disposition proceedings.

(d) *Hearing*. The court shall hold a hearing in connection with such review, and shall not conduct such review by agreed order.

**Rule 40. Permanent placement review reports.**

At least ten (10) days before the permanent placement review conference, the multidisciplinary treatment team and the Department shall provide to the court and to the parties progress reports describing efforts to implement the permanency plan and any obstacles to permanent placement. The court may require or accept progress reports or statements from other persons, including the parties, service providers, and the CASA representative, provided that such reports or statements are given to all parties prior to the placement review conference.

**Rule 41. Permanent placement review conference.**

(a) *Subjects of permanent placement review conference.* Unless otherwise provided by court order, matters to be considered at the permanent placement review conference shall include a discussion of the reasonable efforts made to secure a permanent placement, including:

(1) The extent to which problems necessitating Department intervention have been remedied and, if appropriate, the actions that should be taken by the respondent(s) to permit return of the child;

(2) Services and assistance that were offered or provided to the family since the previous hearing or permanent placement review conference; reasonable accommodations provided in accordance with the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq., to parents with disabilities in order to allow them meaningful access to reunification and family preservation services; and services needed in the future;

(3) Compliance by the respondent and Department with the case plan and with previous orders and recommendations of the court;

(4) Recommended changes in court orders;

(5) The ability and extent of the respondent to contribute financially to the child's placement;

(6) The appropriateness of the current placement, including its distance from the child's home and whether or not it is the least restrictive one (most family-like one) available;

(7) The appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement;

(8) The Department's coordination with appropriate local education agencies to ensure that the child remains enrolled in the school in which the child was enrolled at the time of placement, including provision for reasonable travel, or if remaining in the same school is not in the child's best interests, the provision of immediate and appropriate enrollment in a new school, with all of the education records of the child provided to the school;

(9) A summary of visitation and any recommended changes;

(10) How the child's special needs were or were not met while in placement, including whether the child had regular opportunities to engage in age- or developmentally-appropriate normal childhood activities;

(11) The location of any siblings and the steps that have been and will be taken to unite them as quickly as possible and to maintain regular contact during the separation if it is in the best interest of each child;

(12) For children aged 14 or older, the specific services aimed at transitioning the child into adulthood. When a child turns 17, or as soon as a child aged 17 comes into a case, the Department must immediately provide the child with assistance and support in developing a transition plan that is personalized at the direction of the child. The plan must include specific options on housing, health insurance, education, local opportunities for mentors, continuing support services, work force support, and employment services, and the plan should be as detailed as the child may elect. In addition to these requirements, when a child with special needs turns 17, or as soon as a child aged 17

with special needs comes into a case, he or she is entitled to the appointment of a Department adult services worker to the multidisciplinary treatment team and coordination between the multidisciplinary treatment team and other transition planning teams, such as special education individualized education planning (IEP) teams;

(13) When the child's permanency plan is another planned permanent living arrangement (APPLA), the efforts to place the child permanently with a parent, relative, or in a guardianship or adoptive placement; the child's desired permanency outcome; and the steps taken to ensure that the foster family follows the "reasonable and prudent parent standard" to allow the child regular opportunities to engage in age- or developmentally-appropriate normal childhood activities;

(14) A recommendation and discussion regarding the child's return home either immediately or within the next six months.

(A) If return is recommended, it shall include a summary of:

(i) Necessary steps to make return possible and to minimize the disruptive effects of return;

(ii) The dangers to the child after return; and

(iii) Reunification services needed, including services to minimize any danger to the child after return;

(B) If return is not recommended, a recommendation and discussion regarding adoption of the child. If placement for adoption is recommended, it shall include a discussion of:

(i) The steps needed to bring about a termination of parental rights action; and

(ii) The time necessary to take such steps;

(C) If neither return home nor placement for adoption is recommended, a discussion of the following shall be included:

(i) Awarding legal guardianship or permanent custody to a specific individual or individuals. If recommended, a proposed time table, recommendations concerning the rights and responsibilities the biological parent should retain, and recommendations concerning the rights and responsibilities of the guardian or custodian shall be addressed; and

(ii) Placement of the child permanently in foster care with specific foster parents. If recommended, a time table and recommendations concerning the terms of the permanent foster care agreement, and court order authorizing permanent foster care, and the continuing rights and responsibilities of the biological parents shall be addressed;

(D) If continued foster care is recommended, an explanation of why it continues to be appropriate for the child;

(E) If placement in a group home or institution is recommended:

(i) An explanation of why treatment outside a family environment is necessary, including a brief summary of supporting expert diagnoses and recommendations; and

(ii) A discussion of why a less restrictive, more family-like setting is not practical, including placement with specially trained foster parents;

(F) If emancipation or independent living is recommended for a child who has attained age sixteen (16) years, an explanation of why foster family care is no longer appropriate; a description of the skills needed by the child to prepare for adulthood; and a description of the ongoing support and services to be provided by the agency; and

(G) Concurrent alternative permanency plans.

(H) Any other matter relevant to implementation of the permanency plan.

(b) *Post-termination placement plan*. Within ninety (90) days of the entry of the final termination order or decree for both parents, the Department responsible for placement of the child shall submit a written permanent placement plan to the court, the guardian *ad litem*, persons entitled to notice and the right to be heard, and other remaining parties, if any, for consideration at the permanent placement review. The plan shall include the following:

(1) A description of the Department's progress toward arranging an adoptive, legal guardianship, or permanent foster care home placement for the child;

(2) Where adoptive, legal guardians, or permanent foster care parents have not been selected, a schedule and a description of steps to be taken to place the child permanently;

(3) A discussion of any special barriers preventing placement of the child for adoption, legal guardianship, or permanent foster care and how they should be overcome; and

(4) A discussion of whether adoption and/or legal guardianship subsidy is needed and, if so, the likely amount and type of subsidy required.

The court shall continue to conduct a permanent placement review at least every three (3) months until permanent placement is achieved. The court shall hold a hearing in connection with such review, and shall not conduct such review by agreed order. Notice of such hearing shall be given to the Department, the child through his guardian *ad litem*, and persons entitled to notice and the right to be heard.

(c) *Stipulations*. The parties may file written stipulations as to any matters to be considered at the permanent placement review conference but such written stipulations shall not be accepted in lieu of the conducting of the permanent placement review conference.

**Rule 42. Findings at permanent placement review; order.**

(a) *Findings of fact and conclusions of law; time frame*. Within ten (10) days of the conclusion of the permanent placement review conference, the court shall enter an order determining whether the Department has made reasonable efforts to finalize the permanency plan for the child. The court shall also find whether permanent placement has been fully achieved within the meaning of Rule 6 and stating findings of fact and conclusions of law to support its determination.

(b) *Dismissal*. If the court finds that permanent placement has been achieved, it may order the case dismissed from the docket.

(c) *Continuance*. If the court finds that permanent placement has not been achieved, the court's order shall address those subjects set forth in Rule 41 as appropriate and shall state:

(1) Changes in the terms of the child's case plan it deems necessary to effect a permanent placement of the child, with supporting findings of fact;

(2) Changes in the terms of visitation and other parental involvement, if any;

(3) Changes in services to be provided the parties and the child, if any;

(4) Changes to the educational plan for the child to further the child's educational stability, if any;

(5) Steps to be taken to assist a child aged 14 or older with the development of a transitional plan;

(6) Restraining orders controlling the conduct of any party who is likely to frustrate the court's orders, if any;

(7) Additional actions to be taken by the parties to achieve permanent placement; and

(8) A date and time for the next placement review conference.

(d) Findings when the permanency plan is another planned permanent living arrangement (APPLA). After asking the child for his or her desired permanency outcome, the court shall find whether APPLA is the best permanency plan for the child; review Department efforts to place the child permanently with a parent, relative, or in guardianship or adoptive placement; and find compelling reasons why it is not in the

child's best interests to be placed permanently with a parent, relative, or in a guardianship or adoptive placement.

**Rule 43. Time for permanent placement.**

Permanent placement of each child shall be achieved within twelve (12) months of the final disposition order, unless the court specifically finds on the record extraordinary reasons sufficient to justify the delay.

**Rule 44. Foster care review.**

Nothing in these rules is intended to abrogate the responsibilities of the Department and the court with regard to the foster care case review system established by W. Va. Code §§ 49-4-110 and 49-4-608. Upon the filing of a foster care case review petition by the Department, the court may schedule a foster care case review hearing at the same time as the required permanent placement review conference contemplated by these rules. Such proceedings shall be conducted in accordance with the provisions of the pertinent statute and these rules.

**Rule 45. Review following permanent placement; reporting permanent placement changes.**

(a) *Discontinuation of permanent placement review*. Permanent placement review shall be discontinued after permanent placement is consummated.

(b) *Reporting changes in permanent placement status.* If the child is removed from an adoptive home or other permanent placement after the case has been dismissed, any party with notice thereof and the receiving agency shall promptly report the matter to the circuit court of origin, the Department, and the child's counsel, and the court shall schedule a permanent placement review conference within sixty (60) days, with notice given to any appropriate parties and persons entitled to notice and the right to be heard. The Department shall convene a multidisciplinary treatment team meeting within thirty (30) days of the receipt of notice of permanent placement disruption.

**Rule 46. Modification or supplementation of court order; stipulations.**

A child, a child's parent (whose parental rights have not been terminated), a child's custodian, or the Department shall file a motion in the circuit court of original jurisdiction in order to modify or supplement an order of the court at any time; provided, that a dispositional order pursuant to W. Va. Code § 49-4-604(b)(6) shall not be modified after the child has been adopted, pursuant to W. Va. Code § 49-4-606. The court shall conduct a hearing and, upon a showing of a material change of circumstances, may modify or supplement the order if, by clear and convincing evidence, it is in the best interest of the child. *Provided*: an order of child support may be modified if, by the preponderance of the evidence, there is a substantial change in circumstances, pursuant to W. Va. Code § 48-11-105. Adequate and timely notice of any motion for modification shall be given to the child's counsel, counsel for the child's parent(s) (whose parental rights have not been

terminated) or custodian, and to the Department, as well as to other persons entitled to notice and the right to be heard. The court may consider a stipulated modification of an order, provided that the child has not been adopted as aforesaid, if the court determines that the parties and persons entitled to notice and the right to be heard understand the contents and consequences of the stipulation and voluntarily consent to its terms, that the stipulation meets the purposes of these rules and controlling statutes, and that the stipulation is in the best interest of the child.

**Rule 47. Status conference.**

The court may convene a status conference, upon its own motion or, if requested, by any party or person entitled to notice and the right to be heard, at any time during the proceedings to allow the parties, the multidisciplinary treatment team, persons entitled to notice and the right to be heard, or representatives of the Department to advise the court of pertinent developments in the case or problems which arose during the formulation and implementation of a case plan. Where it appears to the court that any such issue can not be resolved without the taking of evidence, the court may proceed to take evidence, if appropriate notice has been given in advance, or set such further hearing and require notice thereof to all remaining proper parties or persons entitled to notice and the right to be heard, as the court may be advised. Upon the taking of such evidence, the court shall make such findings in the appropriate post-dispositional order as are required to dispose of the issue thus raised.

**Rule 48. Separate hearing on issue of paternity.**

If the paternity of a child is at issue at any time during these proceedings, the court may set a special hearing to determine paternity and shall notify the Bureau for Child Support Enforcement office.

**Rule 49. Accelerated appeal for child abuse and neglect and termination of parental rights cases.**

Appeals of orders under W. Va. Code § 49-4-601, *et seq.*, are governed by the West Virginia Rules of Appellate Procedure. Within thirty (30) days of entry of the order being appealed, the petitioner shall file a notice of appeal, including required attachments and copies, with the Office of the Clerk of the Supreme Court of Appeals of West Virginia, with service provided as prescribed by the Rules of Appellate Procedure. All parties to the proceeding in the court from which the appeal is taken, including the guardian(s) *ad litem* for the minor children, shall be deemed parties in the Supreme Court, unless the appealing party indicates on the notice of appeal that one or more of the parties below has no interest in the outcome of the matter. An appeal must be perfected within sixty (60) days of entry of the order. The circuit court from which the appeal is taken or the Supreme Court may, for good cause shown, by order entered of record, extend such period, not to exceed a total extension of two months, if the notice of appeal was properly and timely filed by the party seeking the appeal. The filing of any motion to modify an order shall not toll the time for appeal. The Supreme Court of Appeals shall give priority to appeals of child abuse and/or neglect proceedings and termination of parental rights

cases and shall establish and administer an accelerated schedule in each case, to include the completion of the record, briefing, oral argument, and decision.

**Rule 50. Stays on appeal.**

The filing of a petition for appeal does not operate to automatically stay the proceedings or orders of the circuit court in abuse, neglect, and/or termination of parental right cases, but the circuit court or the Supreme Court of Appeals may grant a stay upon a showing of good cause. Any party seeking a stay from the Supreme Court of Appeals pursuant to Rule 28 of the Rules of Appellate Procedure pending an appeal of neglect, abuse, and/or termination of parental rights cases shall submit a written motion for the stay and a brief statement explaining the need for the stay, discussing the effect of the stay on the ability of the circuit court to plan for the child and on the best interests of the child. This rule shall not preclude any motion to the circuit court for a stay which includes a brief statement of the issues previously set forth.

**Rule 51. Multidisciplinary treatment teams.**

(a) *Convening of multidisciplinary treatment teams*. Within thirty (30) days after the petition is filed, the court shall cause to be convened a meeting of a multidisciplinary treatment team assigned to the case, said multidisciplinary treatment team to include those members mandated pursuant to W. Va. Code § 49-4-405, providers of services to the child and/or family, and persons entitled to notice and the right to be heard.

(b) *Access to and confidentiality of information.* The multidisciplinary investigative team created pursuant to W. Va. Code § 49-4-402 and the multidisciplinary treatment team created pursuant to W. Va. Code § 49-4-403, and the community team created pursuant to W. Va. Code § 49-1-207 shall be afforded access to information in the possession of the Department and other agencies and the Department and other offices shall cooperate in the sharing of information as may be provided by W. Va. Code §§ 49-4-402 and 49-5-101, and any other relevant provisions of law. Any multidisciplinary team member who acquires confidential information shall not disclose such information except as provided by statute.

(c) *Responsibilities*. The multidisciplinary treatment team shall submit written reports to the court as required by these rules or by the court; shall meet with the court at least every three months until permanency is achieved for the child, and the case is dismissed from the docket; shall be available for status conferences and hearings as required by the court; and shall not be abrogated by an adoption review committee or other administrative process of the Department.

(d) *Scope of this rule*. This rule is to be construed broadly to effectuate cooperation and communication between all service providers, parties, counsel, persons entitled to notice and the right to be heard, and the court.

**Rule 52. Court-appointed special advocate (CASA) representative.**

(a) *Appointment of court-appointed special advocate representative*. Where a court-appointed special advocate program, which is in good standing as a member of the National CASA Association and the West Virginia CASA Association, is in place, the court may, after the filing of a civil petition, appoint a CASA representative to further the best interests of the child until further order of the court or until permanent placement of the child is achieved.

(b) *Duties of CASA representative*. A CASA representative is to be appointed primarily in proceedings involving child abuse and/or neglect. Duties of a CASA representative include an independent gathering of information through interviews and review of records; facilitating prompt and thorough review of the case; protecting and promoting the best interests of the child; follow-up and monitoring of court orders and case plans; making a written report to the court with recommendations concerning the child's welfare; and negotiating and advocating on behalf of the child.

(c) *Access to information*. The court may enter an order granting the CASA representative access to court records and confidential records of state, county, local agencies, and service providers, or the CASA representative may obtain a waiver for the release of such information from the parties as provided by W. Va. Code § 49-5-101, or in accordance with other law. If such an order is entered or such a waiver is obtained, the CASA representative shall be considered a person entitled to notice and the opportunity to be heard and shall be given notice of pleadings, court orders, hearings, and conferences and shall be allowed to attend proceedings to the extent allowed by the court. The CASA representative shall not disclose any confidential information he or she obtains expect as authorized by statute.

(d) *Notification of hearings*. The CASA representative shall be notified of all hearings and changes in hearings, all status conferences, all treatment multidisciplinary team meetings, and all Department administrative reviews.

(e) *Court orders*. The CASA representative shall receive copies of all court orders in the case to which he or she is appointed.

(f) *Termination*. The CASA representative shall stay involved in the case until further order of the court or permanent placement of the child is achieved. The CASA representative shall have access to information in the selection process of adoptive parents, legal guardians or permanent foster care parents. The CASA representative also shall monitor and advocate for services for the permanent placement family until the final order is entered.

(g) *Continued duties of the child's attorney*. The appointment of a CASA representative shall not in any way abrogate the duties and responsibilities imposed by law on the attorney for the child. The duties and responsibilities of a child's guardian *ad litem* shall continue until such child has a permanent placement, and the guardian *ad*

*litem* shall not be relieved of his responsibilities until such permanent placement has been achieved.

**Rule 53. Case status reporting.**

To effectuate the purpose of the rules and to assist the court in complying with the duty to monitor the progress of each abuse and neglect case from filing through the child's permanent placement, the court shall promptly enter required data into the electronic child abuse and neglect database managed by the Administrator of the Supreme Court of Appeals for each abuse/neglect case commencing from the filing of the case until the child involved in the case is situated by way of unconditional permanent return to parent(s), or other permanent placement ratified by court order, or by emancipation.

**Rule 54. Transitioning Adults**

These rules of procedure pertaining to case reviews and permanency hearings apply to any "transitioning adult" as defined by W. Va. Code § 49-1-202.

**Rule 55. Qualified residential treatment programs.**

(a) When the placement of a child in a qualified residential treatment program is proposed, an independent evaluator designated by the Department shall:

(1) Assess whether the child's needs could be met in a lesser restrictive environment, including in a child's home or in a foster family home; and

(2) Develop a list of child-specific short and long term mental and behavioral health goals. The assessment shall be conducted before the child is placed in a qualified residential treatment program, and the written report shall be submitted to the court, except for good cause shown, no later than 20 days prior to the date that a child is to be placed in the qualified residential treatment program. The assessment shall also be provided to the members of the multi-disciplinary treatment team.

(b) No later than 10 days after the receipt of the report recommending placement of a child in a qualified residential treatment program, the court shall:

(1) Review the assessment on the record, or conduct a hearing, either sua sponte or upon the motion of any party to the case with regard to the placement of the child in the qualified residential treatment program;

(2) Determine whether the needs of the child can be met through placement in a foster family home or, if not, whether placement of the child in a qualified residential treatment program provides the most effective and appropriate level of care for the child in the least restrictive environment and whether that placement is consistent with the short and long term goals for the child, as specified in the permanency plan for the child;

(3) Approve or disapprove the placement by order, including an agreed order; and

(4) In the event that the court disapproves placement of the child in the proposed residential treatment program, the court shall either make written findings of fact and conclusions of law as to why the court finds such placement contrary to the best interest of the child or set forth such findings of fact and conclusions of law in the record at the evidentiary hearing.

(c) The court shall also consider whether the Department has made reasonable efforts to achieve permanency for the child and set forth such findings in its order.

(d) In any event, the final decision of the court shall be made and the order in regards thereto shall be entered no later than 60 days from the date of the filing of independent evaluation with the court.

(e) As long as a child remains placed in a qualified residential treatment program, the Department shall submit evidence at each status review and each permanency hearing held with respect to the child:

(1) Demonstrating that ongoing assessment of the strengths and needs of the child continues to support the determination that the needs of the child cannot be met through placement in a foster family home, that the placement in a qualified residential treatment program provides the most effective and appropriate level of care for the child in the least restrictive environment, and that the placement is consistent with the short and long term goals for the child, as specified in the permanency plan for the child;

(2) Documenting the specific treatment or service needs that will be met for the child in the placement and the length of time the child is expected to need the treatment or services; and

(3) Documenting the efforts made by the Department to prepare the child to return home or to be placed with a fit and willing relative, a legal guardian, or an adoptive parent, or in a foster family home.

## APPENDIX A: Guidelines for Children's Guardians Ad Litem in Child Abuse and Neglect Cases

### Introduction

The purpose of the following Guidelines is to provide guardians *ad litem* (GAL) with guidance in representing a child in an abuse and neglect proceeding under W. Va. Code § 49-4-601, *et seq.* The Guidelines are divided into five parts: 1) Section A sets forth the general role of a GAL and the education and training requirements of a GAL; 2) Section B discusses ethical considerations in representation; 3) Section C describes the duties of a GAL as to the initial stages of representation; 4) Section D discusses the duties of a GAL as to the adjudicatory and dispositional stages of representation; and 5) Section E describes the duties of a GAL as to post-dispositional representation.

### A. Role of GAL; Education and Training

1. *Role of GAL.* The GAL in a child abuse and neglect case has a dual role, both as an attorney, and to represent the best interests of the child. A GAL has broad discretion in determining what is necessary to protect the best interests of a child. The safety, well-being, and timely permanent placement of a child in an abuse and neglect proceeding are central to all aspects of a GAL's representation.

2. *Education and Training.* An attorney appointed as GAL shall complete a minimum of eight (8) hours of continuing legal education training every two years in child abuse and neglect practice and procedure as provided by the Supreme Court of Appeals of West Virginia.

### B. Ethical Considerations in Representation

1. *Rules of Professional Conduct.* The Rules of Professional Conduct apply to a GAL's representation of a child in an abuse and neglect proceeding.

2. *Duty of Confidentiality.* A GAL owes a duty of confidentiality to the child, but this duty is not absolute. A GAL has a duty to disclose a child's confidential communication to the court when the communication implicates a high risk of probable harm to the child.

3. *Conflicts of Interest.* General principles of conflicts of interest apply to a GAL's representation of a child in an abuse and neglect proceeding. Conflicts of interest commonly arising in abuse and neglect proceedings include the following:

a. A GAL determines that there is a conflict of interest in performing both roles as GAL and the child's attorney. In such instance, the lawyer should continue to represent the child as the child's attorney and withdraw as GAL. The lawyer should simultaneously ask the court to appoint a new GAL to represent the best interests of the child. A mere disagreement regarding the best interests of the child does not in itself constitute a basis for withdrawing as counsel.

b. A conflict of interest arises when siblings represented by the same GAL have opposing interests. If the GAL discovers the conflict before commencing representation of the siblings, the GAL shall only accept appointment of one sibling or non-conflicting siblings. If the GAL discovers the conflict of interest after accepting appointment to represent the siblings, the GAL shall request that the court appoint a new GAL to represent the interests of the conflicting sibling or siblings.

c. A conflict of interest arises when a GAL subsequently represents a child's parent, relative, caregiver, foster parent, or pre-adoptive parent in another matter. In such instance, a GAL should not engage in a subsequent representation that compromises the GAL's ability to independently consider the best interests of the child.

**C. Duties of GAL as to Initial Stages of Representation**

1. When appropriate, promptly notify the child and the child's caretaker of the GAL's appointment and the means by which counsel can be contacted.

2. When appropriate, initiate contact with the caseworker, review the caseworker's file and obtain copies of school, medical, social service, or other records necessary to thoroughly understand and investigate the case.

3. Schedule a face-to-face meeting with the child at a time and place that allows for observation and private consultation with the GAL unless the court specifically determines that such a meeting would be inappropriate given the age, medical and/or psychological condition of the child.

4. When appropriate, counsel the child regarding the subject matter of the proceedings, the specific reasons for the GAL's appointment and the expectations of the court.

5. When a Court Appointed Special Advocate (CASA) has been appointed to the case, work with the CASA volunteer to achieve the goal of representing the best interests of the child.

6. Conduct an independent investigation of the facts of the case.

a. When appropriate, conduct in-home visits during which the GAL can observe the respective living environments of the child's parents or caretakers and their interaction with the child.

b. When appropriate, interview caregivers, caseworkers, therapists, school personnel, medical providers, relatives, siblings, and/or other individuals that have pertinent information regarding the child.

c. Ascertain the child's wishes when possible.

7. Maintain contact with the child throughout the case to monitor whether the child is receiving counseling, tutoring, or any other services needed to provide as much support as possible under the circumstances.

8. When appropriate, keep the child apprised of any developments in the case and actions of the court or parties involved.

**D. Duties of GAL as to Adjudicatory and Dispositional Stages of Representations**

1. Actively participate in all aspects of litigation, including, but not limited to, discovery, motions practice, court appearances, and the presentation of evidence.

2. Maintain adequate records of documents filed in the case and of all conversations with the child and potential witnesses.

3. When appropriate, evaluate any available improvement periods and actively assist in the formulation of an improvement period and service plans. The GAL is to monitor the status of the child and progress of the parent(s) in satisfying the conditions of the improvement period by requiring updates or status reports from agencies involved with the family.

4. Assess whether it is appropriate for the child to participate in court hearings or multi-disciplinary team meetings. The GAL is to participate in any discussions regarding the proposed testimony of the child and, if it is determined that the child's testimony is necessary, strongly advocate for the testimony to be taken in an acceptable and emotionally neutral setting.

5. Assess whether it is appropriate for the child to undergo multiple physical or psychological examinations. Before multiple physical or psychological examinations are conducted, the requesting party must present to the judge evidence of a compelling need or reason considering: (1) the nature and intrusiveness of the examination requested; (2) the child's age; (3) the resulting physical and/or emotional effects of the examination on the child; (4) the probative value of the examination to the issues before the court; (5) whether the passage of time renders the examination unnecessary or irrelevant; and (6) the evidence already available for the respondent's use.

6. Review any pre-dispositional report prepared for the court prior to the dispositional hearing and submit a factually accurate report if necessary to correct deficiencies.

7. Complete the investigation of the case with sufficient time between the interviews and court appearances to thoroughly analyze the information gleaned to formulate meaningful arguments and written recommendations to the court.

8. Submit a written report to the court and provide a copy to all parties at least five (5) days prior to the disposition hearing that complies with the format and content requirements of the "Report of Guardian *Ad Litem*" set forth in Appendix B of the Rules of Procedure for Child Abuse and Neglect Proceedings. When necessary, petition the court to seal or redact information contained in the report as provided in Rule 18a of the Rules of Procedure for Child Abuse and Neglect Proceedings. Submit an updated report if necessary to notify the court of any changes in the child's circumstances. Such report is

protected by the attorney-client privilege and the attorney work product privilege. GALs are precluded from testifying as to any aspect of the report.

9. When appropriate, explain to the child the decisions of the court.

10. Ensure that the child/family case plan and subsequent progress reports include appropriate treatment. The GAL is to advocate, when appropriate, for a gradual transition period and take into consideration the educational stability of the child. The GAL is to ensure that the transition plan is intended to foster the child's emotional adjustment.

11. Recommend to the court the appropriateness of establishing, continuing, or collecting a child support obligation from the parents involved in the case.

12. Ensure that the court considers whether continued association with siblings in other placements is in the child's best interests.

13. Ensure that the dispositional order contains provisions that direct the child protective agency to provide periodic reviews and reports to appropriate entities.

**E. Duties of GAL as to Post-Dispositional Representation**

1. When appropriate, explain to the child the decisions of the court.

2. When appropriate, inform the child of the right to appeal and what that right means. Exercise the appellate rights of the child if under the reasonable judgment of the GAL an appeal is necessary. If the GAL decides to file an appeal, the appeal must fully comply with the requirements set forth in Rule 11 of the Rules of Appellate Procedure.

3. Actively participate and timely file a response in any appeal, extraordinary writ, modification, or action ancillary to the abuse and neglect proceeding including proceedings to address the disruption of a permanent placement which affect the recommendations of the GAL. If an appeal is filed by another party in an abuse and neglect case, the GAL is required to file a respondent's brief or summary response that adheres to the requisite provisions of Rule 11 of the Rules of Appellate Procedure.

4. During the period of representation, evaluate whether it is appropriate to file a motion for modification of the dispositional order if a change in circumstances occurs for the child which warrants a modification.

5. As provided in Rule 52(g) of the Rules of Procedure for Child Abuse and Neglect Proceedings, a GAL's representation of the child continues until such time as permanent placement of the child has been achieved, or as determined by the Court.

**APPENDIX B: Report of Guardian Ad Litem**

**IN THE CIRCUIT COURT OF COUNTY, WEST VIRGINIA**

**In the Matter of:**

**(Child's Name)** Case No.:
Judge:

**Report of Guardian *Ad Litem***

As guardian *ad litem* (GAL for the minor child (child's name). I hereby submit the following report based on my investigation and observations prior to the (type of hearing) scheduled on (date of hearing).

**I. General Information**

1. Child's Full Name and Date of Birth

2. Parents' Full Names

3. Sibling Information

4. Other parties involved in the abuse and neglect petition

**II. History**

Provide a brief summary of the procedural posture of the case.

**III. GAL's Contact with Child**

List the dates of contact with the child and the nature of the contact.

**IV. Persons Interviewed**

List the name of each person interviewed, the date of the interview, and the person's relationship to the child.

**V. Summary of Information Obtained from Interviews/Observations**

Provide an objective summary of the information obtained from the interviews and observations obtained from the investigation. Observations may include information regarding the parties' living environments, the child's behavior, and the child's interaction with others.

## VI. Summary of Documents Reviewed

List and briefly summarize the documents reviewed during the course of the investigation and attach any documents that are necessary for the court's consideration.

## VII. Child's Current Status

1. Placement

2. Visitation

3. Education

4. Medical

5. Services

6. Contact with Siblings/Relatives

## VIII. Parents' Current Situation

Provide information regarding each parent's current status and their ability to care for the child.

## IX. Child's Expressed Wishes

When appropriate, discuss the child's wishes and any issues that the child requests that the court consider.

## X. Recommendation

Analyze any allegations of abuse and neglect and provide a specific recommendation that addresses the best interests of the child with regard to custody, visitation, and permanent placement. Discuss the child's case plan as well as the family case plan. Address any additional factors that are necessary for the court to consider to protect the best interests of the child.

## XI. Conclusion

Provide a summary of the most important factors for the court to consider in making its decision and indicate any action that is necessary in order to further the child's best interests.

Respectfully submitted,

(Signature of Guardian *Ad Litem*) (Date)

## DIRECTIONS ON COMPLETING REPORT OF GUARDIAN *AD LITEM*

The following directions provide guidance to guardians *ad litem* (GAL) in preparing a report in an abuse and neglect proceeding pursuant to Rule 18a of the Rules of Procedure for Child Abuse and Neglect Proceedings. A GAL must submit a written report to the court and provide a copy to all parties at least five (5) days prior to the disposition hearing. It is the duty of the GAL to determine if the information contained in the report should be sealed or redacted. The GAL is to submit an updated report if necessary to notify the court of any changes in the child's circumstances. The contents of each section and subsection of the report are discussed below.

### I. General Information

This section is intended to provide general information regarding the parties involved in the abuse and neglect petition including the following:

1. Child's full name and date of birth;

2. Parents' full names;

3. If applicable, the names and ages of any siblings or half-siblings; information regarding the sibling's parents, and the sibling's current placement.

4. Provide the names of any other parties involved in the abuse and neglect petition such as step-parents, relatives, or a parent's boyfriend or girlfriend. If the child is currently in foster care, list the names of foster parents and any other individuals residing in the child's current placement.

### II. History

Briefly describe the procedural posture of the case. Did a parent or parents voluntarily relinquish rights to any other children? Have parental rights been involuntarily terminated to any other children of either parent previously? If so, provide the date, case number, and facts with regard to the previous relinquishment. It is the duty of the GAL to determine what parental information is pertinent to a decision regarding the welfare of the child or children involved in the petition. What circumstances led to the filing of the instant petition? What essential issues need to be addressed by the Court in this proceeding?

### III. GAL'S Contact with Child

Indicate the dates of contact with the child, the purpose of the contact, and the duration of the visit. Was the child alone during the visit? If not, who was present? Did the GAL conduct in-home visits and observe the respective living environments of the child's parents or caretakers and their interaction with the child?

## IV. Persons Interviewed

List the name of each person interviewed and their relationship to the child. Such persons may include parents or caregivers, caseworkers, therapists, school personnel, medical providers, relatives, and siblings. Also list the date and manner in which the interviews were conducted (e.g., by phone, in person).

## V. Summary of Information Obtained from Interviews/Observations

Provide an objective summary of the information obtained from the interviews and observations obtained from the investigation. Observations may include information regarding the parties' respective living environments, the child's behavior, and the child's interaction with parents, siblings, relatives, peers or others.

## VI. Summary of Documents Reviewed

List and summarize the documents reviewed during the course of the investigation. Documents may include medical records, school records, police reports, psychological reports, psychiatric reports, and other documents. Attach any necessary documents.

## VII. Child's Current Status

Provide the court with information regarding the current status of the child including information regarding the child's placement, visitation, education, medical needs, services, and contact with siblings and relatives.

1. Placement. Describe any observations regarding the child's current placement. Is this environment satisfying the needs of the child? What are the plans for the child's permanency?

2. Visitation. What is the status of parental visitation? Are the child's needs being met with regard to visitation?

3. Education. What is the child's current grade level? What school does the child attend? What are the child's current grades? What is the child's attendance record? Does the child have any special needs that need to be addressed?

4. Medical. Does the child have any medical needs that need to be addressed?

5. Services. Does the child need counseling, tutoring, or any other types of services?

6. Contact with Siblings/Relatives. Are the child's needs being met with regard to contact with siblings and/or relatives?

## VIII. Parents' Current Situation

Provide information regarding the fitness of each of the parents and their ability to care for the child including: the parents' work schedules/time available to spend with the child; parents' educational levels: financial resources: family support: home studies/living arrangements; domestic violence issues; substance abuse problems; criminal history; medical, emotional or psychological matters; and the parents' compliance with services and court orders. Include any other information that the GAL determines is pertinent to a decision regarding the welfare of the child or children involved in the petition.

## IX. Child's Expressed Wishes

Discuss the child's wishes when appropriate and any issues that the child requests the court to consider.

## X. Recommendation

Analyze the factors that are essential for the court to consider when making a determination regarding the allegations of abuse and neglect and custody, visitation, and permanent placement of the child. Discuss the child's case plan as well as the family case plan including the services to be made available to the child and family. Address any other issues that are necessary in order for the court to protect the best interests of the child.

## XI. Conclusion

Summarize the most important factors for the court to consider in making its decision, noting all aspects requiring special court direction and indicate any other action that is necessary to further the best interests of the child.

# CHAPTER 9:
# ABUSE AND NEGLECT CASELAW

*A.A. v. S.H.*, 242 W. Va. 523, 836 S.E.2d 490 (2019)

*A.A., In re*, 246 W. Va. 596, 874 S.E.2d 708 (2022)

*A.C., In re Guardianship of*, 240 W. Va. 23, 807 S.E.2d 271 (2017)

*A.F., In re*, 246 W. Va. 49, 866 S.E.2d 114 (2021)

*A.G., In re*, 247 W. Va. 249, 878 S.E.2d 744 (2022)

*A.L.C.M., In re*, 239 W. Va. 382, 801 S.E.2d 260 (2017)

*A.M., In re*, 243 W. Va. 593, 849 S.E.2d 371 (2020)

*A.N., In re*, Nos. 15-0182, 15-0208 (W. Va. September 30, 2015) (memorandum decision); 2015 W. Va. Lexis 960

*A.N., In re*, 241 W. Va. 275, 823 S.E.2d 713 (2019)

*A.P., In re*, 245 W. Va. 248, 858 S.E.2d 873 (2021)

*A.P.-1, In re*, 241 W. Va. 688, 827 S.E.2d 830 (2019)

*A.T.-1, In re*, 243 W. Va. 435, 844 S.E.2d 470 (2020)

*A.T.-1, In re*, --- W. Va. ---, 889 S.E.2d 57 (2023)

*Aaron H., In re*, 229 W. Va. 677, 735 S.E.2d 274 (2012)

*Aaron M. (State ex rel.) v. DHHR*, 212 W. Va. 323, 571 S.E.2d 142 (2001)

*Aaron Thomas M., In re*, 212 W. Va. 604, 575 S.E.2d 214 (2002)

*Abbigail Faye B., In re*, 222 W. Va. 466, 665 S.E.2d 300 (2008)

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*Alyssa W., In re*, 217 W. Va. 707, 619 S.E.2d 220 (2005)

*Amber Leigh J., In re*, 216 W. Va. 266, 607 S.E.2d 372 (2004)

*Amy M. (State ex rel.) v. Kaufman*, 196 W. Va. 251, 470 S.E.2d 205 (1996)

*Antonio R.A., In re*, 228 W. Va. 380, 719 S.E.2d 850 (2011)

*Bryanna H., In the Matter of*, 225 W. Va. 659, 695 S.E.2d 899 (2010)

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*C.H. (State ex rel.) v. Faircloth*, 240 W. Va. 729, 815 S.E.2d 540 (2018)

*C.M., In re*, 235 W. Va. 16, 770 S.E.2d 516 (2015)

*C.M.-1, In re*, 247 W. Va. 744, 885 S.E.2d 875 (2023)

*C.N.S. (State v.)*, 173 W. Va. 651, 319 S.E.2d 775 (1984)

*C.S., In re*, 247 W. Va. 212, 875 S.E.2d 350 (2022)

*Carl B. (State v.)*, 171 W. Va. 774, 301 S.E.2d 864 (1983)

*Carlita B., In the Interest of*, 185 W. Va. 613, 408 S.E.2d 365 (1991)

*Carolyn Jean T., In re*, 181 W. Va. 383, 382 S.E.2d 577 (1989)

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*Cecil T., In re*, 228 W. Va. 89, 717 S.E.2d 873 (2011)

*Cesar L., In re*, 221 W. Va. 249, 654 S.E.2d 373 (2007)

*Charity H., In re*, 215 W. Va. 208, 599 S.E.2d 631 (2004)

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*Chevie V., In re*, 226 W. Va. 363, 700 S.E.2d 815 (2010)

*Christina L., In re*, 194 W. Va. 446, 460 S.E.2d 692 (1995)

*Christina W., In re*, 219 W. Va. 678, 639 S.E.2d 770 (2006)

*Christine Tiara W., In re*, 198 W. Va. 266, 479 S.E.2d 927 (1996)

*Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995)

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*Hunter H., In re*, 227 W. Va. 699, 715 S.E.2d 397 (2011)

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*I.T., In re*, 233 W. Va. 500, 759 S.E.2d 447 (2014)

*Isaiah A., In re*, 228 W. Va. 176, 718 S.E.2d 775 (2010)

*J.A., In re*, 242 W. Va. 226, 833 S.E.2d 487 (2019)

*J.C., In re*, 232 W. Va. 81, 750 S.E.2d 634 (2013)

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*J.D.-1, In re*, 247 W. Va. 270, 879 S.E.2d 629 (2022)

*J.G., In re*, 240 W. Va. 194, 809 S.E.2d 453 (2018)

*J.L., In the Interest of*, 234 W. Va. 116, 763 S.E.2d 654 (2014)

*J.P., In re*, 240 W. Va. 266, 810 S.E.2d 268 (2018)

*J.P., In re*, 243 W. Va. 394, 844 S.E.2d 165 (2020)

*J.S., In re*, 233 W. Va. 394, 758 S.E.2d 747 (2014)

*J.S., In re Adoption of*, 245 W.Va. 164, 858 S.E.2d 214 (2021)

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*James G., In re*, 211 W. Va. 339, 566 S.E.2d 226 (2002)

*James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991)

*James R., II (State v.)*, 188 W. Va. 44, 422 S.E.2d 521 (1992)

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*Jeffrey R.L., In re*, 190 W. Va. 24, 435 S.E.2d 162 (1993)

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*Jonathan Michael D., In re*, 194 W. Va. 20, 459 S.E.2d 131 (1995)

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*Joseph A., In re*, 199 W. Va. 438, 485 S.E.2d 176 (1997)

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*K.B.-R., In re*, 246 W. Va. 682, 874 S.E.2d 794 (2022)

*K.E., In re*, 240 W. Va. 220, 809 S.E.2d 531 (2018)

*K.H., In re,* 235 W. Va. 254, 773 S.E.2d 20 (2015)

*K.L., In re*, 233 W. Va. 547, 759 S.E.2d 778 (2014)

*K.L., In re*, 241 W. Va. 546, 826 S.E.2d 671 (2019)

*K.L., In re*, 247 W. Va. 657, 885 S.E.2d 595 (2022)

*K.P., In re,* 235 W. Va. 221, 772 S.E.2d 914 (2015)

*K.R., In re,* 229 W. Va. 733, 735 S.E.2d 882 (2012)

*K.S., In re*, 246 W. Va. 517, 874 S.E.2d 319 (2022)

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*K.W., In re Guardianship of*, 240 W. Va. 501, 813 S.E.2d 154 (2018)

*Kaitlyn P., In the Interest of*, 225 W. Va. 123, 690 S.E.2d 131 (2010)

*Kasey M., In re*, 228 W. Va. 221, 719 S.E.2d 389 (2011)

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*Mark M., III, In re*, 201 W. Va. 265, 496 S.E.2d 215 (1997)

*Marley M., In re*, 231 W. Va. 534, 745 S.E.2d 572 (2013)

*Mary D. v. Watt*, 190 W. Va. 341, 438 S.E.2d 521 (1992)

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*Mechling (State v.)*, 219 W. Va. 366, 633 S.E.2d 311 (2006)

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*Michael Ray T., In re*, 206 W. Va. 434, 525 S.E.2d 315 (1999)

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*Misty D.G., In re the Marriage of*, 221 W. Va. 144, 650 S.E.2d 243 (2007)

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*N.R., In re*, 242 W. Va. 581, 836 S.E.2d 799 (2019)

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*Rose L. (State ex rel.) v. Pancake*, 209 W. Va. 188, 544 S.E.2d 403 (2001)

*Ruckman (State ex rel. WVDHHR v.)*, 223 W. Va. 368, 674 S.E.2d 229 (2009)

*Ryan B., In re*, 224 W. Va. 461, 686 S.E.2d 601 (2009)

*S.C. (State ex rel.) v. Chafin*, 191 W. Va. 184, 444 S.E.2d 62 (1994)

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*S.C., In re*, 245 W. Va. 677, 865 S.E.2d 79 (2021)

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*Samantha S., In re*, 222 W. Va. 517, 667 S.E.2d 573 (2008)

*Scott C. (DHHR v.)*, 200 W. Va. 304, 489 S.E.2d 281 (1997)

*Scottie D., In the Matter of*, 185 W. Va. 191, 406 S.E.2d 214 (1991)

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*Skyelan H., In re*, 219 W. Va. 661, 639 S.E.2d 753 (2006)

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*Stephen Tyler R., In re*, 213 W. Va. 725, 584 S.E.2d 581 (2003)

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