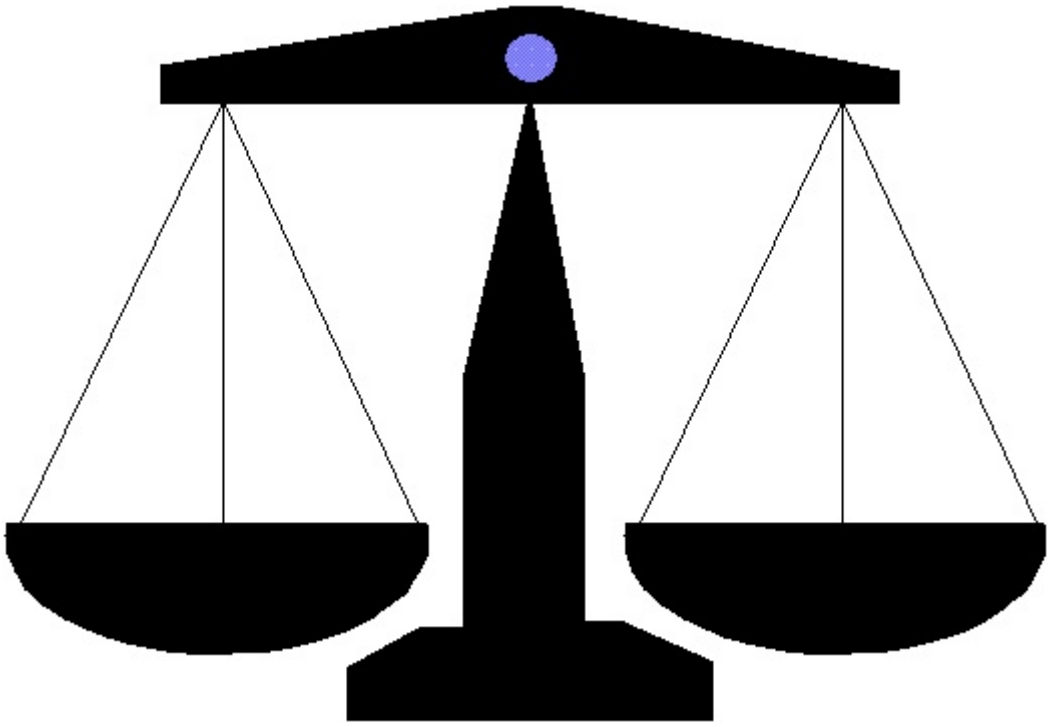
West Virginia Judicial Benchbook

FOR CHILD ABUSE AND NEGLECT PROCEEDINGS



West Virginia Court Improvement Program Oversight Board
West Virginia Supreme Court of Appeals

(Funding for the development and publication of this Benchbook was provided by the U.S. Department of Health & Human Services, Administration of Children and Families, under Court Improvement Program matching grants.)

WEST VIRGINIA JUDICIAL BENCHBOOK

CHILD ABUSE AND NEGLECT PROCEEDINGS

(Revised January 2012)

TABLE OF CONTENTS

Chapter 1

TIMELINE SUMMARY

Chapter Contents

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

JANIS Form 52
Petition to Institute Child Abuse and Neglect Proceeding

Court issues either: 1) Initial order filing petition and granting temporary custody to the Department of Health and Human Resources or to responsible relative; or 2) Initial order filing petition and not granting temporary custody.[1] W. Va. Code § 49-6-3. If temporary custody is ordered, the order must 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. W. Va. Code § 49-6-3(a).

JANIS Form 02
Initial Order Upon Filing Petition

1. Initial order granting temporary custody. W. Va. Code § 49-6-3(a) and 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.

[1]See W. Va. Code § 49-6-3(c) for ratification procedure when the Department takes emergency protective custody of child without prior Court Order. See also W. Va. Code § 49-6-9 (emergency custody by law-enforcement officers).

b. If a parent is a co-petitioner, appoints that parent counsel separate from the prosecuting attorney. Rule 17(a).

c. Appoints counsel for the child, any respondent who had physical custody of child, and for any other qualified respondent who appears and requests appointed counsel. W. Va. Code § 49-6-2(a).

JANIS Form 02.1 *Order Appointing Guardian ad Litem*

d. Provides for immediate transfer of child to the Department or responsible person.

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

JANIS Form 04 *CASA Assignment Order*

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 § 49-6-3(b).

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.

b. If a parent is a co-petitioner, appoints that parent counsel separate from the prosecuting attorney. Rule 17(a).

c. Appoints counsel for child, any respondent who had physical custody of the child, and any qualified respondent who appears and requests appointed counsel. W. Va. Code § 49-6-2(a).

d. Court may appoint a CASA representative for child in area where CASA program in good standing. Rule 52(a).

B. Notice

Notice of the first hearing should be provided with the initial order. W. Va. Code § 49-6-3(a)-(b) and Rule 20.

1. Shall be sent 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 20; W. Va. Code § 49-6-2(a).

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 material 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. Answer

The parents 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).

E. 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 § 49-5D-3 and 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).

II. PRELIMINARY HEARING

A. Relevant Inquiry

JANIS Form 03 *Order Following Preliminary Hearing*

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 §§ 49-2D-3, 49-6-3(b) and Rules 16(c) and 22.

1. Order determines temporary custody of child giving reasons for need to remove from home if removal is ordered. W. Va. Code § 49-6-3(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 the parents. Rule 25.

3. When a child is placed in the temporary custody of the Department or a responsible person pursuant to W. Va. Code § 49-6-3(a), the adjudicatory hearing shall be given priority on the Court docket.

4. 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. The order shall also require the parent(s) to complete financial forms to determine Title IV-D eligibility and the amount of any child support obligation. Rules 16a and 17(c)(5).

5. 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 W. Va. Code §§ 49-6-2(b), 49-6-12(a) and Rule 23.

JANIS Form 20 *Motion for Improvement Period*

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 W. Va. Code § 49-6D-3. 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).

JANIS Form 21 *Order with Respect to Motion for Improvement Period*

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 § 49-6-12(c)(3) and 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

JANIS Form 05
Notice of Hearing

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

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.

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 60 days of the termination of such improvement period. W. Va. Code § 49-6-2(d) and 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 the W. Va. Code § 49-6-2(c). 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 § 49-6-2(c). Any stipulated or uncontested adjudication should conform to Rule 26.

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 nonabusing parent because he or she is a battered parent or because he or she did not knowingly allow abuse. W. Va. Code § 49-1-3. 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 §§ 49-1-3; 49-6-2(c); and Rule 27.

JANIS Form 31 *Stipulated Adjudication Order*

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 opportunity to be heard shall be given notice of the entry of this order. Rule 27.

JANIS Form 30 *Adjudication Order*

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. Rule 16a.

JANIS Form 43 *Order for Child Support*

VI. POST-ADJUDICATORY 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

JANIS Form 20 *Motion for Improvement Period*

JANIS Form 21 *Order with Respect to Motion for Improvement Period*

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. W. Va. Code § 49-6-12(b).

B. Family Case Plan

If a post-adjudicatory 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 § 49-6-12(b)(3) and 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 § 49-6-12(b)(3) and 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 § 49-6-12(g).

JANIS Form 22 *Motion to Extend Improvement Period*

JANIS Form 23 *Order with Respect to Motion to Extend Improvement Period*

F. Revocation or Termination of Improvement Period

JANIS Form 24 *Motion to Revoke Improvement Period*

JANIS Form 25 *Order with Respect to Motion to Revoke Improvement Period*

Upon the motion by any party, the Court shall terminate any improvement period granted when the Court finds that the respondent has failed to fully participate in the terms of the improvement period. W. Va. Code § 49-6-12(h).

VII. 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 W. Va. Code § 49-6-5 and § 49-6D-3 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. Rule 32(b).

C. Timing -- After Dispositional Improvement Period

When a disposition improvement period has been awarded as an alternative to final disposition, a final disposition hearing shall be held no later than 60 days after the end of the disposition improvement period. W. Va. Code § 49-6-12(k) and Rule 38.

D. Legal Authority: Uncontested/Contested Disposition

JANIS Form 33 *Stipulated Disposition Order*

If a parent voluntarily relinquishes parental rights or termination of parental rights is uncontested, the disposition hearing should conform to Rule 35(a). Contested terminations and contests to case plans are governed by Rule 35(b).

E. Disposition Order: Contents

JANIS Form 32 *Disposition Order*

At the conclusion of the final disposition hearing, the Court shall make findings of fact and conclusions of law in accordance with W. Va. Code § 49-6-5 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 nonabusing parent, including a parent who has been found to be a battered parent. W. Va. Code § 49-6-5(a).

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.

VIII. PERMANENCY HEARING

A. Purpose

JANIS Form 41 *Order with Respect to Permanency Hearing*

The purpose of the permanency hearing is to determine the permanent placement and plan for the child. W. Va. Code § 49-6-5a; 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 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).

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 § 49-6-5a and Rule 36a(a).

IX. PERMANENT PLACEMENT REVIEW

A. MDT Responsibilities

JANIS Form 42
Permanent Placement Review Order

The Court, with the assistance of the MDT, shall continue to monitor implementation of the court-ordered permanency plan for the child every three months until permanent placement as defined in Rule 6 is achieved. Rules 39 and 41. The Court shall conduct a review conference requiring the MDT 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. 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

Notes:

(This page intentionally left blank.)

PRELIMINARY HEARING CHECKLIST

A. Notice and Appointments

1. Have all parties and person entitled to notice and a right to be heard received timely notice of the hearing, pursuant to Rule 20? (This includes noncustodial parents and putative fathers.) (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 § 49-6-2(a).

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

JANIS Form 04
CASA Assignment Order

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 § 49-6-2(a). (See Overview Section IV. E.)

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 trial? W. Va. Code § 49-6-3(b).

2. What services, if any, would allow the child to remain safely at home? W. Va. Code § 49-6-3(a)(2).

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 § 49-6-3(b)(4).

5. Are any protective orders necessary or appropriate?

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

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 § 49-6-3(b)(1). (See pages 2-21 to 2-22 of 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 § 49-6-3(b) & (d); W. Va. Code § 49-2D-3. (See pages 2-22 to 2-23 of Title IV-E Checklist).

9. Are there any responsible relatives or other responsible adults who are familiar with the child or family, who are available to serve as foster parents?

10. Does the Indian Child Welfare Act apply? (See Special Procedures Section VIII.)

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

C. Other

1. Has the MDT met, or scheduled a meeting within 30 days of the filing of the petition? W. Va. Code § 49-5D-3 and Rule 51(a).

2. If removal 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? 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 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); W. Va. Code § 49-7-5. (See Special Procedures Section VII.)

D. Actions

1. Mark and admit any reports and exhibits.

2. Set date for next hearing or conference:
   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 23.

3. Enter preliminary hearing order, with findings to include matters set forth in W. Va. Code § 49-6-3(b) and, if applicable, § 49-6-3(d).

JANIS Form 03 *Order Following Preliminary Hearing*

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

CROSS-REFERENCES

CODE
West Virginia Code §§ 49-2D-3; 49-6-2; 49-6-3; 49-6-4; 49-7-5

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

OVERVIEW
V. PRELIMINARY HEARING
VII. IMPROVEMENT PERIODS

SPECIAL PROCEDURES
VI. CONTRARY-TO-WELFARE AND REASONABLE EFFORTS FINDINGS
VII. CHILD SUPPORT
VIII. INDIAN CHILD WELFARE ACT

CASELAW DIGEST
VI. CHILD SUPPORT IN ABUSE AND NEGLECT CASES
VII. PRELIMINARY HEARING
VIII. RIGHT TO COUNSEL/DUTIES AND ROLES
IX. PROCEDURAL PROTECTIONS FOR CHILDREN
X. PROCEDURAL PROTECTIONS FOR PARENTS

Notes:

(This page intentionally left blank.)

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 W. Va. Code § 49-6-1(b). See also Rule 21.

B. Stipulated or Uncontested Adjudication

JANIS Form 31 *Stipulated Adjudication Order*

1. Stipulated or uncontested adjudication must include:

   a) Facts supporting adjudication (which may incorporate written reports and admissions by respondent(s) in an answer and any written stipulation); and
   b) Statement of respondent(s)' problems or deficiencies to be addressed at final disposition. Rule 26(a), (c) and (d).

2. Was the consent to adjudication understood and voluntary? 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 § 49-6-2(c). 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 § 49-1-3.

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

   a) Continuing child placement;
   b) Further evaluations, examinations or services;
   c) Any appropriate protective orders;
   d) 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 § 49-6-5(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 eligibility. Rule 16a and Rule 17(c)(5). W. Va. Code § 49-7-5. (See Special Procedures Section VII.)

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

7. Inquire on record whether respondents desire appeal. If so, direct preparation of transcript. W. Va. Code § 49-6-2(e).

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.

JANIS Form 30
Adjudication Order

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;
   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 §§ 49-1-3(1), (4) and (10); 49-6-2(c), (e); 49-6-5(a); 49-6-12; 49-7-5

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

OVERVIEW
VIII. ADJUDICATORY HEARING
IX. CHILD AND FAMILY CASE PLANS

SPECIAL PROCEDURES
VII. CHILD SUPPORT
VIII. INDIAN CHILD WELFARE ACT

CASELAW DIGEST
VI. CHILD SUPPORT IN ABUSE AND NEGLECT CASES
IX. PROCEDURAL PROTECTIONS FOR CHILDREN
X. PROCEDURAL PROTECTIONS FOR PARENTS
XI. ABUSE AND NEGLECT PROCEEDINGS AND THE RIGHT TO REMAIN SILENT
XIII. ADJUDICATORY HEARING
XX. APPEALS

Notes:

(This page intentionally left blank.)

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 § 49-6-5(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 § 49-5D-3. (See Overview Section VI.)

5. 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

JANIS Form 33 *Stipulated Disposition Order*

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 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 WV Code § 49-6-5(a)(6) and, if applicable, § 49-6-5(a)(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 § 49-6-5(a)(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 finding that continuation in the home is contrary to the child's best interests, and provide specific reasons for such finding. W. Va. Code § 49-6-3(b)(1). (See pages 2-21 to 2-22 of 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 §§ 49-6-3(b) & (d); 49-6-5(a)(5) and 49-2D-3. (See pages 2-22 to 2-23 of Title IV-E Checklist).

4. 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 Rule 36a.

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 eligibility. Rule 16a and Rule 17(c)(5). W. Va. Code §§ 49-6-5(a)(5) and 49-7-5. (See Special Procedures Section VII.)

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 W. Va. Code § 49-6-5, or under

W. Va. Code § 49-6-12(c) 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 § 49-5D-3a.

4. If a disposition 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.

JANIS Form 32
Disposition Order

6. The final disposition order shall also set the date and time of the permanency hearing under Rule 36(d), 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 §§ 49-2D-3; 49-5D-3; 49-5D-3a; 49-6-5(a), (c); 49-6-12(c); 49-6D-3; 49-7-5

RULES
Rule 29, Rule 30, Rule 32, Rule 36, Rule 36a, Rule 37

OVERVIEW
X. DISPOSITION HEARING

SPECIAL PROCEDURES
VI. CONTRARY-TO-WELFARE AND REASONABLE EFFORTS FINDINGS
VII. CHILD SUPPORT

CASELAW DIGEST
XIV. DISPOSITIONAL HEARING
XV. PLACEMENT WITH A PARENT
XVI. GROUNDS FOR TERMINATION OF PARENTAL RIGHTS
XVII. RELINQUISHMENT OF PARENTAL RIGHTS
XVIII. ACHIEVEMENT OF PERMANENCY
XIX. CHILDREN'S RIGHT TO CONTINUED ASSOCIATION

Notes:

(This page intentionally left blank.)

IMPROVEMENT PERIOD CHECKLIST

A. Requirements of Pre-Adjudicatory Improvement Period

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

JANIS Form 20 *Motion for Improvement Period*

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

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

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.

JANIS Form 21 *Order with Respect to Motion for Improvement Period*

5. Order requires Department to prepare and submit a family case plan that complies with W. Va. Code § 49-6D-3.

6. Improvement period not to exceed a period of three months, with no extensions allowed. W. Va. Code § 49-6-12(a) and Rule 23.

B. Requirements of Post-Adjudicatory Improvement Period and Disposition Improvement Period

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

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

3. 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.

4. 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.

5. The order requires Department to prepare and submit a family case plan that complies with W. Va. Code § 49-6D-3.

6. Improvement period can be no longer than six months, unless later extended as set forth below. W. Va. Code § 49-6-12(b),(c) and Rule 37.

C. Other Matters

1. Department may be ordered to pay expenses associated with any improvement period services when respondent is unable to bear such expenses. W. Va. Code §§ 49-6-12(d) and 49-7-33.

2. With respect to any improvement period, respondent is required to execute a release of all medical information regarding that respondent. W. Va. Code § 49-6-12(e).

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 § 49-6-12(g).

JANIS Form 22 *Motion to Extend Improvement Period*

JANIS Form 23 *Order with Respect to Motion to Extend Improvement Period*

CROSS-REFERENCES

CODE
West Virginia Code §§ 49-6-12; 49-6D-3; 49-7-33

RULES
Rule 23, Rule 37, Rule 38

OVERVIEW
VII. IMPROVEMENT PERIODS
IX. CHILD AND FAMILY CASE PLANS

CASELAW DIGEST
XII. IMPROVEMENT PERIODS

Notes:

(This page intentionally left blank.)

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 § 49-6-5a; Rule 36a.

JANIS Form 41
Order with Respect to Permanency Hearing

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.

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

6. Should the annual foster care review be scheduled concurrently with the next permanent placement review? Rule 44. See W. Va. Code §§ 49-2-14; 49-6-8.

C. Actions

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

JANIS Form 42 *Permanent Placement Review Order*

CROSS-REFERENCES

CODE
West Virginia Code §§ 49-6-5a; 49-6-8

RULES
Rule 36a, Rule 39, Rule 40, Rule 41, Rule 42, Rule 43, Rule 44

OVERVIEW
XI. PERMANENT PLACEMENT

SPECIAL PROCEDURES
VI. CONTRARY-TO-WELFARE AND REASONABLE EFFORTS FINDINGS

CASELAW DIGEST
XIV. DISPOSITIONAL HEARING
XV.PLACEMENT WITH A PARENT
XVIII. ACHIEVEMENT OF PERMANENCY
XIX. 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 not 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.

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, conviction for specified crimes, or prior involuntary termination of parental rights

regarding a sibling. [see W. Va. Code § 49-6-5(a)(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.

Best Practice
Include RE-PR 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 not acceptable substitute.

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. [For the purpose of calculating the initial 12-month period, 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 the time of disposition that reasonable efforts to return the child home are not required due to aggravated circumstances, criminal conviction, or prior sibling TPR [W. Va. Code § 49-6-5(a)(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.

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 in 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 within each 12-month interval will make the child ineligible for additional IV-E funding until the court makes such determination.

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

Best Interests in Voluntary Placement (BI-VP)

A. When Required

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

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.

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

Notes:

(This page intentionally left blank.)

CHECKLIST FOR 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?

---

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. For example, direct the DHHR to pursue the ICPC process even 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 Conference of State Court Administrators ICPC contact list: (http://cosca.ncsc.dni.us/statecourtpointsofcontact.html), or from the National Council of Juvenile and Family Court Judges (http://www.ncjfcj.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. 49, art. 20, or Uniform Law Commission website at http://www.nccusl.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 West Virginia 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 §§ 49-2A-1, *et seq.*; 48-20-111(a); 48-20-112(a)

RULES
Rule 14 (telephone conferencing)
Trial Court Rule 12.04 (fax filing)
Trial Court Rule 14.02 (videoconferencing)
ICPC Regulations

SPECIAL PROCEDURES
X. INTERSTATE PLACEMENTS PROCEEDINGS

Notes:

(This page intentionally left blank.)

CHECKLIST REGARDING EDUCATIONAL NEEDS OF CHILDREN AND YOUTH IN FOSTER CARE*

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 or youth enrolled (e.g., specialized school)?

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 foster care placement?
   -Were efforts made to continue school placement, where feasible?

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?

---

* *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, © 2005. Reproduced with permission from the National Council of Juvenile and Family Court Judges, Reno, Nevada.

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?

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's 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. Were efforts made to maintain the child or youth in his or her original school despite foster care placement change?

2. 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?

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 heath 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 effect 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 this 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 and 41.

Chapter 3

OVERVIEW OF PROCEDURE IN CHILD ABUSE AND NEGLECT PROCEEDINGS

Chapter Contents

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 § 49-1-1. 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 IX. 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.

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 § 49-6-2(d). Upon the filing of a petition before the circuit court, a hearing must be docketed immediately. W. Va. Code §§ 49-6-1 and 2. Under no circumstances shall a civil protection 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.

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*, 201 W. Va. 248, 496 S.E.2d 198 (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. EMERGENCY CUSTODY

A. Pre-Petition Removal

If a child in the presence of a child protective services worker is in imminent danger of physical harm (as defined in W. Va. Code § 49-1-3(7)), 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. 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 § 49-6-3(c).

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 10 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).

A 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; and

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

IV. 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 § 49-6-1(a). The petition must be verified by a credible person who has knowledge of the facts. W. Va. Code § 49-6-1(a); Rule 17(a).

B. Co-Petitioners

Two or more parties, including the Department and a nonabusing 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 elects not to do so.

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 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 § 49-6-1(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 § 49-6-1(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 § 49-6-1(a); see also W. Va. Code § 49-1-3 (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 and whether the person responsible for the care of the child is incapacitated. Rule 18(c); W. Va. Code § 49-6-1. The petition should also contain a description of any supportive services already provided by the State to remedy the circumstances. W. Va. Code § 49-6-1; Rule 18(c).

2. **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 § 49-6-3(a). Rule 18(b). 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.

3. **The relief sought:** The petition should state the relief sought, such as temporary custody (W. Va. Code § 49-6-3) and any disposition permitted by W. Va. Code § 49-6-5, including the termination of parental rights. Rule 18(d).

4. **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).

This information 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).

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).

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. If new allegations of abuse and/or neglect arise after the final adjudicatory hearing, the allegations should be included in an amended petition. 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(d).

E. 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 § 49-6-1; Rule 20. If the court orders a temporary placement at the time of the filing of the petition, a preliminary hearing must be held within 10 days. W. Va. Code § 49-6-3(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 § 49-6-3(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 § 49-6-3(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 § 49-6-1(a). The parents or custodians also have a right to be represented by counsel in any child abuse and neglect proceeding. If the initial order gives physical

custody of the child to the Department, counsel is to be appointed for the parents or, if separated or divorced, for the parent or other person standing in *loco parentis* who had physical custody of the child for the majority of the time just before the petition. 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 § 49-6-2(a).

The court must inform any other parent or custodian who appears in the case of their right to counsel, including the appointment of counsel. Upon a parent or custodian's request and filing of a qualifying financial affidavit, the court must appoint a lawyer to represent them.

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. However, a parent who has been judicially determined to be a battered parent must be appointed his or her own attorney. One lawyer may represent multiple children in the same matter. In any case, a lawyer shall not represent multiple parties unless first assuring the court that his or her professional judgment will not be impaired by the multiple representation. W. Va. Code § 49-6-2(a).

Pursuant to West Virginia Code § 49-6-1(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).

Counsel appointed for parties must have at least three hours of annual CLE training on the representation of children in abuse and neglect proceedings. W. Va. Code § 49-6-2(a). However, if no lawyer meeting this requirement is available, the court may appoint other competent counsel.

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. 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 § 49-6-3(a). 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 § 49-1-3(7)); *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 10 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 § 49-6-3(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 §§ 49-2D-3; 49-6-3(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 § 49-6-3(a).

5. Visitation While Case is Pending

For a discussion of post-termination visitation, see Overview Section XII. 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 be ordered whenever possible and appropriate. 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.

F. Answer

An adult respondent must file and serve a verified answer upon the petitioner and his or her counsel no later than 10 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 served. Rule 17(b).

V. PRELIMINARY HEARING

A. 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, any foster or preadoptive parent, any relative providing care for the child the Department, and any CASA representative who has been appointed. W. Va. Code § 49-6-1(b); Rule 20. If the court determines at the time the petition is filed that the child is in imminent danger, notice at least 5 days in advance of the hearing is required. In all other cases, the parties are to be given notice 10 days in advance of the preliminary hearing. 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 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 § 49-6-1(b).

A preliminary hearing may proceed in some circumstances even though one or both of the parents have not been personally served. Rule 21. For instance, if the child is located

in the state, and neither parent has been personally served, the court may accomplish service through publication and continue with the preliminary hearing. However, the court may not hold an adjudicatory hearing until the expiration of the answer time specified in the publication notice.

B. 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 § 49-6-3(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; and

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 §§ 49-2D-3; 49-6-3(d).

4. What efforts, if appropriate, should be made by the Department to facilitate the child's return to the home. W. Va. Code § 49-6-3(b); Rule 3(g).

(See also Special Procedures Section VI.)

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 § 49-6-3(b).

C. 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).

D. Other Matters

The court may order an improvement period consistent with West Virginia Code § 49-6-12(a) (pre-adjudicatory improvement period). The court may also require a party to pay child support. (See Special Procedures Section VII.) The court must require the parents to complete necessary financial forms to determine whether they are entitled to appointed counsel, the amount of any child support obligation, and Title IV-D eligibility. Rule 17(c)(5). 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.

VI. MULTIDISCIPLINARY TREATMENT TEAMS

The court must convene a multidisciplinary treatment team (MDT) within 30 days after the petition is filed. Rule 51. The MDT shall include the following individuals:

1. The child's custodial parents, guardians, or other immediate family members;

2. The attorneys representing the parents;

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

4. The child's counsel or guardian ad litem;

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

6. 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);

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

8. Foster parents, preadoptive parents, or custodial relatives providing care for the child. Rules 3(m) and 51; W. Va. Code § 49-5D-3.

Each team director must keep records of attendance and case discussions for each meeting. W. Va. Code § 49-5D-4. Members may participate by telephone or video conferencing. Rule 51.

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 § 49-5D-3. See also W. Va. Code § 49-1-3(9). The MDT will be involved throughout the circuit court proceedings until permanency is achieved for the child. 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. 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 § 49-5D-3(a)(3)), 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 10 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 § 49-5D-3a. 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 § 49-5D-8. See also Overview Section IX. Child and Family Case Plans.

VII. IMPROVEMENT PERIODS

A court may order an improvement period during the proceeding. W. Va. Code § 49-6-12. 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 § 49-6-12(d). 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 § 49-6-12(e). 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 § 49-6-12(f).

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 § 49-6-12(a); 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 § 49-6-12(h).

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 § 49-6-12(b); 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 § 49-6-12(b) and (g).

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 must be conducted no more than 60 days after the conclusion or termination of an improvement period. W. Va. Code § 49-6-12(k).

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 § 49-6-12(c). Within 60 days after the end of the improvement period, the court must conduct a hearing to determine the final disposition of the case. Rule 38.

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. 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 60 days after the termination of the improvement period. W. Va. Code § 49-6-12(k); Rule 38.

VIII. 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.

At the conclusion of the hearing, the court must determine whether the child is abused or neglected as defined by West Virginia Code § 49-1-3. If applicable, the court may find that a parent, guardian, or custodian of the child is a battered parent or is a nonabusing parent. W. Va. Code § 49-1-3; § 49-6-2(c). 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 § 49-6-2(c); 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).

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 an improvement period was granted, the hearing must be held within 60 days after the end of the improvement period. W. Va. Code § 49-6-2(d); Rule 25. If no temporary custody was ordered, the hearing must be held within 30 days after 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. The order must

require the Department to compile the child case plan, which includes a permanency plan. W. Va. Code § 49-6-5(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).

IX. 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 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 because of the abuse or neglect, such as therapy, a plan for providing the service 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 §§ 49-6-5; 49-6-12; 49-6D-3; Rules 23, 28 and 37.

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. And, as discussed below, the time for submission of child and family case plans are different.

A. Contents of Case Plans

1. **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 and an explanation of why the placement is appropriate, if removal of the child has occurred;

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

d. Any plan for visitation and other contact with the child;

e. The location of siblings, steps required to unite them if they are separated, and visitation plans, if they are separated;

f. If reunification is the permanency plan, a time line for accomplishing reunification;

g. A concurrent permanency plan, such as adoption or legal guardianship; and

h. If reunification is not the plan, the alternative placement and the time lines for achieving permanent placement.

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

a. A list of specific measureable and realistic goals arranged in order of priority;

b. A description of behavioral changes that must be evidenced by the adult respondents to correct the identified problems;

c. A specific description of how the parties will achieve the identified goals and time targets for the achievement of the goals;

d. Tasks assigned to the adult respondents, caseworkers and other participants, and a designation of when and how often tasks will be performed;

e. A description of community and departmental resources that should assist with the implementation of the plan and a list of services that will be provided;

f. A description of the safe placement of the child and plans for safe reunification of the child, including a timetable for reunification; and

g. The ability of the 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 § 49-6D-3(a), (b).

3. **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, education and transition into adulthood, if the child has reached age 16. 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; and

c. For children aged 16 or older, a transition 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 §§ 49-5D-3; 49-6D-3; 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 § 49-6-12(a)(4), (b)(5); 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.

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. 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.

X. 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 60 days after the post-adjudicatory improvement period ends. See Rule 32; see also W. Va. Code § 49-6-12(k).

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 child case plan; (3) notice of the hearing was either effectuated or was waived by the parties.

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 § 49-6-2(c). 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 § 49-6-5(a)(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, 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 nonabusing 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 § 49-6-12(c). (See Section VII. C. above.)

C. Order

The court must enter an order within 10 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

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 60 days after the improvement period ends. W. Va. Code § 49-6-5(c). 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. *In re Darla B.*, 331 S.E.2d 868 (W. Va. 1985).

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 § 49-6-5(a)(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 *In re Cecil T.*, 2011 WL 864950 (W. Va.). 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 Section VI.)

3. 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 or the above options.

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

5. An order requiring services for the child.

F. 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" or that the welfare of the child necessitates termination of the parental or custodial rights. W. Va. Code § 49-6-5(a)(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 § 49-6-5(b). 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 a reasonable family case plan;

3. The abusing adult has not responded to rehabilitative efforts 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 abusing parent suffers from emotional illness that has lasted for such a duration and is of such a nature that he or she been rendered incapable of exercising proper parenting skills; or

7. 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 § 49-6-5(a)(6).

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 § 49-6-5(a)(6). See *In the Interest of Jessica G.*, 226 W. Va. 17, 697 S.E.2d 53 (2010). If the court terminates parental rights, the court may commit the child to the sole custody of the nonabusing parent, including a battered parent, or to the permanent custody of the Department. W. Va. Code § 49-6-5(a), (b).

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 Section VI.)

XI. PERMANENT PLACEMENT

A. Permanency Hearing

The purpose of the hearing is to determine the permanency plan for the child, and the court has exclusive authority or jurisdiction to determine the permanent placement of a child. Rule 36a. The permanent placement of a child shall not be disrupted or delayed by any administrative process or determination by the Department, such as an adoption review committee or a grievance procedure. Rule 36(e). In addition, the circuit court retains jurisdiction over any subsequent request for the modification of a permanent placement of a child. See Rule 6. The two circumstances in which a circuit court would not retain jurisdiction over subsequent placements includes: 1) the 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 cohabitating parents and does not establish terms of visitation or child support

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. If the court finds that the Department is <u>not</u> 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. W. Va. Code §49-6-5(a)(7). If the court finds that the Department is required to make reasonable efforts to preserve the family, then the permanency hearing must be conducted within one year from the date that the child entered foster care. A child is considered to have entered foster care from the earlier of the date of the first finding of abuse or neglect or 60 days after removal from the home. See Rule 36a; W. Va. Code §§ 49-6-5(a)(7) and -5a.

B. Permanent Placement Review

The court, with the assistance of the MDT, must continue to monitor implementation of the permanency plan. A permanent placement review must be held at least once every three months until permanency is achieved. Counsel for the parties and interested persons entitled to notice and the right to be heard should be given at least 15 days' notice of the review. The best practice is to schedule the next review at the conclusion of the current review hearing. The review must actually be held and may not be conducted merely with the entry of an agreed order. Rule 39.

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

4. Any recommended changes in court orders;

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

6. The appropriateness of the current placement of the child and whether it is it is the most family-like setting;

7. 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 or to enroll the child in a new school;

8. A summary of visitation and any recommended changes;

9. Whether the child's special needs were or were not met while in placement;

10. The location of siblings and the steps being taken to unite them;

11. For children aged 16 or older, a transition plan and necessary services for transition;

12. Any recommendation or discussion of the child's return home, placement for adoption, other permanent placement, and concurrent alternative permanency plans; and

13. Determination of reasonable efforts for reunification or permanent placement.
Rule 41(a).

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) the steps needed to effectuate the termination of parental rights; (b) 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 including, (i) rights and responsibilities of the biological parents and the custodial parents or guardians, and (ii) a time table for the awarding of permanent custody; (b) a discussion of permanently placing the child in foster care, including, (i) a proposed time table, (ii) terms of the foster care agreement, and (iii) and the continuing rights of the biological parents.

4. **If continued foster care is recommended**: an explanation of why foster care continues to be appropriate for the 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; (c) why placement with specially trained foster parents is not practical;

6. **If emancipation 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; and

7. A concurrent alternative permanency plan.

Rule 41(a).

C. Preferences for Permanency Plans

Note: West Virginia Code § 49-2-14, discussed below, applies to foster care as well as adoptive placements. The discussion in this paragraph is, however, limited to adoptive placements.

When establishing a permanency plan, West Virginia Code § 49-2-14(e) sets forth a preference for placing a child in an adoptive home with his or her siblings. 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 § 49-2-14(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 § 49-2-14(e). 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*.

Similar to sibling placements, West Virginia Code § 49-3-1(a) establishes a preference for placing a child for adoption with his or her grandparents if parental rights have been terminated. 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 prefer the grandparents over another placement that serves a child's best interest. *In re Elizabeth F.*, 696 S.E.2d 296 (W. Va. 2010).

Federal law requires the Department to *consider* the placement of a child with relatives as opposed to non-relatives. However, similar to the sibling and grandparent preferences established by West Virginia statutes, this preference is not absolute and does not override another placement that is in a child's best interests. See *Kristopher O. v. Mazzone*, 706 S.E.2d 381 (W. Va. 2011).

D. Order

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 to be provided to the parties and the child;

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

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

6. Findings as to whether the Department has made reasonable efforts to finalize the permanency plan in effect. (See Special Procedures Section VI. Contrary-to-Welfare and Reasonable Efforts Findings.)

7. A date and time for the next permanent placement review conference.

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

E. Achievement of Permanency

Permanent placement shall be achieved within 12 months of the final disposition order unless there are extraordinary reasons to justify the delay. Rule 43.

XII. 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 visitation during a case, see Overview Section IV. E.

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 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). 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. 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.

The Supreme Court has also recognized that post-termination visitation may be allowed between a grandparent and child, even though parental rights have been terminated. Syl. Pt. 2, *Elmer S. v. Kenneth B.*, 483 S.E.2d 846 (W. Va. 1997). If an abuse and neglect case remains pending, jurisdiction for any

grandparent visitation lies with the circuit court. W. Va. Code § 48-10-402. To grant visitation in these circumstances, the court must find that the child consents to the visitation and it is in the child's best interests. Rule 15. When deciding whether to grant grandparent visitation, the court should analyze the factors set forth in West Virginia Code § 48-10-502, including the preference of adoptive parents. *In re Samantha S.*, 667 S.E.2d 573 (W. Va. 2008). Pursuant to Rule 15, the court should also consider whether the visitation would interfere with the child's case plan. *Id.*

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.

XIII. MODIFICATION OR SUPPLEMENTATION OF COURT ORDERS

Subject to an exception detailed below, 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. Rule 46. See also W. Va. Code § 49-6-6. However, a court may not modify a dispositional order that terminated parental rights after a child has been adopted. To modify a court order, a party must show, by clear and convincing evidence, that the proposed modification is in a child's best interest. (Rule 46 excludes child support orders from this evidentiary requirement and allows such orders to be modified upon a substantial change in circumstances as provided by West Virginia Code § 48-11-105.)

When a person files a motion to modify a court order, notice must be provided to: 1) the child's counsel; 2) counsel for any parents, provided their parental rights have not been terminated; 3) the child's custodian; and 4) other persons entitled to notice and the right to be heard. A court may consider a stipulated modification of and order, provided the

proposed stipulation does not modify a termination order after the child has been adopted. When considering a stipulated modification, the court must find that the parties and persons entitled to notice and the right to be heard understand the proposed modification and consent to it. Additionally, the court must find that the modification meets the purposes of the controlling rules and statutes and is in the child's best interests.

XIV. APPEAL

A. Procedure

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 § 49-6-2(e). 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 § 49-6-2(e). A party may also appeal a ruling after a final disposition hearing. For example, the DHHR may appeal an order that provides for reunification. As another example, a parent may appeal the termination of his or her parental rights.

A party appealing a judgment must file a notice of appeal within 30 days of the judgment. See W. Va. R.R.A.P. 11; W. Va. RPCANP 49. A motion to modify a judgment does not operate to toll the time for an appeal. In addition to information that must be included in all cases, the notice of appeal requires a party in an abuse and neglect case to provide specialized information to the Supreme Court, such as a child's current placement and the status of parental rights.

The petitioner's brief and required appendices must be filed with the Supreme Court Clerk within 60 days of the judgment. W. Va. R.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 and must also file it with the Supreme Court Clerk. Any

order ruling on the motion must be provided to the Supreme Court Clerk. W. Va. R.R.A.P. 11(f); W. Va. RPCANP 49. A party may also 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 Revised Rules of Appellate Procedure. W. Va. R.R.A.P. 11(f); W. Va. RPCANP 49.

Subsection (f) of Revised Rule 11 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.

Under Revised Rule 11(j), 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. If oral argument is scheduled, the parties are required to provide a written statement that provides any changes or updates to the required information no less than one week before oral argument.

B. Appellate Duties of Guardian *Ad Litem*

If a guardian *ad litem* did not initiate the appeal, he or she is required to file either a responsive brief or a summary response in appropriate cases. W. Va. R.R.A.P. 11(h). A guardian *ad litem* must also appear at any oral argument scheduled in the case, unless the Court orders otherwise. 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).

C. Stays

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 Revised Rules of Appellate Procedure.

When a party requests a stay from the Supreme Court, he or she must file a written motion requesting relief. The motion should explain the reasons for a stay and address the effect of a stay on the circuit court's ability to plan for a child. The motion should also address the effect of the stay on the child's best interests. Rule 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 § 49-6-2(e) 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, 2000 ("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.

As indicated in the comment to Revised Rule 11, "The Court encourages petitioners in abuse and neglect cases to proceed without a transcript." Based on this preference, the Court has established a procedure, set forth in subsection (i) of Revised Rule 11, that allows a petitioner to complete a statement of facts that are relevant to the assignments of error in lieu of a transcript. Counsel for the petitioner has a fiduciary duty to faithfully represent and accurately present facts to the Supreme Court, and must include a certificate that indicates that counsel has done so.

Although parties are encouraged to prepare an appeal without transcripts, the Court has recognized that there are situations in which it will need to review a disputed evidentiary or testimonial issue. 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 Supreme Court will determine whether a transcript request will be approved or not. W. Va. R.R.A.P. 11(b). 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.R.A.P. 11(d). To obtain a transcript without cost, a party must certify that he or she was entitled to a fee waiver and must attach the order appointing counsel to the transcript request form.

Chapter 4

SPECIAL PROCEDURES AND TOPICS FOR CHILD ABUSE AND NEGLECT CASES

Chapter Contents

I. PRINCIPAL ABUSE AND NEGLECT DEFINITIONS

West Virginia Code § 49-1-3 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. 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. W. Va. Code § 49-1-3(1) and (4).

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 contentions 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 "nonprotecting 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, West Virginia Code § 49-1-3 includes acts that would constitute domestic violence under West Virginia Code § 48-27-202 in the definition of child abuse. 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 § 49-1-3(3). 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 "nonprotecting" 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 seventeen 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 the child is without food, clothing, shelter, medical care, education or supervision. W. Va. Code § 49-1-3(10).

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 nonaccidental trauma. 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 § 49-1-3(7).

II. RESPONSIBLE AGENCIES, OFFICERS AND PERSONS

A brief explanation of the statutory duties of the Department of Health and Human Services with regard to child welfare follows. Additionally, a brief description of duties and educational obligations for persons who work with children and families is also included.

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 § 49-1-1(d).

B. Department of Health and Human Resources: Responsibilities for Protection and Care of Children

West Virginia Code §§ 49-2-1, *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 § 49-2-16 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 § 49-6A-11 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 Article 2B of Chapter 49 of the West Virginia Code. Consistent with this duty, the Department is required to provide 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 § 49-2D-4.

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 § 49-6-5b. 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 §§ 49-6-5a(b); 49-6-8; 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 § 49-2-17.

C. Duties of Department: Licensing for Child Welfare Agencies

West Virginia Code §§ 49-2B-1, *et seq.* specifies the responsibilities of the Department for the licensing, approving and registering of child care facilities and child welfare agencies in the State. 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 Prosecuting Attorneys

Every prosecuting attorney has the following duties with regard to the abuse and neglect of children: 1) fully and promptly cooperate with persons seeking relief in suspected instances; 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 § 49-6-10. The prosecuting attorney shall provide legal services to the DHHR. W. Va. Code § 49-7-26. Any disputes that arise between a prosecuting attorney and the DHHR 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 § 49-6-10a. As recognized by the West Virginia Supreme Court, the DHHR is the client of the prosecuting attorney in a county, and the relationship between the DHHR 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). 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. See also W. Va. Code § 7-4-5.

E. Department of Health and Human Resources: Multidisciplinary Treatment Teams

The DHHR 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 § 49-5D-3. See Overview Section VI. Multidisciplinary Treatment Teams for a complete explanation of multidisciplinary treatment teams in child abuse and neglect cases.

F. Duties of Child Protective Services.

Under West Virginia Code § 49-6A-9, 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 § 49-6-3(c) relating to emergency custody by child protective service workers.)

G. Persons under Mandatory Duty to Report Suspected Abuse or Neglect

West Virginia Code § 49-6A-2 requires medical, dental and mental health professionals, school personnel, social workers, child care workers, clergy, law-enforcement officers, humane officers, and judicial officers to report any suspected child abuse or neglect. 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 § 49-6A-2a.

H. 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(i) (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 § 49-6-2(a) (Mandatory continuing legal education training for lawyers involved with representation in child abuse and neglect proceedings); West Virginia Code § 61-8-9a (Curriculum on parenting skills to avoid child abuse required for secondary-level grades in all State schools).

III. WEST VIRGINIA SAFETY ASSESSMENT AND MANAGEMENT SYSTEM (SAMS)

A. Background

The Bureau for Children and Families of the West Virginia Department of Health and Human Resources (BCF) recognized a need to change the way it provided child protective services to the children and families of West Virginia. This change occurred due to internal case reviews, poor results in reviews conducted by the federal government and the DHHR's goal to provide protection to West Virginia's children.

The BCF, along with Action for Child Protection, Inc., designed a new child protective services assessment model for West Virginia. Action for Child Protection, Inc. operates the National Resource Center for Child Protective Services (NRCCPS) on behalf of the Children's Bureau, Administration for Children and Families (ACF), U.S. Department of Health and Human Services. The NRCCPS provides training and technical assistance to help State, local, Tribal and other publicly administered or supported child welfare agencies to achieve safety, permanency, and well-being for children and families. This model is based on nationally recognized best practices in child protective services. The purpose of implementing the new model is to have a more precise way to respond to children threatened with harm and to engage families in the child protective services process.

This new model is an integrated safety assessment system called the West Virginia Safety Assessment and Management System (SAMS). SAMS includes four different assessments that evaluate whether a child is safe. All SAMS assessment

processes should be implemented statewide by the end of 2012. Currently, the first two SAMS assessments, the Intake Assessment and Family Functioning Assessment, have been implemented statewide. The two remaining assessments, the Protective Capacities Family Assessment and Family Case Plan Evaluation, will be implemented statewide by the end of 2012.

B. Summary of CPS Assessment Processes

1. Intake Assessment

During the initial assessment or Intake Assessment, a child protective services worker will gather relevant information to determine if a child is abused or neglected or threatened with abuse and neglect, as defined by West Virginia Code § 49-1-3. During the Intake Assessment, the worker will attempt to gather information about maltreatment or harm that has already occurred and other family dynamics that are likely to result in harm to a child. If any child in the home has been abused or neglected, or is subject to conditions where abuse or neglect is likely to occur, the family will be subject to a Family Functioning Assessment. When families do not receive a Family Functioning Assessment, the CPS worker may make appropriate referrals to community resources.

2. Family Functioning Assessment (FFA)

The Family Functioning Assessment (FFA) seeks to engage families and evaluate them to determine if any child in the home is in need of protection. Throughout the FFA, the child protective services worker will gather relevant information to determine if a child has been harmed, or if a child is likely to be harmed or is in "impending danger." If a child is in impending danger, the Department will open an "ongoing" case for services. Additionally, a Protective Capacities Family Assessment will be completed.

3. Protective Capacities Family Assessment (PCFA)

The results of a PCFA are very relevant to an abuse and neglect case because the PCFA will determine the terms of a either the child or family case plan. In turn, the case plan should

increase child safety by enhancing the protective capacities of a caregiver. The purpose of the treatment plan, therefore, is to eliminate or reduce impending danger to the point where a family can provide a safe environment for a child.

The protective capacities of a parent or caregiver include behavioral, cognitive and emotional characteristics that are directly associated with a person's ability to adequately protect his or her children. They are "strengths" that are specifically associated with a person's ability to perform effectively as a caregiver or parent and to provide a safe environment for the child. Ongoing CPS social workers, caregivers and multidisciplinary teams should formulate treatment plans that enhance the protective capacities of a parent or caregiver. By doing so, the likelihood of harm to a child should be significantly decreased.

4. Family Case Plan Evaluation

The Family Case Plan Evaluation is a formal decision-making process, which requires involvement from caregivers, children, any service providers, any safety service providers and any other members of the multidisciplinary treatment team. The purpose of the Family Case Plan Evaluation is to measure progress toward achieving the goals of the family case plan, to re-evaluate the status of the threat of harm or impending danger, to re-evaluate the status of the children's needs, and to provide information to the multidisciplinary treatment team. The evaluation should help the treatment team make recommendations to the court concerning the continued necessity for out-of-home placement or concerning any changes to the permanency plan. In order for the Family Case Plan Evaluation to be effective, the goals of the PCFA must have been appropriate.

C. Information Relevant to the Court's Decisions

SAMS is designed to improve the quality of information that is provided to the court. In turn, the improved information should assist the court when it must make the following types of decisions: 1) whether a child should be removed from his or her home; 2) whether a child can be safely returned home; 3) whether the parent is making progress on treatment goals that

enhance a child's safety; or 4) whether the permanency plan should be changed because of inadequate progress.

D. Evaluation or Assessment Based on Safety

Perhaps most importantly, SAMS is designed to assist a parent so that he or she is providing a safe environment, as opposed to evaluating whether a parent is simply complying with directives from a caseworker. There are instances in which a parent or caregiver attends parenting classes, has clean drug screens, maintains employment, or attends mental health counseling, and yet has not made the changes necessary to provide a safe home for his or her child.

The purpose of the PCFA, therefore, is to engage the parent in developing goals that, when achieved, would demonstrate that the parent is able to safely care for his or her child. The goals of the PCFA should clearly illustrate the essential characteristics or necessary changes a parent or caregiver must make in order to be able to provide a safe environment for his or her children. Services will then be used to assist the parent in meeting the necessary goals. *Services are a means to meet a goal; services must never be the goal or the focus of CPS intervention.* After goal development with the family, CPS intervention will focus on engaging the caregivers in meeting the goals and monitoring progress. This emphasis will allow CPS workers to report whether caregivers are making the changes necessary to provide a safe home for their child.

Because SAMS focuses on changes associated with a parent's behaviors, attitudes and emotions, it is likely that some adult respondents will not be successful in a case, even though they have complied with directives and participated in various services. Alternatively, CPS workers may recommend that a child be returned home even if the parent has not complied with all of the requirements associated with a service. In either situation, the CPS social worker should be able to explain to the court, in detail, the reasons for recommendations at various stages of an abuse and neglect case.

E. Basis for Custody

Although the SAMS assessment process involves the completion of four different assessments, it does not foreclose CPS from taking emergency custody of a child and filing petitions in which it seeks the custody of children because of circumstances involving imminent danger. At any point in CPS's involvement with a family, it may file a petition to obtain custody of a child when imminent danger is present. Circumstances in which CPS may seek custody of a child include, but are not limited to, the following:

1. When a report of suspected abuse or neglect has been received and the parents refuse to allow access to the children to be interviewed;

2. The child is unsafe due to a threat of harm and there are no available or appropriate in-home safety responses that would allow the child to safely remain in the home;

3. The child is in imminent danger and there are no appropriate or available safety responses that would allow the child to remain in the home safely;

4. The parent(s) has committed an act which meets the definition of aggravated circumstances or other situations as defined in West Virginia Code § 49-6-3(d); or

5. The child is unsafe due to a threat of harm, an in-home safety plan controls the threat, but the parents have demonstrated that they are incapable of or unwilling to take the actions necessary to reduce the threat to their child so that safety does not have to be controlled by external means.

IV. MEDICAL AND MENTAL EXAMINATIONS

A. Procedure for Court-Ordered Medical and Mental Examinations

West Virginia Code § 49-6-4 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 State will be responsible for payment if the child or parent is indigent. (With regard to the payment of expert fees, see the discussion below.)

4. No evidence acquired as the result of such examination of any parent/custodian may be used against such person in subsequent criminal proceedings.

5. Subsection (b) of this statute allows any person with authority to file an abuse or neglect petition to apply to the circuit judge or juvenile referee for a medical examination in advance of institution of an abuse or neglect proceeding if there is probable cause to believe evidence of abuse or neglect may be found by such examination.

6. In addition to the medical and mental examinations authorized by West Virginia Code § 49-6-4, 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.

B. 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 a case styled *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 DHHR to pay the expert witness pursuant to West Virginia Code § 49-7-33. However, the Court also held that the DHHR would not be liable for the expert witness fee schedule established by the Public Defender Corporation. Rather, the DHHR would be liable for payment pursuant to its own fee schedule.

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 DHHR 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 were dispositive of the issue. For a complete discussion of *Chevie V.*, see Caselaw Digest, Section II, J. Advance Approval of Expert Fees.

V. 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) and West Virginia Code § 49-7-7 (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 § 49-6-11. The court is authorized to take further action as allowed by Article 6 of Chapter 49.

VI. 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.[1] When findings of reasonable efforts to prevent removal are negative, insufficient, late or missing, the loss of eligibility for federal foster care

[1] 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 past.

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 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 6 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 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 or against another child of the parent; or the parental rights of a sibling have been terminated involuntarily. 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 (10-day temporary custody); (iii) Order Following Preliminary Hearing; or (iv) Disposition Order.

2. Reasonable Efforts to Prevent Removal

The judicial findings regarding reasonable efforts 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 of reasonable efforts to finalize the child's permanent placement in a timely manner must be made on or before the "due date" of each permanency hearing. Permanency hearings are required 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 following the due date of the permanency hearing (or 12 months after the most recent judicial determination of reasonable efforts to finalize a permanency plan was 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.

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 (10-day) custody calls for both contrary to welfare and reasonable efforts to prevent removal findings. W. Va. Code §§ 49-2D-3; 49-6-3(a). 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 §§ 49-2D-3; 49-6-3(b). Upon consideration of temporary custody pursuant to either W. Va. Code § 49-6-3(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 § 49-6-3(d), See also W. Va. Code § 49-2D-3.

Third, 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 §§ 49-2D-3; 49-6-5(a)(5). Fourth, both types of findings are likewise required in any disposition involving termination of parental rights. W. Va. Code § 49-6-5(a)(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 § 49-6-5(a)(7).

When a court conducts permanency hearings, both an initial permanency hearing and permanency reviews, West Virginia Code §§ 49-6-5a(a) and 49-6-8(a), require a court to determine whether the Department has made reasonable efforts to finalize the permanency plan. The Rules of Procedure for Child Abuse and Neglect Proceedings had incorporated the reasonable efforts to finalize placement determination in the court review process. See, e.g., Rule 41(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 Department to establish timely permanency for children.

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 (simultaneous with 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.

VII. CHILD SUPPORT

A. Establishment of Support

In any child abuse or neglect proceeding in which the custody or decision-making responsibility for a child is altered or the child is committed to the custody of DHHR, a child support obligation for one or both parents must be established. Rule 16a; W. Va. Code § 49-7-5; and Syl. Pt. 4, *DHHR v. Smith*, 624 S.E.2d 917 (W. Va. 2005). When a child is the subject of an abuse or neglect proceeding in which custody is altered, it is within the sole jurisdiction of the circuit court to establish a child support obligation. Syl. Pt. 3, *Smith*. 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). If necessary, the court may order the withholding of support from the wages of the person liable for support. W. Va. Code § 49-7-6.

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). In any child abuse or neglect proceeding, 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. 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.

Modifications of a support order may be made by the court on the motion of any party. Rule 16a; W. Va. Code § 48-11-104. A court may modify a child support order if there is a substantial change in circumstances pursuant to West Virginia 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. Rule 16a; W. Va. Code § 48-11-105.

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). W. Va. Code § 48-13-302.

C. Post-Termination Child Support

When a circuit court enters an order terminating parental rights, the court should ordinarily require the terminated parent to continue paying child support. 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). If the court finds it is not in the child's best interests for the parent to pay such support, it

should make a finding and place it on the record. Syl. Pt. 2, *Ryan B.* 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*.

D. 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.

E. 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. Similarly, a child may participate in multidisciplinary treatment team meetings unless the team finds it is inappropriate. 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, *Jeffrey R. L.*, 435 S.E.2d 162 (W. Va. 1993).

One juncture in which a child's **input** or **attendance** may well be appropriate is a hearing or multidisciplinary treatment team meeting involving a mature child and a consideration of a permanency plan. In such circumstances, the child's preferences are entitled to some weight. For example, the West Virginia Supreme Court has recognized that a child's preferences about the termination of parental rights should be considered when the child is of an age of discretion. See *In the Interest of Jessica G.*, 697 S.E.2d 53 (W. Va. 2010); W. Va. Code § 49-6-5(a)(6)(C). Additionally, 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. See *In re Frances J.A.S.*, 584 S.E.2d 492 (W. Va. 2003); see also *In the Matter of Bryanna H.*, 695 S.E.2d 889 (W. Va. 2010). Similarly, permanent placement review hearings, provided that the child is sufficiently mature, would be another time in which a child's attendance and/or input may be appropriate.

VIII. 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.

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 10 days have passed after receipt of notice. Even after such 10 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.

D. 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).

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).

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).

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).

E. 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.

F. 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) 784-6012
www.ncjfcj.org

IX. 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. The following rules are intended to address this commonly occurring issue: Rules 48 and 48a, Rules of Practice and Procedure for Family Court; Rules 16a and 25a, Rules of Practice and Procedure for Domestic Violence Civil Proceedings; Rule 13, Rules for Minor Guardianship Proceedings; and Rule 3a, Rules of Procedure for Child Abuse and Neglect Proceedings. All of the rules noted above are commonly referred to as the "overlap" rules. These rules outline specialized procedures that may be invoked when abuse and neglect allegations arise in certain types of family court cases.

A. 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. 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),

Rules of Practice and Procedure for Family Court; Rules 16a and 25a(a), Rules of Practice and Procedure for Domestic Violence Civil Proceedings. In 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 10 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.

B. 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 § 49-6-5b. 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 § 49-6-3(d)(1).

C. 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.

D. Removal of Family Court Infant 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 10 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 10 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.

X. 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 §§ 49-2A-1, *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 10 articles and 10 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).

Filing via FAX (West Virginia Trial Court Rule 12.04).

Use of telephonic practices (R. Pro. Child Abuse and Neglect Proceedings – Rule 14).

D. Dissolution or Disruption of Permanent Placement

Rule 45 has established a procedure when a child is removed from an adoptive or other permanent placement after a case has been dismissed. When this situation arises, it should promptly be reported to the Department, the circuit court of origin and the child's counsel. The Department is required to convene a multidisciplinary treatment team meeting within 30 days of receiving notice of the placement disruption. In turn, the court is required to schedule a permanent placement review conference within 60 days. Notice shall be given to appropriate parties and persons entitled to notice and the right to be heard.

Chapter 5

CHILD ABUSE AND NEGLECT CASELAW DIGEST

Chapter Contents

I. 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.*, 201W. 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.,* 2010 WL 1488012 (W. Va.)

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.

In re Lacey P., 189 W. Va. 580, 433 S.E.2d 518 (1993)

In any child welfare case, the best interests of the child are foremost in cases involving the termination of parental rights. All parental rights in child custody matters are subordinate to the interests of the innocent child.

In re R.J.M., 164 W. Va. 496, 266 S.E.2d 114 (1980)
In the Matter of R.O., 180 W. Va. 190, 375 S.E.2d 823 (1988)
In the Interest of Darla B., 175 W. Va. 137, 331 S.E.2d 868 (1985)
In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991)
David M. v. Margaret M., 182 W. Va. 57, 385 S.E.2d 912 (1989)
Ortner v. Pritt, 187 W. Va. 494, 419 S.E.2d 907 (1992)

In the Matter of Taylor B., 201 W. Va. 60, 491 S.E.2d 607 (1997)

"Contrary to the assertion of James B., civil 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.

B. When Criminal Investigations and Proceedings are Pending

Jennifer A. v. Burgess, No. 21009 (W. Va. Supreme Court unpublished order entered May 15, 1992)

Abuse and neglect proceedings should be instituted even though criminal investigations and proceedings are pending.

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[.]"

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 re 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)

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).

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)

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 child care.

G. Governing Rules and Procedures

1. West Virginia Code §§ 49-1-1, *et seq.*

Syl. Pt. 2, *In the Matter of Lindsey C.*, 196 W. Va. 395, 473 S.E.2d 110 (1995)

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.

2. 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.

3. Rules of Evidence

In the Interest 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 § 49-6-2(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. 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*.

B. Jurisdiction -- Interstate Custody Issues

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.

C. Jurisdiction – Child Support

Note: For a more complete discussion of this case, see Caselaw Digest Section VI. Child Support in Abuse and Neglect Cases. See also Special Procedures Section VII.

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.

D. 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.*, 2010 WL 1488012 (W. Va.)

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. W. Va. DHHR 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.

E. Time Standards for Processing Abuse and Neglect Cases

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.

State ex rel. Amy M. v. Kaufman, 196 W. Va. 251, 470 S.E.2d 205 (1996)

Delay of eight months in holding evidentiary hearing and of two months in making determination of neglect were in clear contravention of directive that matters involving abuse and neglect of children take precedence over almost every other matter and that abuse and neglect proceedings must be resolved as expeditiously as possible.

W. Va. DHHR v. La Rea Ann C.L., 175 W. Va. 330, 332 S.E.2d 632 (1985)

Syl. Pt.1, *State ex rel. S.C. v. Chafin*, 191 W. Va. 184, 444 S.E.2d 62 (1994)

If the court adjudicates, pursuant to W. Va. Code § 49-6-2, that the child is 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 permanency plan for the child.

State ex rel. Tristen K. v. Janes, Memorandum Order, No. 35718 (W. Va. Supreme Court unpublished order entered November 17, 2010).

In this memorandum order that dismissed a petition for a writ of prohibition, the Court noted that:

> "[W]e remain troubled by the expanse of time involved in this case and feel compelled to remind the lower court of the time frames involved in abuse and neglect cases, as well as the priority that should be placed on such cases."

F. 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.

G. 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 IV. E.

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.

H. 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)

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.

I. Required Findings of Fact and Conclusions of Law

In the Interest of S.C., 168 W. Va. 366, 284 S.E.2d 867 (1981)

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)

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.

J. Advance Approval of Expert Fees

Note: For a discussion of the authority of the circuit court to set expert fees, see Special Procedures Section IV. B.

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.

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 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 West Virginia Code § 49-7-33 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 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:

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.

III. 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.

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.

B. Investigations Ordered by a Family Court Pursuant to W. Va. Code § 48-9-301

State ex rel. West Virginia Department of Health and Human Resources 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:

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. 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).

IV. 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 IV.

State ex rel. Paul B. v. Hill, 201 W. Va. 248, 496 S.E.2d 198 (1997)

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)

When an abuse and neglect petition was brought by a child's grandparents and was dismissed without a hearing, the Supreme Court indicated that West Virginia Code § 49-6-1 requires the Department to participate in abuse and neglect proceedings and to provide supportive services to remedy the circumstances of abuse and neglect. Upon remand, the Department 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 . . .."

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.

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.

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.

D. Foster Parents in Abuse and Neglect Cases

1. Foster Parents' Participation - Subject to the Court's Discretion

Syl. Pt. 1, *In re Jonathan G.,* 198 W. Va. 716, 482 S.E.2d 893 (1996)

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.

2. 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 West Virginia Code § 49-6-5a(c) grants the right to notice and an opportunity to be heard at the permanency hearing 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.

3. 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.

4. Right to Appeal

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.

E. Abuse and Neglect Proceedings Not Applicable to School Teachers

W. Va. DHS v. Boley, 178 W. Va. 179, 358 S.E.2d 438 (1987)

Statutory provisions relating to child abuse and neglect are not applicable to remove or discipline a teacher who allegedly abused student; removal or disciplinary procedures are properly accomplished under provisions of teacher disciplinary statute.

V. 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.

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.

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. 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.

D. 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.

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.

E. 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 . . .."

F. 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 as established by West Virginia Code § 49-1-3. 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.

In re Randy H., 220 W. Va. 122, 640 S.E.2d 185 (2006)

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 sixteen-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 additional evidence that was not included in the allegations of the original petition, 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.

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.

VI. 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 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.

Syl. Pt. 3: 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.

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 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. 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 W. Va. Code § 49-6-5(a)(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.

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.

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:

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.

VII. 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).

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)

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.

VIII. RIGHT TO COUNSEL/DUTIES AND ROLES

A. Guardians *Ad Litem* for Children

Appendix A, *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993)

GUIDELINES FOR GUARDIANS *AD LITEM* IN ABUSE AND NEGLECT CASES

Initial Stages of Representation

1. Notify promptly the child and any caretaker of the child of the appointment of counsel and the means by which counsel can be contacted.

2. Contact the caseworker and review the caseworker's file and all relevant information.

3. Contact and interview persons such as older children, caseworkers, and caretakers who may have information with respect to the child and obtain names and addresses of hospital personnel, physicians, teachers, law enforcement, and other persons who may have pertinent information regarding the child and interview them.

4. Absent extraordinary circumstances and the child is three or under:

a. If the child is in the care of someone other than the respondent(s), conduct interviews with the child's caretakers concerning the type of services the child is now receiving and the type of services the child needs and visit the child in the caretaker's home, making observations of the child or

b. If the child is in the care of the respondent(s), request from the respondent(s)' attorney interviews with the respondent(s) concerning the child's care and the type of services the child needs and visit the child in his/her home, making observations of the child. If refused, ask for assistance of the court.

5. Absent extraordinary circumstances and the client is over three:

a. If the child is in the care of someone other than respondent(s), conduct interviews with the child's caretakers concerning the type of services the child is now receiving and the type of services the child needs.

b. If the child is in the care of someone other than the respondent(s), conduct interviews with the child in a manner and environment appropriate to the child's age and maturity to obtain facts concerning the alleged abuse or neglect and to determine the child's wishes and needs regarding temporary visitation and/or placement.

c. If the child is in the care of the respondent(s), request from the respondent(s)' attorney interviews with the child out of the presence of the respondent(s) in a manner and environment appropriate to the child's age and maturity. It is essential that the guardian *ad litem* understand that the interview is for the purpose of gathering information not influencing information. If refused, ask the assistance of the court.

6. Provide to the child, his or her parents, and any caretaker notice of the petition and all subsequent motions.

7. Maintain contact with the child throughout the case and assure that s/he is receiving counseling, tutoring, or any other services needed to provide as much stability and continuity as possible under the circumstances.

Preparation for and Representation at Adjudicatory and Dispositional Hearing

8. Pursue the discovery of evidence, formal and informal.

9. File timely and appropriate written motions such as motions for status conference, prompt hearing, evidentiary purpose, psychological examination, home study, and development and neurological study.

10. Evaluate any available improvement periods and actively assist in the formulation of an improvement period, where appropriate, and service plans.

11. Monitor the status of the child and progress of the parent(s) in satisfying the conditions of the improvement period by requiring monthly updates or status reports from agencies involved with the family.

12. 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 a legally acceptable and emotionally neutral setting.

13. Maintain adequate records of documents filed in the case and of conversations with the client and potential witnesses.

14. Ensure that the child is not exposed to excessive interviews with the potential dangers inherent therein. 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 of the examination requested and the intrusiveness; (2) the victim's age; (3) the resulting physical and/or emotional effects of the examination on the victim; (4) the probative value of the examination to the issue before the court; (5) the remoteness in time of the examination; and (6) the evidence already available for the defendant's use.

15. Ensure that a child who is court ordered to be interviewed by a psychologist or psychiatrist is interviewed in the presence of the guardian *ad litem* attorney unless the court, after consulting the child's guardian *ad litem,* believes that the interview is best conducted without the guardian *ad litem.*

16. Subpoena witnesses for hearings or otherwise prepare testimony or cross-examination of witnesses and ensure that relevant material is introduced.

17. Review any predispositional report prepared for the court prior to the dispositional hearing and be prepared to submit another if the report is not consistent with all other appropriate evidence.

18. Apprise the court of the child's wishes.

19. Explain to the child, in terms the child can understand, the disposition.

20. Advocate a gradual transition period, in a manner intended to foster emotional adjustment whenever a child is to be removed from the custody of anyone with whom s/he has formed an important attachment.

21. Ensure that the court considers whether continued association with siblings in other placements is in the child's best interests and an appropriate order is entitled to preserve the rights of siblings to continued contact.

22. Ensure that the dispositional order contains provisions that direct the child protective agency to provide periodic reviews and reports.

Post-Dispositional Representation

23. Inform the child of his/her right to appeal.

24. Exercise the appellate rights of the child, if under the reasonable judgment of the guardian *ad litem,* an appeal is necessary.

25. File a motion for modification of the dispositional order if a change of circumstances occurs for the child which warrants a modification or represent the child if said motion for modification is filed by any other party.

26. Continue to represent the child until such time as the child is adopted, placed in a permanent home, or the case is dismissed after an improvement period.

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)

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. Furthermore, Rule XIII of the W. Va. Rules for Trial Courts of Record provides that a guardian ad litem shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. 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.

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 eighteen 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.

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. 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.

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 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.

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].

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.

B. 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.

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)

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 through W. Va. Code § 49-6-10, 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.

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)

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 Department to participate in abuse and neglect proceedings and to provide supportive services to remedy the circumstances of abuse and neglect. Upon remand, the Department 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 . . .."

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.

IX. 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)

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.

C. Children as Witnesses

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.

D. West Virginia Procedures for Child Witnesses

Syl. Pt. 4, *In re Joseph A.*, 199 W. Va. 438, 485 S.E.2d 176 (1997)

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.

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.

In re R.J.M., 164 W. Va. 496, 266 S.E.2d 114 (1980)
In the Matter of R.O., 180 W. Va. 190, 375 S.E.2d 823 (1988).
In the Interest of Darla B., 175 W. Va. 137, 331 S.E.2d 868 (1985)

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.

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).

X. 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 IV. B.

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

In re Travis W., 206 W. Va. 478, 525 S.E.2d 669 (1999)

Syl. Pt. 2: 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)

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 Department 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 Glenn B., Jr.*, 532 S.E.2d 64 (W. Va. 2000).

C. Right to Notice of Accusations

Burdette v. Lobban, 174 W. Va. 120, 323 S.E.2d 601 (1984)

A parent accused of sexual abuse by his minor child has a constitutional right to know what his child accuses him of in order to prepare his defense.

D. 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 West Virginia Code § 49-6-1(a), a circuit court is required to hold a hearing and appoint counsel for the child. The Supreme Court also noted that under West Virginia Code § 49-6-1(b), notice of abuse and neglect proceedings is to be provided to the Department. The purpose of providing notice to the Department is so that it can fulfill its statutory duty established by West Virginia Code § 49-6-1 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 Department should be granted intervenor status so that it would fulfill its statutory duty.

E. 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 § 49-6-2(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.

F. 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.

G. 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.

XI. 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)

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.

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."

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.

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).

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.

D. Confidentiality of Statements Obtained During a Court-Ordered Examination

1. No Meaningful Protection Afforded by W. Va. Code § 49-7-1

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.

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.

XII. IMPROVEMENT PERIODS

A. Burden of Proof

In re Charity H., 215 W. Va. 208, 599 S.E.2d 631 (2004)

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.

B. 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.

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)

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.

C. 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.

D. 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)

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.

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[.]"

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, required by West Virginia Code § 49-6D-3(a), 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 West Virginia Code § 49-6D-3 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.

E. Statutory Limits

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.

F. 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 Department 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.

G. Prohibition Available to Challenge Improvement Periods

State ex rel. Amy M. v. Kaufman, 196 W. Va. 251, 470 S.E.2d 205 (1996)

Prohibition is available to abused and/or neglect children to restrain courts from granting improvement periods of greater extent and duration than permitted under governing statutes.

James M. v. Maynard, 185 W. Va. 648, 408 S.E.2d 400 (1991)
State ex rel. DHHR v. Yoder, 226 W. Va. 520, 703 S.E.2d 292 (2010)

H. 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 Department after the children were removed, was based on the assumption that the Department, and not the mother, had the responsibility for initiating contact after the children were removed. The Court found, however, that "[a]lthough the Department is required 'to make reasonable efforts to reunify a family' (W. Va. Code § 49-6-12(i)), the parents or custodians have the responsibility 'for the initiation and completion of all terms of the improvement period.' W. Va. Code § 49-6-12(d)." Therefore, the Court affirmed termination of parental rights.

n. 14, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996)

The Court again 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).

I. 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)

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.

Important factor justifying denial of the improvement period was the lengthy pattern of the parent's failure to improve despite concerted efforts of the Department 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. DHHR obtained emergency custody of him and his four siblings. 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 DHHR, the circuit court granted the parents' motions for a six month post-adjudicatory improvement period. 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 West Virginia Code § 49-6-12(b)(2).

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 that abandonment of a child by a parent constitutes compelling circumstances sufficient to justify the denial of an improvement period.

J. 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.

This 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.

In re 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.

K. 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)

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.

L. 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)

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.

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.

M. Extension of Improvement Period

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.*, 2010 WL 1488012 (W. Va.)

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.

XIII. 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)

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 the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991)

B. 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*, 176 W. Va. 688, 347 S.E.2d 208 (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.

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.

In the Interest of Betty J.W., 179, W. Va. 605, 371 S.E.2d 326 (1988)
W. Va. DHS v. Tammy B., 180 W. Va. 295, 376 S.E.2d 309 (1988)
In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991)
State v. Graham, 208 W. Va. 463, 541 S.E.2d 341 (2000)

C. 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*, 209 W. Va. 449, 549 S.E.2d 323 (2001), *cert. denied*, 534 U.S. 1142 (2002)).

D. 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.

E. 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.

F. Abandonment as Neglect

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.

G. Drug Use as Abuse

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."

H. 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).

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 Department 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*, 178 W. Va. 10, 357 S.E.2d 43 (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.

XIV. DISPOSITIONAL HEARING

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); *In re Kasey M.*, 2011 WL 5830325 (W. Va.)(per curiam)

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 Kristopher E., 212 W. Va. 393, 572 S.E.2d 916 (2002) (per curiam)

In this per curiam opinion involving extraordinary facts, the Court found that the circuit court's finding of abuse and neglect was clearly erroneous. The Court also held that a circuit court could accept a voluntary surrender agreement without reaching the question of abuse and neglect. However, the Court did not discuss or overrule *State v. T.C.* which requires a finding of abuse or neglect before a case can continue.

In re Kasey M., 2011 WL 5830325 (W. Va.)(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.

B. Voluntary Dispositional Plan

Syl. Pt. 2, *State v. T.C.*, 172 W. Va. 47, 303 S.E.2d 685 (1983)

Statutes governing child abuse and neglect proceedings do not foreclose the ability of the properly counseled parties, to make some voluntary dispositional plan; however, such arrangements are not without restrictions: (1) that plan is subject to approval of the court, and (2) the parties cannot circumvent the threshold question, i.e. 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.

C. Mandatory to Conduct Dispositional Hearing

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. 3, *State ex rel. W. Va. DHHR and Chastity D. v. Hill*, 207 W. Va. 358, 532 S.E.2d 358 (2000)

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.

D. Accelerated Disposition Hearing

Syl. Pt. 3, *In re Travis W.*, 206 W. Va. 478, 525 S.E.2d 669 (1999)

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.

E. Child Case Plan and Permanency Plan

State ex rel. S.C. v. Chafin, 191 W. Va. 184, 444 S.E.2d 62 (1994)

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.

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.

F. 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.

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 West Virginia Code § 49-6-6, the West Virginia Supreme Court adopted the following syllabus points that concern voluntary relinquishments:

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.

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 pursuant to West Virginia Code § 49-6-6. 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.

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.

XV. 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.

B. Placement with a Biological 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 Department 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.

XVI. GROUNDS FOR TERMINATION OF PARENTAL RIGHTS

A. 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); *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)

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 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)

B. Finding of Imminent Danger Not Required

State v. Carl B., 171 W. Va. 774, 301 S.E.2d 864 (1983) (per curiam)

Circuit court terminated parental rights after four improvement periods. State 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)

C. Proof of Failure to Comply with Family Case Plan Unnecessary

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 eleven 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 fourteen 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 Department 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.

W. Va. DHS v. Tammy B., 180 W. Va. 295, 376 S.E.2d 309 (1988)

In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991)

D. 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.

E. 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.*, 2010 WL 1488012 (W. Va.)

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.

F. Considering the Wishes of a Child Who Is of An Age of Discretion

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 the court failed to consider his daughter's wishes as required by West Virginia Code § 49-6-5(a)(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 pursuant to West Virginia Code § 49-6-5(a)(6) 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.

G. 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 re Jonathan P., 182 W. Va. 302, 387 S.E.2d 537 (1989)

Termination of parental rights upheld in case of infant where schizophrenic mother failed to provide proper food and shelter.

Mother was not entitled to improvement period prior to termination of parental rights where mother did not make request for improvement period until final hearing to terminate parental rights approximately 14 months after initial temporary custody order was entered.

In re Carolyn Jean T., 181 W. Va. 383, 382 S.E.2d 577 (1989) (per curiam)

Where 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. Remanded for further evidentiary development.

H. 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.

I. 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)

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.

J. 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 § 49-1-3(1) 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)

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 § 49-1-3(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 seventeen 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 the Interest of Darla B., 175 W. Va. 137, 331 S.E.2d 868 (1985)
State v. Jessica M., 191 W. Va. 302, 445 S.E.2d 243 (1994)

K. 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)

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.

L. 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.

M. 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."

State v. C.N.S., 173 W. Va. 651, 319 S.E.2d 775 (1984)
In the Matter of R.O., 180 W. Va. 190, 375 S.E.2d 823 (1988)

In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991)

N. 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.

O. Parents - Failure to Acknowledge Problem

In the Matter of Taylor B., 201 W. Va. 60, 491 S.E.2d 607 (1997)

"In *Doris*, this Court stated that, for a parent to remedy the problem of abuse and neglect, the problem must first be acknowledged." 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.

P. Incarcerated Parents

Syl. Pt. 3, *In re Cecil T.*, 2011 WL 864950 (W. Va.)

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 West Virginia Code § 49-6-5(a)(5) 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.

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.

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.

Q. 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).

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.*, 164 W. Va. 496, 266 S.E.2d 114 (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 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.

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.

R. 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.

S. Domestic Violence

D.H.S. 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.

DHHR ex rel. Mills v. Billy Lee C., 199 W. Va. 541, 485 S.E.2d 710 (1997)
In re Erica C., 214 W. Va. 375, 589 S.E.2d 517 (2003)
In re Betty J.W., 179 W. Va. 605, 371 S.E.2d 326 (1988)

XVII. RELINQUISHMENT OF PARENTAL RIGHTS

A. Relinquishment Associated with Adoption, Not Abandonment

Syl. Pt. 4, *State ex rel. Paul B. v. Hill*, 201W. 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)

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.

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:

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 XIV.F.

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 pursuant to West Virginia Code § 49-6-7 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.

D. Oral Relinquishments

In re Tessla N.M., 211 W. Va. 334, 566 S.E.2d 221 (2002)

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. DHS 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.

XVIII. 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 plain language of West Virginia Code § 49-6-5a(c) grants the right to 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.

B. Time Period for Achievement of Permanency

Syl. Pt. 6, *In re Cecil T.*, 2011 WL 864950 (W. Va.)

The eighteen-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 relied on West Virginia Code § 49-6-5(a)(5) as 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*, 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 eighteen-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 Department pursuant to West Virginia Code §49-6-5(a)(5). 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.

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 eleven 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 GAL'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,* 135 W.Va. 877, 65 S.E.2d 488 (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)

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.

F. Preferred Placement – Grandparents

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 Department 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 Department's decision. The Supreme Court, however, reversed the circuit court, and recognized the statutory preference for grandparents established by West Virginia Code § 49-3-1(a). 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.

Syl. Pt. 4: 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.

Syl. Pt. 5: 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 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 grandparent preference for an adoptive placement established by West Virginia Code § 49-3-1(a)(3). 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 Hunter H., --- W. Va. ---, 715 S.E.2d 397 (2011)

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 set forth in West Virginia Code § 49-3-1(a)(3). 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.

G. 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.

H. Relative Placements

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.

I. 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.

In re George Glen B., Jr., 207 W. Va. 346, 532 S.E.2d 64 (2000)

Syl. Pt. 7: 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.

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.

J. Subsidized Adoption and Legal Guardianship

State ex rel. Treadway v. McCoy, 189 W. Va. 210, 429 S.E.2d 492 (1993)

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.

On appeal, the West Virginia 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, and that the DHHR knew of both the child and his adoptive parents. 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.

XIX. 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.*, 2010 WL 1488012 (W. Va.)

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 fourteen 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.

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); *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.

C. Continued Association with Foster Parents

Syl. Pt. 11, *In re Jonathan G.,* 198 W. Va. 716, 482 S.E.2d 893 (1996); *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 Grandparent Visitation of Cathy L.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 thirteen 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.

2. 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)

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."

The footnote to Rule 15 states that "This Rule is intended to neither increase nor decrease any rights of the grandparents as set forth in West Virginia Code §§ 49-6-1, *et seq.* and 48-2B-1, *et seq.*" Substantial revisions to the Grandparent Visitation Act have been made since the date this case was decided. Currently, grandparent visitation is controlled by West Virginia Code §§ 48-10-101, *et seq*.

3. The Effect of Adoption on Grandparent Visitation

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.)

XX. APPEALS

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)

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.

B. Transcripts

W. Va. DHHR v. Scott C., 200 W. Va. 304, 489 S.E.2d 281(1997) (per curiam)

Concerning preparation of and payment for transcripts necessary for appeal. See W. Va. Code §§ 49-6-2(e) and 51-7-8.

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 W. Va. Code § 49-6-3, which allows the DHHR to maintain temporary custody of a child for no more than sixty 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; W. Va. 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.

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 set forth in W. Va. Code §§ 49-6-5(a) and 49-6D-3(a), as well as the additional requirements articulated in W. Va. Code § 49-6-5(a).

Finally, the Court held that W. Va. 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 thirty days after the third placement.

Jennifer A. v. Burgess, No. 21009 (W. Va. Supreme Court unpublished order entered May 15, 1992)

Writ of mandamus was granted directing DHHR to create and submit within ninety days guidelines for dealing with alleged sexual abuse cases involving children. Guidelines must be concise, compact and detail specific steps for child protective services worker to follow upon receipt of complaint. Recommend routine determination on need for counseling as well as a prepared checklist of completed steps. Upon completion of the guidelines, training programs are to begin. Prior to dismissal or closure of any case, recommendation is made that the case be reviewed by a child protective services supervisor or other individual in authority as a final safeguard against closure of a meritorious case.

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. The holding of this case has been codified by 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." 212 W. Va. at 703, 575 S.E.2d at 313.

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 West Virginia Code § 49-7-33 for professional services in a juvenile delinquency case. Referring to *Hewitt v. DHHR*, *supra*, the Court noted that the payment restrictions in West Virginia Code § 49-7-33 apply to 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. J. For a discussion of the authority of the circuit court to set expert witness fees, see Special Procedures Section IV. B.

In this case involving a dispute over the payment of expert witness fees, the Court concluded that West Virginia Code § 49-7-33 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 West Virginia Code § 49-7-33 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 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:

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.

D. Prohibition Available

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 W. Va. Code §§ 49-6-2(b) and 49-6-5(c).

The State and the children's guardian ad litem sought relief from an order in which the Respondent judge 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. We granted the Petitioners' request and prohibited the circuit court from enforcing its order granting a post-adjudicatory improvement period. We also ordered the circuit court to set this matter immediately for final disposition pursuant to W. Va. Code § 49-6-5. In granting the requested relief, we 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 W. Va. Code §§ 49-6-2(b) and 49-6-5(c). Further, there is 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. W. Va. 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. Rose L. v. Pancake, 209 W. Va. 188, 544 S.E.2d 403 (2001)
State ex rel. Lowe v. Knight, 209 W. Va. 134, 544 S.E.2d 61 (2000).

XXI. 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 West Virginia 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.

XXII. CRIMINAL PROSECUTION

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)

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 West Virginia Supreme 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 West Virginia Supreme 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.

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 Department 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*, 178 W. Va.

10, 357 S.E.2d 43 (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 W. Va. 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) 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.

XXIII. 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 W. Va. 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 W. Va. 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 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.

XXIV. FAMILY COURT PROCEEDINGS INVOLVING ABUSE AND NEGLECT ALLEGATIONS

Note: For a discussion of caselaw involving the overlap of child abuse and neglect issues in family and circuit court, see Caselaw Digest Section III. For a complete discussion of pre-petition proceedings relating to child abuse and neglect, see Special Procedures Section IX.

A. Referral of Child Abuse and Neglect Allegations to the DHHR by Judicial Officials

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.

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.

B. Emergency Change of Custody

Syl. Pt. 1, *State ex rel. George B.W. v. Kaufman,* 199 W. Va. 269, 483 S.E.2d 852 (1997); Syl. Pt. 2, *Haller v. Haller,* 198 W. Va. 487, 481 S.E.2d 793 (1996)

Although a court may enter an emergency order transferring custody where there are allegations of abuse or neglect without notice and full hearing if the court deems such an order necessary for the immediate protection of the child(ren), such order should be of limited duration, should set a prompt and full hearing on the allegations, and should appraise both parties of the scope of the hearing. In the event such emergency change is found to be warranted, the court should immediately appoint a guardian ad litem for the child.

C. Minor Guardianship Proceedings

Syl. Pt. 5, *In re Antonio R.A.,* 2011 WL 5923517 (W. Va.)

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 (2010), which grants courts discretion in determining when the

appointment of a guardian for a minor is appropriate. West Virginia Code § 44–10–4 (2010), 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.

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 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 §§ 49-11-1, *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.

D. Supervised Visitation – Analysis of Best Interests

Syl. Pt. 3, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996); Syl. Pt. 4, *In re Jason S.*, 219 W. Va. 485, 637 S.E.2d 583 (2006); Syl. Pt. 6, *In re Marriage of Misty D.G.*, 221 W. Va. 144, 650 S.E.2d 243 (2007)

Because of the extraordinary nature of supervised visitation, such visitation should be ordered when necessary to protect the best interests of the children. In determining the best interests of the children when there are allegations of sexual or child abuse, the circuit court should weigh the risk of harm of supervised visitation or the deprivation of any visitation to the parent who allegedly committed the abuse if the allegations are false against the risk of harm of unsupervised visitation to the child if the allegations are true.

Syl. Pt. 5, *Carter v. Carter*, 196 W. Va. 239, 470 S.E.2d 193 (1996); Syl. Pt. 3, *In re Jason S.*, 219 W. Va. 485, 637 S.E.2d 583 (2006); Syl. Pt. 5, *In re Marriage of Misty D.G.*, 221 W. Va. 144, 650 S.E.2d 243 (2007); Syl. Pt. 6, *State ex rel. WV DHHR v. Ruckman*, 223 W. Va. 368, 674 S.E.2d 229 (2009)

In visitation as well as custody matters, we have traditionally held paramount the best interests of the child.

Syl. Pt. 3, *Mary D. v. Watt*, 190 W. Va. 341, 438 S.E.2d 521 (1992); Syl. Pt. 5, *State ex rel. George B.W. v. Kaufman,* 199 W. Va. 269, 483 S.E.2d 852 (1997) ; Syl. Pt. 1, *State ex rel. Isferding v. Canady*, 199 W. Va. 209, 483 S.E.2d 555 (1997); Syl. Pt. 3, *Alireza D. v. Kim Elaine W.*, 198 W. Va. 178, 479 S.E.2d 688 (1996); Syl. Pt. 3, *Mary Ann P. v. William R.P.*, 197 W. Va. 1, 475 S.E.2d 1 (1996); Syl. Pt. 8, *State ex rel. WV DHHR v. Ruckman*, 223 W. Va. 368, 674 S.E.2d 229 (2009)

Where supervised visitation is ordered pursuant to W. Va. Code § 48-2-15(b)(1), the best interest of a child include determining that the child is safe from the fear of emotional and psychological trauma which he or she may experience. The person(s) appointed to supervise the visitation should have had some prior contact with the child so that the child is sufficiently familiar with and trusting of that person in order for the child to have a secure feelings and so that the visitation is not harmful to his or her emotional well being. Such a determination should be incorporated as a finding of the family law master or circuit court.

Belinda Kay C. v. John David C., 193 W. Va. 196, 455 S.E.2d 565 (1995)

In custody cases, where there is evidence that a parent has on occasion demonstrated violent propensities and that his violence has, at least, disturbed his children, such evidence is sufficient to require restrictions on the parent's visitation, including, but not limited to, supervision. 455 S.E.2d at 566.

The best of the interest of the child must be the determining factor in assessing how supervision should be conducted. In order to require supervision it is not necessary to demonstrate that the parent has abused the child. Evidence of previous violent propensities as well as evidence that those propensities have had some impact on the parties' children is sufficient. 455 S.E.2d at 568.

E. Supervised Visitation – Requisite Finding and Standard of Proof

Syl. Pt. 2, in part, *Mary D. v. Watt,* 190 W. Va. 341, 438 S.E.2d 521 (1992); Syl. Pt. 6, *State ex rel. George B.W. v. Kaufman,* 199 W. Va. 269, 483 S.E.2d 852 (1997)

Prior to ordering supervised visitation pursuant to W. Va. Code § 48-2-15(b)(1), if there is an allegation involving whether one of the parents sexually abused the child involved, a family law master or circuit court must make a finding with respect to whether that parent sexually abused the child. A finding that sexual abuse has occurred must be supported by credible evidence. The family law master or circuit court may condition such supervised visitation upon the offending parent seeking treatment. Prior to ordering supervised visitation, the family law master or circuit court should weigh the risk of harm of such visitation or the deprivation of any visitation to the parent who allegedly committed the sexual abuse against the risk of harm of such visitation to the child. Furthermore, the family law master or circuit court should ascertain that the allegation of sexual abuse under these circumstances is meritorious and if made in the context of the family law proceeding, that such allegation is reported to the appropriate law enforcement agency or prosecutor for the county in which the alleged sexual abuse took place.

Syl. Pt. 2, *In re Jason S.*, 219 W. Va. 485, 637 S.E.2d 583 (2006)

Prior to ordering supervised visitation … if there is an allegations involving whether one of the parents sexually abused the child involved, a family law … [judge] or circuit court must make a finding with respect to whether that parent sexually abused the child. A finding that sexual abuse has occurred must be supported by credible evidence. The family law … [judge] or circuit court may condition such supervised visitation upon the offending parent seeking treatment. Prior to ordering supervised visitation, the family law … [judge] or circuit court should weigh the risk of harm of such visitation or the deprivation of any visitation to the parent who allegedly committed the sexual abuse against the risk of harm of such visitation to the child.

F. Supervised Visitation During and After an Investigation Ordered by a Family Court

Syl. Pt. 9, *State ex rel. WV DHHR v. Ruckman*, 223 W. Va. 368, 674 S.E.2d 229 (2009)

A family court finding potential safety risks to minor children that warrant a court-ordered investigation pursuant to West Virginia Code § 48-9-301 may not order visitation between a child and the party posing the potential risks while the investigation proceeds. Supervised visitation may be ordered following the investigation if the court finds the investigation or other information supplies the requisite credible evidentiary basis to believe a child's safety will be jeopardized if visitation is not supervised. Where supervised visitation is contemplated, the family court should schedule a hearing, with notice to all parties and any proposed supervisors, regarding the most suitable source for supervision under the circumstances. The purpose of the hearing is to determine the most appropriate source for supervision by considering (1) whether the child is comfortable and familiar with a potential supervisor through prior contact or otherwise, and (2) whether the potential supervisor is willing and has ability to fulfill the obligation. In order to provide an adequate basis for review, this determination should be incorporated as a finding of the family court judge in the order granting supervised visitation.

G. When Supervised Visitation No Longer Necessary

Syl. Pt. 4, *Carter v. Carter,* 196 W. Va. 239, 470 S.E.2d 193 (1996)

If the protection of the children provided by supervised visitation is no longer necessary, either because the allegations that necessitated the supervision are determined to be without "credible evidence" (*Mary D. v. Watt*, 190 W. Va. 341, 348, 438 S.E.2d 521, 528 (1992)) or because the noncustodial parent had demonstrated a clear ability to control the propensities which necessitated the supervision, the circuit court should gradually diminish the degree of supervision required with the ultimate goal of providing unsupervised visitation. The best interest of the children should determine the pace of any visitation modification to assure that the children's emotional and physical well being is not harmed.

Chapter 6

RELEVANT STATUTES AND REGULATIONS

(through 2011 Legislative Sessions)

Chapter Contents

CHAPTER 49. CHILD WELFARE.

ARTICLE 1. PURPOSES; DEFINITIONS.

§49-1-1. Purpose.

(a) The purpose of this chapter is to provide a coordinated system of child welfare and juvenile justice for the children of this state that has goals to:

(1) Assure each child care, safety and guidance;

(2) Serve the mental and physical welfare of the child;

(3) Preserve and strengthen the child's family ties;

(4) Recognize the fundamental rights of children and parents;

(5) Adopt procedures and establish programs that 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 and his or her family or caregiver in the planning and delivery of programs and services;

(7) Provide services that are community-based, in the least restrictive settings that are consonant 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 with measures and services to prevent abuse and neglect or delinquency;

(9) Provide a system for the rehabilitation of status offenders and juvenile delinquents;

(10) Provide a system for the secure detention of certain juveniles alleged or adjudicated delinquent;

(11) Provide a system for the secure incarceration of 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.

(b) In pursuit of these goals it is the intention of the Legislature to provide for removing the child from the custody of his or her parents only when the child's welfare or the safety and protection of the public cannot be adequately safeguarded without removal; and, when the child has to be removed from his or her family, to secure for the child custody, care and discipline consistent with the child's best interests and other goals herein set out. It is further the intention of the

Legislature to require that any reunification, permanency or preplacement preventative services address the safety of the child.

(c) The child welfare service of the state shall be administered by the department of health and human resources. The division of juvenile services of the department of military affairs and public safety 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 juvenile services over any child 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.

(d) The department of health and human resources is designated as the agency 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 regulations thereof, and to receive and expend federal funds for these services. The division of juvenile services of the department of military affairs and public safety is designated as the agency 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 regulations thereof, and to receive and expend federal funds for these services.

(e) The department of health and human resources and the division of juvenile services shall present a joint plan for a coordinated system of child welfare and juvenile justice, including specific provisions for juveniles who have been accused of an act of delinquency through the filing of a formal petition pursuant to section seven, article five of this chapter, to the designated legislative task force for juvenile oversight on or before the first day of September, one thousand nine hundred ninety-nine. The department and division shall report regularly during the interim period to the designated task force before completion of the plan to advise the Legislature as to progress of the plan's development.

§49-1-2. "Juvenile" or "child" defined.

As used in this chapter, "juvenile" or "child" means any person under eighteen years of age. Once a juvenile or child is transferred to a court with criminal jurisdiction pursuant to section ten, article five of this chapter, he or she nevertheless remains a juvenile or child for the purposes of the applicability of the provisions of this chapter with the

exception of sections one through seventeen of article five of this chapter, unless otherwise stated therein.

§49-1-3. Definitions relating to abuse and neglect.

As used in this chapter:

(1) "Abused child" means a child whose health or welfare is 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; or

(B) Sexual abuse or sexual exploitation; or

(C) The sale or attempted sale of a child by a parent, guardian or custodian in violation of section sixteen, article four, chapter forty-eight of this code; or

(D) Domestic violence as defined in section two hundred two, article twenty-seven, chapter forty-eight of this code.

In addition to its broader meaning, physical injury may include an injury to the child as a result of excessive corporal punishment.

(2) "Abusing parent" means a parent, guardian or other custodian, regardless of his or her age, whose conduct, as alleged in the petition charging child abuse or neglect, has been adjudged by the court to constitute child abuse or neglect.

(3) "Battered parent" means a parent, guardian or other custodian who has been judicially determined not to have 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 section two hundred two, article twenty-seven, chapter forty-eight of this code, which domestic violence was perpetrated by the person or persons determined to have abused or neglected the child or children.

(4) "Child abuse and neglect" or "child abuse or neglect" means physical injury, mental or emotional injury, sexual abuse, sexual exploitation, sale or attempted sale or negligent treatment or maltreatment of a child by a parent, guardian or custodian who is responsible for the child's welfare, under circumstances which harm or threaten the health and welfare of the child.

(5) "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 services to the children and the families so as to reunify such children with their families or some portion thereof;

(E) Placing children in suitable adoptive homes when reunifying the children with their families, or some portion thereof, is not possible or appropriate; and

(F) Assuring the adequate care of children who have been placed in the custody of the department or third parties.

(6) "Child advocacy center" means a community-based organization that is a member in good standing with the West Virginia Child Abuse Network, Inc., and is working to implement the following program components:

(A) Child-appropriate/child-friendly facility: A child advocacy center provides a comfortable, private, child-friendly setting that is both physically and psychologically safe for clients.

(B) Multidisciplinary team (MDT): A multidisciplinary team for response to child abuse allegations includes representation from the following: Law enforcement; child protective services; prosecution; mental health; medical; victim advocacy; child advocacy center.

(C) Organizational capacity: A designated legal entity responsible for program and fiscal operations has been established and implements basic sound administrative practices.

(D) Cultural competency and diversity: The CAC promotes 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.

(E) Forensic interviews: Forensic interviews are conducted in a manner which is of a neutral, fact finding nature and coordinated to avoid duplicative interviewing.

(F) Medical evaluation: Specialized medical evaluation and treatment are to be made available to CAC clients as part of the team response, either at the CAC or through coordination and referral with other specialized medical providers.

(G) Therapeutic intervention: Specialized mental health services are to be made available as part of the team response, either at the CAC or through coordination and referral with other appropriate treatment providers.

(H) Victim support/advocacy: Victim support and advocacy are to be made available as part of the team response, either at the CAC or through coordination with other providers, throughout the investigation and subsequent legal proceedings.

(I) Case review: Team discussion and information sharing regarding the investigation, case status and services needed by the child and family are to occur on a routine basis.

(J) Case tracking: CACs must develop and implement a system for monitoring case progress and tracking case outcomes for team components: *Provided,* That a child advocacy center 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.

(7) "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. Such emergency situation exists 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 or life of any child in the home:

(A) Nonaccidental trauma inflicted by a parent, guardian, custodian, sibling or a 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; or

(H) The parent, guardian or custodian's abuse of alcohol, or drugs or other controlled substance as defined in section one-hundred one, article one, chapter sixty-a 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.

(8) "Legal guardianship" means the permanent relationship between a child and caretaker, established by order of the circuit court having jurisdiction over the child, pursuant to the provisions of this chapter and chapter forty-eight of this code.

(9) "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.

(10) (A)"Neglected child" means a child:

(i) 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 such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian; or

(ii) 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;

(B) "Neglected child" does not mean a child whose education is conducted within the provisions of section one, article eight, chapter eighteen of this code.

(11) "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.

(12) "Parental rights" means any and all rights and duties regarding a parent to a minor child, including, but not limited to, custodial rights and visitational rights and rights to participate in the decisions affecting a minor child.

(13) "Parenting skills" means a parent's competencies in providing physical care, protection, supervision and psychological support appropriate to a child's age and state of development.

(14) "Sexual abuse" means:

(A) As to a child who is less than sixteen years of age, any of the following acts which a parent, guardian or custodian shall engage in, attempt to engage in, or knowingly procure another person to engage in, with such child, notwithstanding the fact that the child may have willingly participated in such conduct or the fact that the child may have suffered no apparent physical injury or mental or emotional injury as a result of such conduct:

(i) Sexual intercourse;

(ii) Sexual intrusion; or

(iii) Sexual contact;

(B) As to a child who is sixteen years of age or older, any of the following acts which a parent, guardian or custodian shall engage in, attempt to engage in, or knowingly procure another person to engage in, with such child, notwithstanding the fact that the child may have consented to such conduct or the fact that the child may have suffered no apparent physical injury or mental or emotional injury as a result of such conduct:

(i) Sexual intercourse;

(ii) Sexual intrusion; or

(iii) Sexual contact.

(C) Any conduct whereby 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 such display, or of the child, or for the purpose of affronting or alarming the child.

(15) "Sexual contact" means sexual contact as that term is defined in section one, article eight-b, chapter sixty-one of this code.

(16) "Sexual exploitation" means an act whereby:

(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 section one, article eight-c, chapter sixty-one of this code; or

(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 such display is likely to be observed by others who would be affronted or alarmed.

(17) "Sexual intercourse" means sexual intercourse as that term is defined in section one, article eight-b, chapter sixty-one of this code.

(18) "Sexual intrusion" means sexual intrusion as that term is defined in section one, article eight-b, chapter sixty-one of this code.

(19) "Placement" means any temporary or permanent placement of a child who is in the custody of the state in any foster home, group home or other facility or residence. (20) "Serious physical abuse" means bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ.

(21) "Siblings" means children who have at least one biological parent in common or who have been legally adopted by the same parents or parent.

(22) "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 any such services, provided during fifteen of the most recent twenty-two months a child has been in foster care, 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 sixty days after the child is removed from home.

§49-1-4. Other definitions.

As used in this chapter:

(1) "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 or any facility that provides care for unmarried mothers and their children;

(2) "Child advocacy center" means a community-based organization that is a member in good standing with the West Virginia Child Abuse Network, Inc., and is working to implement the following program components:

(A) Child-appropriate/child-friendly facility: A child advocacy center provides a comfortable, private, child-friendly setting that is both physically and psychologically safe for clients;

(B) Multidisciplinary team (MDT): A multidisciplinary team for response to child abuse allegations includes representation from the following: Law enforcement; child protective services; prosecution; mental health; medical; victim advocacy; child advocacy center;

(C) Organizational capacity: A designated legal entity responsible for program and fiscal operations has been established and implements basic sound administrative practices;

(D) Cultural competency and diversity: The child advocacy center promotes 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;

(E) Forensic interviews: Forensic interviews are conducted in a manner which is of a neutral, fact-finding nature and coordinated to avoid duplicative interviewing;

(F) Medical evaluation: Specialized medical evaluation and treatment are to be made available to child advocacy center clients as part of the team response, either at the child advocacy center or through coordination and referral with other specialized medical providers;

(G) Therapeutic intervention: Specialized mental health services are to be made available as part of the team response, either at the child advocacy center or through coordination and referral with other appropriate treatment providers;

(H) Victim support/advocacy: Victim support and advocacy are to be made available 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;

(I) Case review: Team discussion and information sharing regarding the investigation, case status and services needed by the child and family are to occur on a routine basis;

(J) Case tracking: Child advocacy centers must develop and implement a system for monitoring case progress and tracking case outcomes for team components: *Provided,* That a child advocacy center 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;

(3) "Community based", when referring to a facility, program, or service, means located near the juvenile'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, alcoholism and any treatment and other rehabilitation services;

(4) "Court" means the circuit court of the county with jurisdiction of the case or the judge thereof in vacation unless otherwise specifically provided;

(5) "Custodian" means a person who has or shares actual physical possession or care and custody of a child, regardless of whether such person has been granted custody of the child by any contract, agreement or legal proceedings;

(6) "Department" or "state department" means the State Department of Health and Human Resources;

(7) "Division of Juvenile Services" means the division within the Department of Military Affairs and Public Safety pursuant to article five-e of this chapter;

(8) "Guardian" means a person who has care and custody of a child as a result of any contract, agreement or legal proceeding;

(9) "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;

(10) "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 such facility and which provides its residents access to the surrounding community with supervision;

(11) "Referee" means a juvenile referee appointed pursuant to section one, article five-a of this chapter, except that in any county which does not have a juvenile referee, the judge or judges of the circuit court may designate one or more magistrates of the county to perform the functions and duties which may be performed by a referee under this chapter;

(12) "Secretary" means the Secretary of Health and Human Resources;

(13) "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;

(14) "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;

(15) "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 child'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 such person or without good cause; or

(C) Who is habitually absent from school without good cause;

(16) "Valid court order" means a court order given to a juvenile who was brought before the court and made subject to such order and who received, before the issuance of such order, the full due process rights guaranteed to such juvenile by the constitutions of the United States and the State of West Virginia.

§49-1-5. Limitation on out-of-home placement.

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 shall not order the placement of a child in a particular facility 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 the provisions of article two-b 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.

ARTICLE 2. STATE RESPONSIBILITIES FOR THE PROTECTION AND CARE OF CHILDREN.

§49-2-1. Care for children committed to the state department.

It shall be the responsibility of the state department to provide care for neglected children who are committed to its care for custody or guardianship. For purposes of this chapter, the department of health and human resources 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 state department may provide care for such 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. The department in placing any child in the care of a family or a child welfare agency shall select as far as practicable 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.

§49-2-2. Duration of custody or guardianship of children committed to state department.

A child committed to the state department for guardianship, after termination of parental rights, shall remain in the care of the department until he attains the age of eighteen years, or is married, or is adopted, or guardianship is relinquished through the court.

A child committed to the state department for custody shall remain in the care of the department until he attains the age of eighteen years, or until he is discharged because he is no longer in need of care.

§49-2-3. Development of standards of child care.

The state department shall be responsible for the development of desirable standards for the care of children. To this end, it shall cooperate with, advise and assist all child welfare agencies, including state institutions, which care for neglected, delinquent, or mentally or physically handicapped children, and shall supervise all such agencies. The department, in cooperation with the state department of health and 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.

§49-2-4. Repealed. Acts, 1981 Reg. Sess., Ch. 44.

§49-2-4a. Repealed. Acts, 1981 Reg. Sess., Ch. 44.

§49-2-5. Same -- Supervision, records and reports.

In order to improve standards of child care, the state department shall cooperate with the governing boards of child welfare agencies, assist the staffs of such 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 state department of health, or its duly authorized agent, may visit any child welfare agency to advise the agency on matters affecting the health of children and to inspect the sanitation of the buildings used for their care. Each child welfare agency shall keep such records regarding each child under its control and care as the state department may prescribe, and shall report to the department, whenever requested, such facts as may be required with reference to such children, upon blanks 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 state department.

§49-2-6. Same -- Approval of articles of incorporation.

A child welfare agency shall not be incorporated in this state unless the articles of incorporation have first been examined and approved by the state department. Proposed amendments to such articles of incorporation shall likewise be subject to the examination and approval of the state department.

§49-2-7. Repealed. Acts, 1981 Reg. Sess., Ch. 44.

§49-2-8. Repealed. Acts, 1981 Reg. Sess., Ch. 44.

§49-2-9. Unsupervised foster homes -- Generally.

Any family home, not under the supervision of the state department of welfare or of a child welfare agency, in which one or more neglected children under the care of the state department of welfare and under eighteen years of age, separated from parents or guardian and not related by blood or marriage to the person maintaining the home, are received, cared for and maintained for compensation, or otherwise, shall be considered an unsupervised foster home. No person shall conduct an unsupervised foster home without a certificate from the state department.

§49-2-10. Same -- Certificate.

It shall be the duty of the state department in cooperation with the state department of health to establish reasonable minimum standards for foster-home care to which all certified foster homes must conform. No unsupervised foster home shall be certified until an investigation of the home and its standards of care has been made by the state department or by a licensed child welfare agency serving as its representative. Any such home that conforms to the established standards of care and to the prescribed rules shall receive a certificate from the state department, which shall be in force for one year from the date of issuance and which may be renewed unless revoked because of wilful violation of the provisions of this chapter. The certificate shall show the name of the persons authorized to conduct the home, its exact location and the number of children that may be received and cared for at one time. No certified foster home shall receive for care more children than are specified in the certificate.

§49-2-11. Same -- Visits; records.

The state department or its authorized agent shall visit every certified foster home as often as is necessary to assure that proper care is given to the children. Every certified foster home shall maintain

a record of the children received which shall include such facts in regard to the children and their care, and shall be in such form and manner as are prescribed by the state department.

§49-2-12. Same -- Removal of child from undesirable foster home.

If at any time the state department shall find a child in an unsupervised foster home where the child is subject to undesirable influences or lacks proper or wise care and management, it shall take necessary action to remove the child and arrange for his care.

§49-2-13. Parole of certain children to state department.

Children paroled from state institutions and homes for juveniles shall be paroled to the state department. Thereafter, unless the court which committed the child otherwise provides, the state department shall, notwithstanding any other provision of this code, have supervisory control over every child so paroled, and shall have authority to revoke the parole or to discharge the child from parole. Upon the revocation of any parole and the return of the parolee to the institution from which he was paroled, all authority over the parolee, originally vested in such institution, shall again become operative.

§49-2-14. Criteria and procedure for removal of child from foster home; notice of child's availability for placement; limitations.

(a) The state 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 and preclude contact between the children and the foster parents. 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 said allegations, the department shall permanently terminate all foster care arrangements with said foster parents: *Provided*, That if the state 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 state 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 such 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 circuit court orders the termination upon a finding that the state 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 state department may terminate the foster care arrangement if another, more beneficial, long-term placement of the child is developed: *Provided*, That 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) 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. 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 such arrangement is in the best interests of the child: *Provided*, That 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) 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 said child may be united or reunited with a sibling or siblings, the state 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: *Provided*, That 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 state department may petition the circuit court for an order allowing the separation of the siblings to continue: *Provided*, however, That if the child is twelve years of age or older, the state 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, such separation may be ordered only if the court determines that clear and convincing evidence supports the department's determination. In any proceeding brought by the department seeking to maintain separation of siblings, notice shall be 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 said persons may be parties to any such 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.

§49-2-15. 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 state 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 is adopted or discharged from care with the approval of the state department.

§49-2-16. State responsibility for child care.

The division of juvenile services of the department of military affairs and public safety is hereby authorized and empowered to operate and maintain centers for juveniles needing detention pending disposition by a court having juvenile jurisdiction or temporary care following such court action.

The department of health and human resources is hereby authorized and empowered 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. Such department is also hereby authorized and empowered in its discretion 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 department of health and human resources or any county office of such department is also hereby authorized and empowered in its discretion to accept temporary custody of children for care from any law-enforcement officer in an emergency situation.

Within ninety days of the date of the signatures to a voluntary placement agreement, after receipt of physical custody, the state department of health and human resources shall file with the court a petition for review of the placement, stating the child's situation and the circumstance that gives rise to the voluntary placement. 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. The court shall appoint an attorney for the child, who shall also receive a copy of the case plan. The court shall schedule a hearing and shall give notice of the time and place and right to be present at such hearing to: The child's attorney; the child, if twelve years of age or older; the child's parents or guardians; the child's foster parents; any preadoptive parent or relative providing care for the child; and any other such persons as the court may in its discretion direct. The child's presence at such hearing may be waived by the child's attorney at the request of the child or if the child would suffer emotional harm. 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 determining whether or not continuation of the voluntary placement is in the best interests of the child; specifying under what conditions the child's placement shall continue; and specifying whether or not the department is required to and has made reasonable efforts to preserve and to reunify the family, as set forth in subsection (d), section three, article six of this chapter and/or provide a plan for the permanent placement of the child.

§49-2-17. Subsidized adoption and legal guardianship.

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 or a child welfare agency licensed to place children for adoption. A legal guardianship subsidy shall not require the surrender or termination of parental rights. For either subsidy, the children must be in special circumstances either because they:

(a) Have established emotional ties with prospective adoptive parents or prospective legal guardians while in their care; or

(b) Are not likely to be adopted or become a ward of a legal guardian by reason of one or more of the following conditions:

(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;

(5) They are a member of a racial or ethnic minority; or

(6) They have any combination of these conditions.

The department shall provide assistance in the form of subsidies or other 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 must be a written agreement between the family entering into the subsidized adoption or legal guardianship and the department. 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 special services only, or for money payments, and either for a limited period, or for a long term, or for any combination of the foregoing. The specific financial terms of the subsidy shall be

included in the agreement between the department and the adoptive parents or legal guardians. The amount of the time-limited or long-term subsidy may in no case exceed that which would be allowable from time to time for such child under foster family care, or, in the case of a special service, the reasonable fee for the service rendered. In addition, 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 between the department and the adoptive parent or legal guardian and who the department determines cannot be placed with an adoptive parent or legal guardian without medical assistance because the child has special needs for medical, mental health or rehabilitative care.

Whenever significant emotional ties have been established between a child and his or her foster parents, and the foster parents seek to adopt the child or to become legal guardians, the child shall be certified as eligible for a subsidy conditioned upon his or her adoption or his or her becoming a ward of a legal guardian under applicable procedures by the foster parents.

In all other cases, after reasonable efforts have been made without the use of subsidy and no appropriate adoptive family or legal guardian has been found for the child, the department shall certify the child as eligible for a subsidy in the event of adoption or a legal guardianship.

If the child is the dependent of a voluntary licensed child-placing agency, that agency shall present to the department evidence of significant emotional ties between the child and his foster parents or evidence of inability to place the child for adoption. In no event shall the value of the services and assistance provided by the department under an agreement pursuant to this section exceed the value of assistance available to foster families in similar circumstances. All records regarding subsidized adoptions or legal guardianships shall 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 persons receiving funds for such child.

ARTICLE 2A. INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN.

§49-2A-1. 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:

INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

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 such 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, such 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 Placement.

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. Such violation may be punished or subjected to penalty in either jurisdiction in accordance with its laws. In addition to liability for any such punishment or penalty, any such 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. Such 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 such 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 such 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 being sent to such 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 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 parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or his guardian and leaving the child with any such 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 said 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 any such jurisdiction when such 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 such 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.

§49-2A-2. Definitions; implementation.

(1) 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, the provisions of section one, article two of this chapter may be invoked.

(2) 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 welfare and said agency shall receive and act with reference to notices required by said Article III.

(3) 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 welfare.

(4) 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. Any such agreement which contains a financial commitment or imposes a financial obligation on this state or subdivision or agency thereof shall not be 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.

(5) Any requirements for visitation, inspection or supervision of children, homes, institutions or other agencies in another party state which may apply under sections five and eleven of 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.

(6) The provisions of section fifteen, article two of this chapter shall not apply to placements made pursuant to the interstate compact on the placement of children.

(7) Any court having jurisdiction to place delinquent children may place such 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.

(8) 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 said Article VII.

REGULATIONS - INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

Note: The Association of Administrators of the Interstate Compact on the Placement of Children has adopted the following regulations that establish, in detail, the procedures for the interstate placement of children.

Regulation No. 0.01

Forms

1. To promote efficiency in processing placements pursuant to the Interstate Compact on the Placement of Children (ICPC) and to facilitate communication among sending agencies, states and other concerned persons, the forms promulgated by the compact administrators, acting jointly, shall be used by all sending agencies, sending and receiving states, and others participating in the arranging, making, processing and supervision of placements.

2. ICPC forms shall be uniform as to format and substance, and each state shall make available a reference to where its forms may be obtained by the public.

3. The mandatory forms currently in effect are described below. These forms shall be reproduced in sufficient supply by each of the states to meet its needs and the needs of persons and agencies required to use them. Forms referenced in the preceding sentence, above, currently in effect are the following:

ICPC-100A "Interstate Compact Placement Request;"
ICPC-100B "Interstate Compact Report on Child's Placement Status;"
ICPC-100C "Quarterly Statistical Report: Placements Into An ICPC State;"
ICPC-100D "Quarterly Statistical Report: Placements Out Of An ICPC State;" and
ICPC-101 "Sending State's Priority Home Study Request."

4. Form ICPC-102 "Receiving State's Priority Home Study Request" is an optional form that is available for use.

5. Words and phrases used in this regulation have the same meanings as in the Compact, unless the context clearly requires another meaning.

6. This regulation is adopted pursuant to Article VII of the Interstate Compact on the Placement of Children by action of the Association of Administrators of the Interstate Compact on the Placement of Children at its annual meeting of April 29 through May 2, 2001; the regulation, as amended, was approved May 2, 2001, and is effective as of July 2, 2001.

Regulation No. 1 **Conversion of Intrastate Placement into Interstate Placement; Relocation of Family Units**

1. Regulation No. 1 as first effective May 1, 1973, is repealed and is replaced by the following:

2. A placement initially intrastate in character becomes an interstate placement subject to the Interstate Compact on the Placement of Children (ICPC) if the child's principal place of abode is moved to another state.

3. If the child is to be sent or brought to the receiving state more than forty-five (45) days in the future, the normal procedures of ICPC for an interstate placement shall be initiated. However, the ICPC-100A and the information accompanying it shall make it specific and clear that the relocation of a family unit is involved and that the family home is not yet in the receiving state. As much information as reasonably possible shall be given to the receiving state concerning the location and character of the intended family home in the receiving state.

4. (a) In any instance where the decision to relocate into another state is not made until forty-five (45) days or less before the date on which it is intended to send or bring the child to the receiving state, an ICPC-100A and its supporting documentation shall be prepared immediately upon the making of the decision, processed promptly by the sending agency's state compact administrator and transmitted to the receiving state compact administrator. The sending agency's state compact administrator shall request that the receiving state provide prompt handling of the case with due regard for the desired time for the child to be sent or brought to the receiving state.

(b) The documentation provided with a request for prompt handling shall include:

(1) A form ICPC-100A fully completed.

(2) A copy of the court order pursuant to which the sending agency has authority to place the child or, if authority does not derive from a court order, a statement of the basis on which the sending agency has authority to place the child.

(3) A case history for the child.

(4) In any instance where the sending state has required licensure, certification or approval, a copy of the most recent license, certificate or approval of the qualification of the custodian(s) and/or their home showing the status of the custodian(s), as qualified custodian(s).

(5) A copy of the most recent home study of the custodian(s) and any updates thereof.

(6) A copy of the child's permanency plan and any supplements to that plan.

(7) An explanation of the current status of the child's Title IV-E eligibility under the Federal Social Security Act.

(c) Requests for prompt handling shall be as provided in paragraph 4(a) hereof. Some or all documents may be communicated by express mail or any other recognized method for expedited communication. The receiving state shall recognize and give effect to any such expedited transmission of an ICPC-

100A and/or supporting documentation, provided that it is legible and appears to be a complete representation of the original. However, the receiving state may request and shall be entitled to receive originals or duly certified copies if it considers them necessary for a legally sufficient record under its laws.

(d) In an instance where a custodian(s) holds a current license, certificate or approval from the sending state evidencing qualification as a foster parent or other custodian, the receiving state shall give effect to such license, certificate or approval as sufficient to support a determination of qualification pursuant to Article III(d) of ICPC, unless the receiving state compact administrator has substantial evidence to the contrary. This provision applies to a case which meets the description set forth in paragraph 4(b) of this regulation.

(e) The receiving state may decline to provide a favorable determination pursuant to Article III(d) of ICPC if its compact administrator finds that the child's needs cannot be met under the circumstances of the proposed relocation, or until it has the documentation identified in subparagraph (b) hereof.

(f) If necessary or helpful to meet time requirements, the receiving state may communicate its determination pursuant to Article III(d) to the sending agency and the sending agency's state compact administrator by "FAX" or other means of facsimile transmission. However, this may not be done before the receiving state compact administrator has actually recorded the determination on the ICPC-100A. The written notice (the completed ICPC-100A) shall be mailed or otherwise sent promptly to meet Article III(d) written notice requirements.

5. If the referral is submitted by a custodian(s), a receiving state shall recognize and give effect to evidence that the custodian(s) have satisfactorily completed required training for foster parents or other parent training. Such recognition and effect shall be given if:

(a) the training program is shown to be substantially equivalent to training offered for the same purpose in the receiving state; and
(b) the evidence submitted is in the form of an official certificate or other document identifying the training.

6. Nothing in this regulation shall be construed to alter the obligation of a receiving state to supervise and report on the placement; nor to alter the requirement that the custodian(s) comply with the licensing and other applicable laws of the receiving state after arrival therein.

7. A favorable determination made by a receiving state pursuant to Article III(d) of the ICPC and this regulation means that the receiving state is making such determination on the basis of the best evidence available to it in accordance with the requirements of paragraph 4(b) of this regulation and does not relieve any custodian or other entity of the obligation to comply with the laws of the receiving state as promptly after arrival in the receiving state of the child as possible. If it is subsequently determined that the placement in the receiving state appears to be contrary to the interest of the child, the sending agency shall arrange to return the child or make an alternative placement as provided in Article V(a) of the ICPC.

8. Within thirty (30) days of being notified by the sending state or by the custodian(s) that the custodian(s) and the child have arrived in the receiving state, the appropriate personnel of the receiving state shall make an initial contact with the custodian(s) to ascertain conditions and progress toward compliance with applicable laws and requirements of the receiving state.

9. Words and phrases used in this regulation have the same meanings as in the Compact, unless the context clearly requires another meaning.

10. This regulation is adopted pursuant to Article VII of the Interstate Compact on the Placement of Children by action of the Association of Administrators of the Interstate Compact on the Placement of Children at its annual meeting of April 1999.

Regulation No. 2. Repealed.

This regulation, adopted May 25, 1977, relating to certain programs in which children could be placed in family homes to permit their attendance at local public schools was repealed by action taken at the annual meeting of the Association of Administrators of the Interstate Compact on the Placement of Children, April 1999.

Regulation No. 3 Placements with Parents, Relatives, Non-agency Guardians, and Non-family Settings

The following regulation, adopted by the Association of Administrators of the Interstate Compact on the Placement of Children, is declared to be in effect on and after July 2, 2001.

1. "Placement" as defined in Article II (d) includes the arrangement for the care of a child in the home of his parent, other relative, or non-agency guardian in a receiving state when the sending agency is any entity other than a parent, relative, guardian or non-agency guardian making the arrangement for care as a plan exempt under Article VIII (a) of the Compact.

2. "Conditions for Placement" as established by Article III apply to any placement as defined in Article II (d) and Regulations adopted by action of the Association of Administrators of the Interstate Compact on the Placement of Children.

3. The terms "guardian" and "non-agency guardian" have the same meanings as set forth in Regulation No. 10 of the Regulations for the Interstate Compact on the Placement of Children (ICPC).

4. The term "family free or boarding home" as used in Article II (d) of ICPC means the home of a relative or unrelated individual whether or not the placement recipient receives compensation for care or maintenance of the child, foster care payments, or any other payments or reimbursements on account of the child's being in the home of the placement recipient.

5. The term "foster care" as used in Article III of ICPC, except as modified in this paragraph, means care of a child on a 24-hour a day basis away from the home of the child's parent(s). Such care may be by a relative of the child, by a non-related individual, by a group home, or by a residential facility or any other entity. In addition, if 24-hour a day care is provided by the child's parent(s) by reason of a court-ordered placement (and not by virtue of the parent-child relationship), the care is foster care.

6. (a) Pursuant to Article VIII (a), this Compact does not apply to the sending or bringing of a child into a receiving state by the child's parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or the child's guardian and leaving the

child with any such relative or non-agency guardian in the receiving state, provided that such person who brings, sends, or causes a child to be sent or brought to a receiving state is a person whose full legal right to plan for the child: (1) has been established by law at a time prior to initiation of the placement arrangement, and (2) has not been voluntarily terminated, or diminished or severed by the action or order of any court.

(b) The Compact does not apply whenever a court transfers the child to a non-custodial parent with respect to whom the court does not have evidence before it that such parent is unfit, does not seek such evidence, and does not retain jurisdiction over the child after the court transfers the child.

7. Placement of a child requires compliance with the Compact if such placement is with either of the following:

(a) any relative, person, or entity not identified in Article VIII of the Compact; or

(b) any entity not included in the definition of placement as specified in Article II (d) of the Compact.

8. If a court or other competent authority invokes the Compact, the court or other competent authority is obligated to comply with Article V (Retention of Jurisdiction) of the Compact.

9. Words and phrases used in this regulation have the same meanings as in the Compact, unless the context clearly requires another meaning.

10. This regulation is adopted pursuant to Article VII of the Interstate Compact on the Placement of Children by action of the Association of Administrators of the Interstate Compact on the Placement of Children at its annual meeting of April 29 through May 2, 2001; the regulation, as amended, was approved on May 2, 2001 and is effective as of July 2, 2001.

Regulation No. 4 Residential Placement

The following regulation was adopted by the Association of Administrators of the Interstate Compact on the Placement of Children on April 20, 1983, was readopted in 1999, was amended in 2001, and is declared to be effective, as amended, as of July 2, 2001.

1. In determining whether the sending or bringing of a child to another state is exempt from the provisions of the Interstate Compact on the Placement of Children by reason of the exemption for various classes of institutions in Article II (d), the following concepts and terms shall have the following meanings:

(a) "Primarily educational institution" means an institution which operates one or more programs that can be offered in satisfaction of compulsory school attendance laws, in which the primary purpose of accepting children is to meet their educational needs; and which does not do one or more of the following:

(1) accept responsibility for children during the entire year;

(2) provide or hold itself out as providing child care constituting nurture sufficient to substitute for parental supervision and control or foster care;

(3) provide any other services to children, except for those customarily regarded as extracurricular or cocurricular school activities, pupil support services, and those services necessary to make it possible for the children to be maintained on a residential basis in the aforementioned school program or programs.

2. (a) Admission for treatment of an acute condition includes the treatment and care of minors who are mentally ill or developmentally disabled and who require stabilization of such condition for short-term treatment. Such short term treatment is exempt from the Interstate Compact on the Placement of Children.

(b) Placement for treatment of a chronic condition includes the treatment and care of minors who may be mentally ill, emotionally ill, or developmentally disabled and require

treatment beyond what was required for stabilization of the underlying acute condition. Treatment modalities for chronic conditions may include psychotherapy and psychopharmacology.

(c) Any placement of a minor for treatment of that minor's chronic mental or behavioral condition into a facility having treatment programs for acute and chronic conditions must be made pursuant to the Interstate Compact on the Placement of Children. The Interstate Compact on the Placement of Children becomes applicable once the minor is placed for treatment of a chronic condition regardless of whether that child was originally placed in the same facility for treatment of an acute condition.

(d) A minor may be accepted into a residential treatment center without first having been in that facility for the treatment of an acute condition. An interstate placement of a minor into such a facility must be made pursuant to the Interstate Compact on the Placement of Children.

3. An institution for the mentally ill or developmentally disabled may accept a child for treatment and care without complying with ICPC, if the treatment and care and other services are entirely out-patient in character.

4. The type of funding source or sources used to defray the costs of treatment or other services does not determine whether the Interstate Compact on the Placement of Children applies. Such determination is made on a case-by-case basis.

5. The type of license, if any, held by an institution is evidence of its character, but does not determine the need for compliance with ICPC. Whether an institution is either generally exempt from the need to comply with the Interstate Compact on the Placement of Children or exempt in a particular instance is to be determined by the services it actually provides or offers to provide. In making any such determinations, the criteria set forth in this regulation shall be applied.

6. Words and phrases used in this regulation have the same meanings as in the Compact, unless the context clearly requires another meaning.

7. This regulation was amended pursuant to Article VII of the Interstate Compact on the Placement of Children by action of the Association of Administrators of the Interstate Compact on the Placement of Children at its annual meeting of April 29 through May 2, 2001; such amendment was approved on May 2, 2001 and is effective as of July 2, 2001.

Regulation No. 5 Central State Compact Office

Regulation No. 5 ("Central State Compact Office"), as first effective April 1982, is amended to read as follows:

1. It shall be the responsibility of each state party to the Interstate Compact on the Placement of Children to establish a procedure by which all Compact referrals from and to the state shall be made through a central state compact office. The Compact Office shall also be a resource for inquiries into requirements for placements into the state for children who come under the purview of this Compact.

2. The Association of Administrators of the Interstate Compact on the Placement of Children deems certain appointments of officers who are general coordinators of activities under the Compact in the party states to have been made by the executive heads of states in each instance wherein such an appointment is made by a state official who has authority delegated by the executive head of the state to make such an appointment. Delegated authority to make the appointments described above in this paragraph will be sufficient if it is either: specifically described in the applicable state's documents that establish or control the appointment or employment of the state's officers or employees; a responsibility of the official who has the delegated authority that is customary and accepted in the applicable state; or consistent with the personnel policies or practices of the applicable state. Any general coordinator of activities under the Compact who is or was appointed in compliance with this paragraph is deemed to be appointed by the executive head of the applicable jurisdiction regardless of whether the appointment preceded or followed the adoption of this paragraph.

3. Words and phrases used in this regulation have the same meanings as in the Compact, unless the context clearly requires another meaning.

4. This regulation was first effective on April 20, 1982; was amended as of April 1999; and is amended by the Compact Administrators, acting jointly and pursuant to Article VII of the Interstate Compact on the Placement of Children, at their annual meeting of April 2002, with such amendments effective after June 27, 2002.

Regulation No. 6 **Permission to Place Child: Time Limitations, Reapplication**

The following regulation, originally adopted in 1991 by the Association of Administrators of the Interstate Compact on the Placement of Children, is amended in 2001 and declared to be in effect, as amended, on and after July 2, 2001.

1. Permission to place a child given pursuant to Article III (d) of the Interstate Compact on the Placement of Children shall be valid and sufficient to authorize the making of the placement identified in the written document ICPC-100A, by which the permission is given for a period of six (6) months commencing on the date when the receiving state compact administrator or his duly authorized representative signs the aforesaid ICPC-100A.

2. If the placement authorized to be made as described in Paragraph 1. of this Regulation is not made within the six (6) months allowed therein, the sending agency may reapply. Upon such reapplication, the receiving state may require the updating of documents submitted on the previous application, but shall not require a new home study unless the laws of the receiving state provide that the previously submitted home study is too old to be currently valid.

3. If a foster care license, institutional license or other license, permit or certificate held by the proposed placement recipient is still valid and in force, or if the proposed placement recipient continues to hold an appropriate license, permit or certificate, the receiving state shall not require that a new license, permit or certificate be obtained in order to qualify the proposed placement recipient to receive the child in placement.

4. Upon a reapplication by the sending agency, the receiving state shall determine whether the needs or condition of the child have changed since it initially authorized the placement to be made. The receiving state may deny the placement if it finds that the proposed placement is contrary to the interests of the child.

5. Words and phrases used in this regulation have the same meanings as in the Compact, unless the context clearly requires another meaning.

6. This regulation was readopted pursuant to Article VII of the Interstate Compact on the Placement of Children by action of the Association of Administrators of the Interstate Compact on the Placement of Children at its annual meeting of April 1999; it is amended pursuant to Article VII of the Interstate Compact on the Placement of Children by action of the Association of Administrators of the Interstate Compact on the Placement of Children at its annual meeting of April 29 through May 2, 2001, was approved May 2, 2001, and is effective in such amended form as of July 2, 2001.

Regulation No. 7 **Priority Placement**

The following regulation adopted by the Association of Administrators of the Interstate Compact on the Placement of Children is declared to be in effect on and after July 2, 2001.

1. Words and phrases used in this regulation shall have the same meanings as those ascribed to them in the Interstate Compact on the Placement of Children (ICPC). A word or phrase not appearing in ICPC shall have the meaning ascribed to it by special definition in this regulation or, where not so defined, the meaning properly ascribed to it in common usage.

2. This regulation shall not apply to any case in the sending state wherein:

(a) the request for placement of the child is for licensed or approved foster family care or adoption; or

(b) the child is already in the receiving state in violation of ICPC.

3. Whenever a court, upon request, or on its own motion, or where court approval is required, determines that a proposed priority placement of a child from one state into another state is necessary, the court shall make and sign an order embodying that finding. The court shall send its order to the Sending Agency within two (2) business days. The order shall include the name, address, telephone number, and if available, the FAX number, of the judge and the court. The court shall have the sending agency transmit, within three (3) business days,

the signed court order, a completed Form 100A ("Request for Placement") and supporting documentation pursuant to ICPC Article III, to the sending state Compact Administrator. Within a time not to exceed two (2) business days after receipt of the ICPC priority placement request, the sending state Compact Administrator shall transmit the priority request and its accompanying documentation to the receiving state Compact Administrator together with a notice that the request for placement is entitled to priority processing.

4. The court order, ICPC-100A, and supporting documentation referred to in Paragraph Three (3) hereof shall be transmitted to the receiving state Compact Administrator by overnight mail together with a cover notice calling attention to the priority status of the request for placement. The receiving state Compact Administrator shall make his or her determination pursuant to Article III (d) of ICPC as soon as practicable but no later then twenty (20) business days from the date the overnight mailing was received and forthwith shall send the completed 100-A by FAX to the sending state Compact Administrator.

5. (a) If the receiving state Compact Administrator fails to complete action as the receiving state prescribed in Paragraph Four (4) hereof within the time period allowed, the receiving state shall be deemed to be out of compliance with ICPC. If there appears to be a lack of compliance, the court, which made the priority order, may so inform an appropriate court in the receiving state, provide that court with copies of relevant documentation in the case, and request assistance. Within its jurisdiction and authority, the requested court may render such assistance, including the making of appropriate orders, for the purpose of obtaining compliance with this Regulation and ICPC.

(b) The foregoing shall not apply if:

(1) within two (2) business days of receipt of the ICPC priority placement request, the sending state Compact Administrator determines that the ICPC request documentation is substantially insufficient, specifies that additional information is needed, and requests the additional documentation from the sending agency. The request shall be made by FAX, or by telephone if FAX is not available, or

(2) within two (2) business days of receipt of the ICPC priority placement request, the receiving state Compact Administrator notifies the sending state Compact Administrator that further information is necessary. Such notice shall specifically detail the information needed. For a case in which this subparagraph applies, the twenty (20) business day period for the receiving state Compact Administrator to complete action shall be calculated from the date of the receipt by the receiving state Compact Administrator of the information requested.

(c) Where the sending state court is not itself the sending agency, it is the responsibility of the sending agency to keep the court, which issued the priority order, informed of the status of the priority request.

6. A court order finding entitlement to a priority placement shall not be valid unless it contains an express finding that one or more of the following circumstances applies to the particular case and sets forth the facts on which the court bases its finding:

(a) the proposed placement recipient is a relative belonging to a class of persons who, under Article VIII (a) of ICPC could receive a child from another person belonging to such a class, without complying with ICPC and; (1) the child is under two (2) years of age; or (2) the child is in an emergency shelter; or (3) the court finds that the child has spent a substantial amount of time in the home of the proposed placement recipient.

(b) the receiving state Compact Administrator has a properly completed ICPC-100A and supporting documentation for over thirty (30) business days, but the sending agency has not received a notice pursuant to Article III (d) of ICPC determining whether the child may or may not be placed.

7. Time periods in this regulation may be modified with a written agreement between the court which made the priority order, the sending agency, the receiving state Compact Administrator, and the sending state Compact Administrator. Any such modification shall apply only to the single case to which it is addressed.

8. To fulfill its obligations under ICPC, a state and its local agencies must process interstate cases no less quickly than intrastate

cases and give no less attention to interstate hardship cases than to intrastate hardship cases. If in doing so, a receiving state Compact Administrator finds that extraordinary circumstances make it impossible for it and its local agencies to comply with the time requirements set forth in this regulation, it may be excused from strict compliance therewith. However, the receiving state Compact Administrator shall, within two (2) business days of ascertaining inability to comply, notify the sending state Compact Administrator via FAX of the inability to comply and shall set forth the date on or before which it will complete action. The notice shall contain a full identification and explanation of the extraordinary circumstances which are delaying compliance.

9. Unless otherwise required or allowed by this regulation, all transmittals of documents or other written materials shall be by overnight express mail carrier service.

10. This regulation as first effective October 1, 1996, and readopted pursuant to Article VII of the Interstate Compact on the Placement of Children by action of the Association of Administrators of the Interstate Compact on the Placement of Children at its annual meeting of April 1999, is amended pursuant to Article VII of the Interstate Compact on the Placement of Children by action of the Association of Administrators of the Interstate Compact on the Placement of Children at its annual meeting of April 29 through May 2, 2001; the regulation, as amended, was approved on May 2, 2001 and is effective as of July 2, 2001.

Regulation No. 8 **Change of Placement Purpose**

1. An ICPC-100B should be prepared and sent in accordance with its accompanying instructions whenever there is a change of purpose in an existing placement, e.g., from foster care to preadoption even though the placement recipient remains the same. However, when a receiving state or a sending state requests a new ICPC-100A in such a case, it should be provided by the sending agency and transmitted in accordance with usual procedures for processing of ICPC-100As.

2. Words and phrases used in this regulation have the same meanings as in the Compact, unless the context clearly requires another meaning.

3. This regulation is effective on and after April 30, 2000, pursuant to Article VII of the Interstate Compact on the Placement of Children by action of the Association of Administrators of the Interstate Compact on the Placement of Children at its annual meeting of April 30–May 3, 2000.

Regulation No. 9 **Definition of a Visit**

Regulation No. 9 ("Definition of a Visit"), as first adopted in 1999, is amended to read as follows:

1. A visit is not a placement within the meaning of the Interstate Compact on the Placement of Children (ICPC). Visits and placements are distinguished on the basis of purpose, duration, and the intention of the person or agency with responsibility for planning for the child as to the child's place of abode.

2. The purpose of a visit is to provide the child with a social or cultural experience of short duration, such as a stay in a camp or with a friend or relative who has not assumed legal responsibility for providing child care services.

3. It is understood that a visit for twenty-four (24) hours or longer will necessarily involve the provision of some services in the nature of child care by the person or persons with whom the child is staying. The provision of these services will not, of itself, alter the character of the stay as a visit.

4. If the child's stay is intended to be for no longer than thirty (30) days and if the purpose is as described in Paragraph 2, it will be presumed that the circumstances constitute a visit rather than a placement.

5. A stay or proposed stay of longer than thirty (30) days is a placement or proposed placement, except that a stay of longer duration may be considered a visit if it begins and ends within the period of a child's vacation from school as ascertained from the academic calendar of the school. A visit may not be extended or renewed in a manner which causes or will cause it to exceed thirty (30) days or the school vacation period, as the case may be. If a stay does not from the outset have an express terminal date, or if its duration is not clear from the circumstances, it shall be considered a placement or proposed placement and not a visit.

6. A request for a home study or supervision made by the person or agency which sends or proposes to send a child on a visit and that is pending at the time that the visit is proposed will establish a rebuttable presumption that the intent of the stay or proposed stay is not a visit.

7. A visit as defined in this regulation is not subject to the Interstate Compact on the Placement of Children.

8. Words and phrases used in this regulation have the same meanings as in the Compact, unless the context clearly requires another meaning.

9. This regulation was first adopted as a resolution effective April 26, 1983; was promulgated as a regulation as of April 1999; and is amended by the Compact Administrators, acting jointly and pursuant to Article VII of the Interstate Compact on the Placement of Children, at their annual meeting of April 2002, with such amendments effective after June 27, 2002.

Regulation No. 10 **Guardians**

Regulation No. 10 ("Guardians"), as first adopted in 1999, is amended to read as follows:

1. Guardian Defined.

As used in the Interstate Compact on the Placement of Children (ICPC) and in this Regulation:

(a) "Guardian" means a public or private agency, organization or institution which holds a valid and effective permanent appointment from a court of competent jurisdiction to have custody and control of a child, to plan for the child, and to do all other things for or on behalf of a child which a parent would have authority and responsibility for doing by virtue of an unrestricted parent-child relationship. An appointment is permanent for the purposes of this paragraph if the appointment would allow the guardianship to endure until the child's age of majority without any court review, subsequent to the appointment, of the care that the guardian provides or the status of other permanency planning which the guardian has a professional obligation to

carry out. Guardian also means an individual who is a non-agency guardian as defined in subparagraph (b) hereof.

(b) "Nonagency guardian" means an individual holding a currently valid appointment from a court of competent jurisdiction to have all of the authority and responsibility of a guardian as defined in subparagraph (a) hereof.

2. Prospective Adoptive Parents Not Guardians.

An individual with whom a child is placed as a preliminary to a possible adoption cannot be considered a non-agency guardian of the child, for the purpose of determining applicability of ICPC to the placement, unless the individual would qualify as a lawful recipient of a placement of the child without having to comply with ICPC as provided in Article VIII (a) thereof.

3. Effect of Guardianship on ICPC Placements.

(a) An interstate placement of a child with a nonagency guardian, whose appointment to the guardianship existed prior to consideration of the making of the placement, is not subject to ICPC if the sending agency is the child's parent, stepparent, grandparent, adult brother or sister, or adult uncle or aunt.

(b) An appropriate court of the sending agency's state must continue its jurisdiction over a non-exempt placement until applicability of ICPC to the placement is terminated in accordance with Article V (a) of ICPC.

4. Permanency Status of Guardianship.

(a) A state agency may pursue a guardianship to achieve a permanent placement for a child in the child welfare system, as required by federal or state law. In the case of a child who is already placed in a receiving state in compliance with ICPC, appointment of the placement recipient as guardian by the sending state court is grounds to terminate the applicability of the ICPC when the sending and receiving state compact administrators concur on the termination pursuant to Article V (a). In such an instance, the court which appointed the guardian may continue its jurisdiction if it is maintainable under another applicable law.

(b) If, subsequent to the making of an interstate placement pursuant to ICPC, a court of the receiving state appoints a non-agency guardian for the child, such appointment shall be construed as a request that the sending agency and the receiving state concur in the discontinuance of the application of ICPC to the placement. Upon concurrence of the sending and receiving states, the sending agency and an appropriate court of the sending state shall close the ICPC aspects of the case and the jurisdiction of the sending agency pursuant to Article V (a) of ICPC shall be dismissed.

5. Guardian Appointed by Parent.

If the statutes of a jurisdiction so provide, a parent who is chronically ill or near death may appoint a guardian for his or her children, which guardianship shall take effect on the death or mental incapacitation of the parent. A nonagency guardian so appointed shall be deemed a nonagency guardian as that term is used in Article VIII (a) of ICPC, provided that such nonagency guardian has all of the powers and responsibilities that a parent would have by virtue of an unrestricted parent-child relationship. A placement with a nonagency guardian as described in this paragraph shall be effective for the purposes of ICPC without court appointment or confirmation unless the statute pursuant to which it is made otherwise provides and if there is compliance with procedures required by the statute. However, the parent must be physically present in the jurisdiction having the statute at the time that he or she makes the appointment or expressly submits to the jurisdiction of the appointing court.

6. Other Definitions of Guardianship Unaffected.

The definitions of "guardian" and "nonagency guardian" contained in this regulation shall not be construed to affect the meaning or applicability of any other definitions of "guardian" or "nonagency guardian" when employed for purposes or to circumstances not having a bearing on placements proposed to be made or made pursuant to ICPC.

7. Words and phrases used in this regulation have the same meanings as in the Compact, unless the context clearly requires another meaning.

8. This regulation was first promulgated in April 1999; it is amended by the Compact Administrators, acting jointly and pursuant to Article VII of the Interstate Compact on the Placement of Children, at their annual meeting of April 2002, with such amendments effective after June 27, 2002.

ARTICLE 2B. DUTIES OF SECRETARY OF HUMAN SERVICES FOR CHILD WELFARE.

§49-2B-1. Policy and purpose.

(a) It is the policy of the state to assist a child and the child's family as the basic unit of society through efforts to strengthen and preserve the family unit. In the event of a temporary or permanent absence of parents or the separation of a child from the family unit for care or treatment purposes, it is the policy of the state to assure that a child receives care and nurturing as close as possible to society's expectations of a family's care and nurturing of its child. The state has a duty to assure that proper and appropriate care is given and maintained.

(b) 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.

(c) 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.

(d) In order to carry out the above policy, the Legislature enacts this article to protect and prevent harm to children separated from their families and to enhance their continued growth and well-being while in care.

(e) The purposes of this article are:

(1) To protect the health, safety and well-being of children in substitute care by preventing improper and harmful care;

(2) To establish statewide rules for regulating programs as defined in this article;

(3) To encourage and assist in the improvement of child care programs;

(4) To ensure that persons and entities offering child care are not unduly burdened by licensure and registration requirements; and

(5) To ensure that all child care programs be safe, reliable and geared to the ages and needs of the children they serve, meet basic health and safety standards, and employ people who have the training and experience needed to work with children.

(f) In order to carry out these purposes, the powers of the child welfare licensing board created by chapter nineteen, Acts of the Legislature, one thousand nine hundred forty-five, are hereby transferred to the commissioner of human services, along with the other powers granted by this article.

§49-2B-2. Definitions.

As used in this article, unless the context otherwise requires:

(a) "Approval" means a finding by the secretary that a facility operated by the state has met the requirements set forth in the rules promulgated pursuant to this article.

(b) "Certificate of approval" means a statement of the secretary that a facility operated by the state has met the requirements set forth in the rules promulgated pursuant to this article.

(c) "Certificate of license" means a statement issued by the secretary 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.

(d) "Certificate of registration" means a statement issued by the secretary to a family child care home, informal family child care home or relative family child care home, upon receipt of a self-certification statement of compliance with the rules promulgated pursuant to the provisions of this article.

(e) "Child" for the purpose of residential services under this article means any person under eighteen years of age or is a transitioning adult.

(f) "Child" for the purpose of child care services means an individual who meets one of the following conditions:

(1) Is under thirteen years of age.

(2) Is thirteen to eighteen years of age and under court supervision.

(3) 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 multi-disciplinary team.

(g) "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 Juvenile Services, created under section two, article five-e of this chapter. It includes the provision of child care services or residential services.

(h) "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 thirteen or more children for child care services in any setting, if the facility is open for more than thirty days per year per child.

(i) "Child care services" means direct care and protection of children during a portion of a twenty-four hour day outside of the child's own home which provides experiences to children that foster their healthy development and education.

(j) "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 sixteen or seventeen years old and living unlicensed residences.

(k) "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: *Provided*, That the term does not

include juvenile detention facilities or juvenile correctional facilities operated by or under contract with the Division of Juvenile Services, created under section two, article five-e of this chapter, nor any other facility operated by that division for the secure housing or holding of juveniles committed to its custody.

(l) "Department" means the Department of Health and Human Resources.

(m) "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: *Provided*, That the term does not include any juvenile detention facility or juvenile correctional facility operated by or under contract with the Division of Juvenile Services, created pursuant to section two, article five-e of this chapter, for the secure housing or holding of juveniles committed to its custody.

(n) "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. No more than two of the total number of children may be under twenty-four months of age.

(o) "Family child care facility" means any facility which is used to provide nonresidential child care services for compensation for seven to twelve children, including children who are living in the household, who are under six years of age. No more than four of the total number of children may be under twenty-four months of age. A facility may be in a provider's residence or a separate building.

(p) "Foster family home" means a private residence which is used for the care on a residential basis of no more than five children who are unrelated by blood, marriage or adoption to any adult member of the household.

(q) "Informal family child care" means a home that is used to provide nonresidential child care services for compensation for three (3) 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.

(r) "License" means the grant of official permission to a facility to engage in an activity which would otherwise be prohibited.

(s) "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.

(t) "Registration" means the process by which a family child care home, informal family child care home or a relative family child care home self-certifies compliance with the rules promulgated pursuant to this article.

(u) "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 and or treatment for transitioning adults: *Provided*, That the term does not include or apply to any juvenile detention facility or juvenile correctional facility operated by the Division of Juvenile Services, created pursuant to section two, article five-e of this chapter, for the secure housing or holding of juveniles committed to its custody.

(v) "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(ren) receiving care. Care is given in the provider's home.

(w) "Rule" means a statement issued by the secretary of the standard to be applied in the various areas of child care.

(x) "Transitioning adult" means an individual with a transfer plan to move to an adult setting who meets one of the following conditions:

(1) Is eighteen years of age but under twenty-one years of age, was in departmental custody 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.

(2) Is eighteen years of age but under twenty-one years of age, was adjudicated abused, neglected, or in departmental custody upon reaching eighteen years of age and enters into a contract with the department to continue in an educational, training, or treatment program which was initiated prior to the eighteenth birthday.

(y) "Secretary" means the Secretary of the Department of Health and Human Resources.

(z) "Variance" means a declaration that a rule may be accomplished in a manner different from the manner set forth in the rule.

(aa) "Waiver" means a declaration that a certain rule is inapplicable in a particular circumstance.

§49-2B-3. 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: *Provided,* That this requirement does not apply to any juvenile detention facility or juvenile correctional facility operated by or under contract with the Division of Juvenile Services, created pursuant to section two, article five-e of this chapter, for the secure housing or holding of juveniles committed to its custody. The facilities and placing agencies shall maintain the same standards of care applicable to licensed facilities, centers or placing agencies of the same category.

(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.

(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 state 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 thirty 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 Juvenile Services, created pursuant to section two, article five-e of this chapter, 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 twelfth grade students when the program is monitored by the West Virginia Department of Education; or

(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 and meets all of the following requirements:

(i) The program is located in a facility that meets all fire and health codes;

(ii) The program performs background checks on all volunteers and staff;

(iii) The program's primary source of funding is not from fees for service; and

(iv) The program has a formalized monitoring system in place.

(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 service's license or registration until notice is provided and the child care service is given thirty 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.

§49-2B-4. Rules.

(a) The secretary shall promulgate rules in accordance with the provisions of chapter twenty-nine-a of this code regarding the licensure, approval, certification and registration of child care facilities and the implementation of the provisions of this article. The rules shall provide at a minimum the requirement that every residential child care facility shall be subject to an annual time study regarding the quantification of staff supervision time at each facility. Every residential child care facility shall participate in the time study at the request of the department.

(b) The secretary shall review the rules promulgated pursuant to the provisions of this article at least once every five years, making revisions when necessary or convenient: *Provided,* That on or before the first day of September, two thousand six, the department shall promulgate emergency rules pursuant to the provisions of article three, chapter twenty-nine-a of this code that amends and replaces licensing requirements for group residential programs for children, 78 CSR 3, and child placing agencies for children, 78 CSR 2: *Provided, however,* That on or before the first day of July, two thousand six, the department shall promulgate emergency rules pursuant to the provisions of article three, chapter twenty-nine-a of this code that creates requirements for informal family child care homes and relative family child care homes that voluntarily register with the department. All individuals, facilities, entities, programs, agencies or family child care homes subject to said emergency rules shall have one hundred eighty days to come into compliance after promulgation of such rules.

§49-2B-5. Penalties; injunctions.

(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 thereof, shall be punished by imprisonment in jail not exceeding one year, or a fine of not more than five hundred dollars, or both fined and imprisoned.

(b) Any family child care facility which operates without a license when a license is required is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars.

(c) Where a violation of this article or a 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.

§49-2B-6. 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 the provisions of this article or any rules promulgated pursuant to this article. 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 this rule 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 the provisions of 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 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: *Provided*, That 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.

§49-2B-7. 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 rule criteria and procedures for the granting of waivers or variances so that uniform practices may be maintained throughout the state.

§49-2B-8. 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 article. 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 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;

(6) Health, sanitation and nutrition.

(e) Further inquiry and investigation may be made as the secretary may direct.

(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.

§49-2B-9. Supervision and consultation required.

(a) The secretary shall provide supervision to ascertain compliance with the rules promulgated pursuant to this article through regular monitoring, visits to facilities, documentation, evaluation and reporting. The secretary shall be 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 Director of the Department of Health and the State Fire Marshal shall cooperate with the secretary in the administration of the provisions of this article by providing such reports and assistance as may be requested by the secretary.

§49-2B-10. Investigative authority.

(a) The secretary shall enforce the provisions of this article.

(b) An on-site evaluation of every facility regulated pursuant to this article, 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, but not limited to, 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. Such 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.

§49-2B-11. 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 article if a facility materially violates any provision of this article, or any terms or conditions of the license, registration or approval issued, or fails to maintain established requirements of child care: *Provided*, That the provisions of this section shall 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 any provision of this article, or any terms or conditions of the registration certificate issued, or fails to maintain established requirements of child care.

§49-2B-12. Closing of facilities by the secretary; placement of children.

When the secretary finds that the operation of a 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.

§49-2B-13. Administrative and judicial review.

Any person, corporation, governmental official or child welfare agency, aggrieved by a decision of the secretary made pursuant to the provisions of this article 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 the provisions of 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 five of this article.

§49-2B-14. Annual reports; directory; licensing reports and recommendations.

(a) The secretary shall submit on or before the first day of January of each year a report to the Governor, and upon request to members of the Legislature, 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, but not be limited to, 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.

§49-2B-15. Education of the public.

The secretary shall provide ongoing education of the public in regard to the requirements of this article through the use of mass media and other methods as are deemed appropriate and within fiscal limitations.

§49-2B-16. Implementation of the Integrated Pest Management Program.

By the fifteenth day of August, one thousand nine hundred ninety-five, the secretary shall implement the Integrated Pest Management Program promulgated under rules by the Department of Agriculture under authority of section four, article sixteen-a, chapter nineteen of this code.

§49-2B-17. Repealed.

ARTICLE 2D. HOME-BASED FAMILY PRESERVATION ACT.

§49-2D-1. Findings and purpose.

The Legislature finds that there exists a need in this state to assist dysfunctional families by providing nurture and care to such families' children as an alternative to removing children from such 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 such intervention service, but only to the extent that such moneys would normally be available for the removal and placement of the particular child at risk.

§49-2D-2. Definitions.

As used in this article, the following terms have the meanings indicated:

(a) "Dysfunctional family" 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 such children are natural offspring, adopted children, step children or unrelated children to such parents.

(b) "Home-based family preservation services" means services dispensed by the department of human services or by another person, association or group who has contracted with the department of human services to dispense such services when such 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:

(1) Intensive, short term intervention of four to six weeks; and

(2) Home-based, longer term after care following intensive intervention.

§49-2D-3. 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: Provided, 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.

§49-2D-4. 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: Provided, That such services are not required when the child appears in imminent danger of serious bodily or serious emotional injury.

§49-2D-5. Caseload limits for home-based preservation services.

For purposes of this article, no contractor employee of the department of human services may exceed three families during any period of time when such 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 of human services or contractor shall provide trained personnel who shall be available during nonworking hours to assist families on an emergency basis.

§49-2D-6. Situational criteria requiring service.

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 any such contract shall be based on performance.

§49-2D-7. Service delivery through service contracts; accountability.

Services required by this article which are not practically deliverable directly from the department of human services 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. Such 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. 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. The department shall further include the results of this investigation in its report to the Legislature required by section nine of this article.

§49-2D-8. Provision of special services.

Costs of providing special services to families receiving regular services in accordance with this article are allowable to the extent such goods and services are justified pursuant to carrying out the purposes of this article. Such special services may include, but are not limited to, homemaker assistance, food, clothing, educational materials, respite care and recreational or social activities.

§49-2D-9. 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. Notwithstanding the other provisions of this article to the contrary, it is the intent of this legislation to permit the department to establish a pilot program in FY90 to serve 200 families. The department is vested with discretion to select target populations using geographical or other criteria it deems appropriate. The department shall report back to the Legislature by the thirty-first day of December, one thousand nine hundred ninety, on the feasibility of using funds currently earmarked for the placement of children for the intervention and what additional amounts may be needed to fully implement this article.

ARTICLE 3. CHILD WELFARE AGENCIES.

§49-3-1. Consent by agency or department to adoption of child; statement of relinquishment by parent; petition to terminate parental rights.

(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 the provisions of 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 the provisions of 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 any such 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.

(4) The department shall make available, upon request, for purposes of any private or agency adoption proceeding, preplacement and postplacement counseling services by persons experienced in adoption counseling, at no cost, to any person whose consent or

relinquishment is required pursuant to the provision of 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 or unknown father, as those terms are defined pursuant to the provisions of 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 said child. Abandonment may be established in accordance with the provisions of 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 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 such 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 such rights: *Provided*, That if such child is more than six months old at the time such notice would be required and such father has not asserted or exercised his parental rights and he knew the whereabouts of the child, then such father shall be presumed to have had reasonable opportunity to assert or exercise such 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 said petition shall be personally served on any respondent at least twenty days prior to the date set for the hearing.

(2) Such notice shall inform the person that his parental rights, if any, may be terminated in the proceeding and that such person may appear and defend any such rights within twenty days of such service. In the case of any such person who is a nonresident or whose whereabouts are unknown, service shall be achieved: (1) By personal service; (2) by registered or certified mail, return receipt requested, postage prepaid, to the person's last known address, with instructions to forward; or (3) by publication. If personal service is not acquired, then if the person giving notice shall have 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. Any such service achieved by mail shall be complete upon mailing and

shall be 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 such person's whereabouts, then the court shall order service of such notice by publication as a Class II publication in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area shall be the county where such 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 personal representative, or if there be none, on 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 shall be allowed thirty days from the date of the first publication or mailing of such service on a personal representative or guardian ad litem in which to appear and defend such 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 parental rights and shall award the legal and physical custody and control of said child to the petitioner.

§49-3-2. Approval of incorporation of child care organizations.

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 possession pertaining to the proposed corporation, to the state department, and no charter for any such corporation shall be issued unless the state department shall first certify to the secretary of state that it has investigated the need for the services proposed and the merits of the proposed charitable corporation and recommends the issuance thereof; applications for amendments of any existing charter shall be similarly referred and shall be granted only upon similar approval.

ARTICLE 4A. WEST VIRGINIA FAMILY SUPPORT PROGRAM.

§49-4A-1. Findings.

(a) The West Virginia Legislature finds that families are the greatest resource available to individuals with developmental disabilities, and they must be supported in their role as primary caregivers. It further finds that supporting families in their effort to care for their family members at home is more efficient, cost effective and humane than placing the developmentally disabled person in an institutional setting.

(b) The Legislature accepts the following as basic principles for providing services to support families of people with developmental disabilities:

(1) The quality of life of children with developmental disabilities, their families and communities is enhanced by caring for the children within their own homes. Children with disabilities benefit by growing up in their own families, families benefit by staying together and communities benefit from the inclusion of people with diverse abilities.

(2) Adults with developmental disabilities should be afforded the opportunity to make decisions for themselves, live in typical homes and communities and exercise their full rights as citizens. Developmentally disabled adults should have the option of living separately from their families but when this is not the case, families of disabled adults should be provided the support services they need.

(3) Services and support for families should be individualized and flexible, should focus on the entire family and should promote the inclusion of people with developmental disabilities in all aspects of school and community life.

(4) Families are the best experts about what they need. The service system can best assist families by supporting families as decision makers as opposed to making decisions for them.

(c) The Legislature finds that there are at least ten thousand West Virginians with developmental disabilities who live with and are supported by their families, and that the state's policy is to prevent the institutionalization of people with developmental disabilities.

(d) To maximize the number of families supported by this program, each family will contribute to the cost of goods and services based on their ability to pay, taking into account their needs and resources.

(e) Therefore, it is the intent of the Legislature to initiate, within the resources available, a program of services to support families who are caring for family members with developmental disabilities in their homes.

§49-4A-2. Definitions.

(a) "Family or primary caregiver" 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. The term does not include hospitals, sanitariums, nursing homes, personal care homes or any other such institution.

(b) "Legal guardian" 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 such person, regardless of whether the disabled person resides with his or her legal guardian or another family member.

(c) "Family support" 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.

(d) "Family support program" means a coordinated system of family support services administered by the department of health and human resources through initial contracts with agencies within four of the state's behavioral health regions.

(e) "Developmental disability" means a severe, chronic disability of a person which:

(1) Is attributable to a mental or physical impairment or a combination of mental and physical impairments;

(2) Is manifested before the person attains age twenty-two;

(3) Results in substantial functional limitations in three or more of the following areas of major life activity: (A) Self-care; (B) receptive and expressive language; (C) learning; (D) mobility; (E) self-direction; (F) capacity for independent living; and (G) economic self-sufficiency; and

(4) Reflects the person's need for services and supports which are of lifelong or extended duration and are individually planned and coordinated. 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.

(f) "Regional family support council" means the council established by the regional family support agency under the provisions of section six of this article to carry out the responsibilities specified in this article.

(g) "State family support council" means the council established by the department of health and human resources under section six of this article to carry out the responsibilities specified in this article.

§49-4A-3. Family support services.

(a) The regional family support agency, designated under section five of this article, shall direct and be responsible for the individual assessment of each developmentally disabled person which it has designated and shall prepare a service plan with such developmentally disabled person's family. The needs and preferences of the family will be the basis for determining what goods and services will be made available within the resources available.

(b) The family support program may provide funds to families to purchase goods and services included in the family service plan. Such goods and services related to the care of the developmentally disabled person may include, but are not limited to:

(1) Respite care;

(2) Personal and attendant care;

(3) Child care;

(4) Architectural and vehicular modifications;

(5) Health-related costs not otherwise covered;

(6) Equipment and supplies;

(7) Specialized nutrition and clothing;

(8) Homemaker services;

(9) Transportation;

(10) Utility costs;

(11) Integrated community activities; and

(12) Training and technical assistance.

(c) As part of the family support program, the regional family support agency, designated under section five of this article, shall provide case management for each family to provide information, service coordination and other assistance as needed by the family.

(d) The family support program shall assist families of developmentally disabled adults in planning and obtaining community living arrangements, employment services and other resources needed to achieve, to the greatest extent possible, independence, productivity and integration of the developmentally disabled adult into the community.

(e) The family support program shall conduct outreach to identify families in need of assistance and shall maintain a waiting list of individuals and families in the event that there are insufficient resources to provide services to all those who request them.

(f) The family support program may provide for differential fees for services under the program or for appropriate cost participation by the recipient families consistent with the goals of the program and the overall financial condition of the family.

(g) Funds, goods or services provided to eligible families by the family support program under this article shall not be considered as income to those families for any purpose under this code or under the rules and regulations of any agency of state government.

§49-4A-4. Eligibility; primary focus.

(a) To be eligible for the family support program, a family must have at least one family member who has a developmental disability, as defined in this article, living with the family.

(b) The primary focus of the family support program is supporting: (1) Developmentally disabled children, school age and younger, within their families; (2) adults with developmental disabilities who choose to live with their families; and (3) adults with developmental disabilities for whom other community living arrangements are not available and who are living with their families.

§49-4A-5. Program administration.

(a) The administering agency for the family support program is the department of health and human resources.

(b) The department of health and human resources shall initially implement the family support program through contracts with an agency within four of the state's behavioral health regions, with the four regions to be determined by the department of health and human resources in consultation with the state family support council. These regional family support agencies of the family support program will be responsible for implementing the provisions of this article and subsequent policies for the families of persons with developmental disabilities residing within their respective regions. Each regional family support agency must serve at least twenty-five families from each fifty thousand dollars allocated. The total appropriation from general revenue funds for this program shall not exceed two hundred thousand dollars for the fiscal year beginning the first day of July, one thousand nine hundred ninety-one.

(c) The department of health and human resources, in conjunction with the state family support council, shall adopt policies and procedures regarding:

(1) Development of annual budgets;

(2) Program specifications;

(3) Criteria for awarding contracts for operation of regional family support programs and the role of regional family support councils;

(4) Annual evaluation of services provided by each regional family support agency, including consumer satisfaction;

(5) Coordination of the family support program and the use of its funds, throughout the state and within each region, with other publicly funded programs, including medicaid;

(6) Performance of family needs assessments and development of family service plans;

(7) Methodology for allocating resources to families within the funds available; and

(8) Resolution of grievances filed by families pertaining to actions of the family support program.

(d) The department of health and human resources shall submit a report to the governor and the Legislature on the family support program, by the fifteenth day of January, one thousand nine hundred ninety-two, and by the fifteenth day of September every year thereafter, so long as the program is funded.

§49-4A-6. Regional and state family support councils.

(a) Each regional family support agency shall establish a regional family support council comprised of at least seven members, of whom at least a majority shall be persons with developmental disabilities or their parents or primary caregivers. Each regional family support council shall meet at least quarterly to advise the regional family support agency on matters related to local implementation of the family support program and to communicate information and recommendations regarding the family support program to the state family support council.

(b) The secretary of the department of health and human resources shall appoint a state family support council comprised of at least twenty-two members, of whom at least a majority shall be persons with developmental disabilities or their parents or primary caregivers. A representative elected by each regional council shall serve on the state council. The state council shall also include a representative from each of the following agencies: The state developmental disabilities planning council, the state protection and advocacy agency, the university affiliated center for developmental disabilities, the office of special education, the association of community mental health/mental retardation programs and the early intervention interagency coordinating council.

(c) The state council shall meet at least quarterly. The state council will participate in the development of program policies and procedures,

annual contracts and perform such other duties as are necessary for statewide implementation of the family support program.

(d) Members of the state and regional councils who are a member of the family or the primary caregiver of a developmentally disabled person shall be reimbursed for travel and lodging expenses incurred in attending official meetings of their councils. Child care expenses related to the developmentally disabled person shall also be reimbursed. Members of regional councils who are eligible for expense reimbursement shall be reimbursed by their respective regional family support agencies.

ARTICLE 5D. MULTIDISCIPLINARY TEAMS.

§49-5D-1. Purpose; additional cases and teams.

(a) The purpose of this article is to provide 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. It is the further purpose of this article to establish, 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. It is the further purpose of this article to ensure 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.

§49-5D-2. Multidisciplinary investigative teams; establishment; procedures; coordination between agencies.

(a) The prosecuting attorney shall establish a multidisciplinary investigative team in each county. The multidisciplinary team shall be headed and directed by the prosecuting attorney or his or her designee and shall include as permanent members the prosecuting attorney or his or her designee, a local child protective services caseworker from the Department of Health and Human Resources, a local law-enforcement officer employed by a law-enforcement agency in the county, a child advocacy center representative where available and, where appropriate to the particular case under consideration and

available, a representative from the 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 said agencies to release information in its possession relating to the child. The team shall assure that all information received and developed in connection with the provisions of this article remains confidential. For purposes of this section, the term "confidential" shall be construed in accordance with the provisions of section one, article seven of this chapter.

§49-5D-3. Multidisciplinary treatment planning process.

(a) (1) A multidisciplinary treatment planning process 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. The Division of Juvenile Services shall establish a similar

treatment planning process for delinquency cases in which the juvenile has been committed to the custody of the director of the division.

(2) Treatment teams shall assess, plan and implement a comprehensive, individualized service plan for children who are victims of abuse or neglect and their families when a judicial proceeding has been initiated involving the child or children for juveniles and their families involved in status offense or delinquency proceedings when, in a status offense proceeding, the court refers the juvenile for services pursuant to sections eleven and eleven-a, article five of this chapter and when, in a delinquency proceeding, 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 the provisions of section thirteen of said article. In any such status offense or delinquency case, the juvenile probation officer shall notify the local office of the Department of Health and Human Resources and the Division of Juvenile Services at least five working days before the court proceeding in order to allow the multidisciplinary treatment team to convene and develop a comprehensive individualized service plan for the child: *Provided,* That such notice is not required in cases where the child is already in state custody or there exist exigent circumstances which justify taking the child immediately into custody without a judicial proceeding. In developing an individualized service plan for a child, the team shall utilize a uniform comprehensive assessment of the child. The department shall adopt a standard uniform comprehensive assessment instrument or protocol to be used by treatment teams.

(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 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 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.

(b) Each treatment team shall be convened by the child's or family's case manager in the Department of Health and Human Resources or the Division of Juvenile Services if the juvenile has been ordered into its custody for examination and diagnosis pursuant to section thirteen, article five of this chapter. The treatment team shall consist of the child's custodial parent or parents, guardian or guardians, other immediate family members, the attorney or attorneys representing the

child, the parent or parents of the child, the child's attorney, the guardian ad litem, if any, the prosecuting attorney or his or her designee, a member of a child advocacy center when the child has been processed through the child advocacy center program(s) and, where appropriate to the particular case under consideration and available, a court- appointed special advocate, a member of a child advocacy center, an appropriate school official and any other person or an agency representative who may assist in providing recommendations for the particular needs of the child and family. The child may participate in multidisciplinary treatment team meetings if such is deemed appropriate by the multidisciplinary treatment team. For purposes of delinquency proceedings, the juvenile probation officer shall be a member of the treatment team. 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: *Provided,* That a member of a child advocacy center should participate in any case when appropriate to the particular case under consideration.

(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) State, county and local agencies shall provide the multidisciplinary treatment 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 said agencies to release information in its possession relating to the child. The team shall assure that all information received and developed in connection with the provisions of this article remain confidential. For purposes of this section, the term "confidential" shall be construed in accordance with the provisions of section one, article seven of this chapter.

(e) Nothing in this section may be construed to require a multidisciplinary team meeting to be held prior to temporarily placing a child out-of-home under exigent circumstances or upon a court order placing the juvenile in a juvenile facility operated by the Division of Juvenile Services.

§49-5D-3a. Recommendation of team to the court; hearing requirement; required findings.

(a) In any case in which a multidisciplinary treatment team develops an individualized service plan for a child pursuant to the provisions of section three of 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 such 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 the provisions of 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.

§49-5D-4. Report of teams.

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 section one, article six of this chapter, 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.

§49-5D-5. Child fatality review team.

(a) The child fatality review team is hereby established under the office of the chief medical examiner. The child fatality review team is a multidisciplinary team created to review the deaths of children under the age of eighteen years as provided for in this section.

(b) The child fatality review team is to consist of the following members, appointed by the governor, to serve three-year terms:

(1) The chief medical examiner, who is to serve as the chairperson of the child fatality review team;

(2) Two prosecuting attorneys or their designees;

(3) The state superintendent of the West Virginia state police or his or her designee;

(4) One law-enforcement official other than a member of the West Virginia state police;

(5) One child protective services worker currently employed in investigating reports of child abuse or neglect;

(6) One physician, specializing in the practice of pediatric medicine or family medicine;

(7) One physician, specializing in the practice of pediatric critical care medicine;

(8) One social worker who may be employed in the area of public health;

(9) The director of the office of maternal and child health of the department of health and human resources or his or her designee;

(10) One representative of the sudden infant death syndrome program of the office of maternal and child health;

(11) The director of the division of children's mental health services of the office of behavioral health services or his or her designee;

(12) The director of the office of social services of the department of health and human resources or his or her designee;

(13) The superintendent of the department of education or his or her designee;

(14) The director of the division of juvenile services or his or her designee; and

(15) The president of the West Virginia association of school nurses or his or her designee.

(c) Members of the child fatality review team shall, unless sooner removed, continue to serve until their respective terms expire and until their successors have been appointed and have qualified.

(d) Each appointment of a prosecuting attorney, whether for a full term or to fill a vacancy, is to be made by the governor from among three nominees selected by the West Virginia prosecuting attorneys institute. Each appointment of a law-enforcement officer, whether for a full term or to fill a vacancy, is to be made by the governor from among three nominees selected by the state fraternal order of police or the West Virginia deputy sheriff's association. Each appointment of a child protective services worker and a social worker, whether for a full term or to fill a vacancy, is to be made by the governor from among three nominees selected by the West Virginia social work licensing board. Each appointment of a physician, whether for a full term or to fill

a vacancy, is to be made by the governor from among three nominees selected by the West Virginia state medical association or the West Virginia academy of pediatrics. When an appointment is for a full term, the nomination is to be submitted to the governor not later than eight months prior to the date on which the appointment is to become effective. In the case of an appointment to fill a vacancy, the nominations are to be submitted to the governor within thirty days after the request for the nomination has been made by the governor to the chairperson or president of the organization. When an association fails to submit to the governor nominations for the appointment in accordance with the requirements of this section, the governor may make the appointment without nominations.

(e) Each member of the child fatality review team shall serve without additional compensation and may not be reimbursed for any expenses incurred in the discharge of his or her duties under the provisions of this article.

(f) The child fatality review team shall, pursuant to the provisions of chapter twenty-nine-a, promulgate rules applicable to the following:

(1) The standard procedures for the establishment, formation and conduct of the child fatality review team; and

(2) Recommend protocols for the review of child fatalities where other than natural causes are suspected.

(g) The child fatality review team shall:

(1) Review all deaths of children under the age of eighteen years who are residents of this state in order to identify trends, patterns and risk factors;

(2) Provide statistical analysis regarding the causes of child fatalities in West Virginia;

(3) Promote public awareness of the incidence and causes of child fatalities, including recommendations for their reduction; and

(4) Provide training for state agencies and local multidisciplinary teams.

(h) The child fatality review team shall submit an annual report to the governor and to the Legislature concerning its activities and the incidents of child fatalities within the state. The report is due annually on the first day of December. The report is to include statistics setting forth the number of child fatalities, identifiable trends in child fatalities in the state, including possible causes, if any, and recommendations to reduce the number of preventable child fatalities in the state. The report is to also include the number of children whose deaths have been determined to have been unexpected or unexplained.

(i) A local multidisciplinary investigative team created pursuant to the provisions of section two of this article shall review all cases

referred to it pursuant to the provisions of that section: Provided, That a local multidisciplinary investigative team may refer any or all cases for review of deaths to the child fatality review team. The local multidisciplinary investigative team shall provide all information to the child fatality review team necessary for the child fatality review team to create and submit any report required by this section.

(j) The child fatality review team, in the exercise of its duties as defined in this section, may not:

(1) Call witnesses or take testimony from individuals involved in the investigation of a child fatality;

(2) Contact a family member of the deceased child, except if a member of the team is involved in the investigation of the death and must contact a family member in the course of performing his or her duties outside of the team; or

(3) Enforce any public health standard or criminal law or otherwise participate in any legal proceeding, except if a member of the team is involved in the investigation of the death or resulting prosecution and must participate in a legal proceeding in the course of performing in his or her duties outside of the team.

(k) Proceedings, records and opinions of the child fatality review team are confidential, in accordance with section one, article seven, chapter forty-nine of this code, and are not subject to discovery, subpoena or introduction into evidence in any civil or criminal proceeding. Nothing in this subsection is to be construed to limit or restrict the right to discover or use in any civil or criminal proceeding anything that is available from another source and entirely independent of the proceedings of the child fatality review team.

(l) Members of the child fatality review team may not be questioned in any civil or criminal proceeding regarding information presented in or opinions formed as a result of a meeting of the team. Nothing in this subsection may be construed to prevent a member of the child fatality review team from testifying to information obtained independently of the team or which is public information.

§49-5D-6. 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 said agencies to release information in its possession relating to the child. The team shall assure that all information received and developed in connection with the provisions of this article remain confidential. For purposes of this section, the term "confidential" shall

be construed in accordance with the provisions of section one, article seven of this chapter.

§49-5D-7. 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.

§49-5D-8. Exemption from multidisciplinary team review for emergency out-of-home placements.

Notwithstanding any provisions of this article to the contrary, a multidisciplinary team recommendation shall not be required for temporary out-of-home placement of a child in an emergency circumstance or for purposes of assessment as provided for by the provisions of this article.

ARTICLE 6. PROCEDURE IN CASES OF CHILD NEGLECT OR ABUSE.

§49-6-1. Petition to court when child believed neglected or abused; notice.

(a) 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. 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 such conduct comes within the statutory definition of neglect or abuse with references thereto, any supportive services provided by the department to remedy the alleged circumstances and the relief sought. 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 section three of this article, the hearing shall be held within thirty days

of the order, unless a continuance for a reasonable time is granted to a date certain, for good cause shown.

(b) The petition and notice of the hearing shall be served upon both parents and any other custodian, giving to the parents or custodian at least ten days' notice. Notice shall also be given to the department, any foster or preadoptive parent, and any relative providing care for the child. In cases wherein 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 such person. If the person signs the certificate, service shall be complete and the certificate shall be filed as proof of the service with the clerk of the circuit court. 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 the provisions of article three, chapter fifty-nine of this code. A notice of hearing shall specify the time and place of the hearing, the right to counsel of the child and parents or other custodians at every stage of the proceedings and the fact that the proceedings can result in the permanent termination of the parental rights. Failure to object to defects in the petition and notice shall not be construed as a waiver.

(c) 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.

§49-6-1a. Minimum staffing complement for child protective services.

For the sole purpose of increasing the number of full time front line child protective service case workers and investigators, the secretary of the department of health and human resources shall have the authority to transfer funds between all general revenue accounts under the secretary's authority and/or between personnel and nonpersonnel lines within each account under the secretary's authority: Provided, That nothing in this section shall be construed to require the department to hire additional child protective service workers at any time if the department determines that funds are not available for such workers. Additionally, the secretary shall prepare a plan to allow the department to progressively reduce caseload standards in West Virginia for child protective services workers, which if adopted by the Legislature during the regular session of the year one thousand nine hundred ninety-five, shall require implementation no later than the first day of July, one thousand nine hundred ninety-six, with said plan to be submitted to the joint committee on government and finance by the thirtieth day of September, one thousand nine hundred ninety-four, and a final report

to be submitted to the Legislature by the first day of January, one thousand nine hundred ninety-five.

§49-6-2. Petition to court when child believed neglected or abused--Right to counsel; improvement period; hearing; priority of proceeding; transcript.

(a) In any proceeding under the provisions of this article, the child, his or her or parents and his or her legally established custodian or other persons standing in loco parentis to him or her shall have the right to be represented by counsel at every stage of the proceedings and shall be informed by the court of their right to be so represented and that if they cannot pay for the services of counsel, that counsel will be appointed. Counsel of the child shall be appointed in the initial order. If the order gives physical custody of the child to the state, the initial order shall appoint counsel for the parents or, if the parents are separated or divorced, the parents or parent or other person or persons standing in loco parentis who had physical custody of the child for the majority of the time in the period immediately preceding the petition: Provided, That such representation shall only continue after the first appearance if the parent or other persons standing in loco parentis cannot pay for the services of counsel. Counsel for other parties shall only be appointed upon request for appointment of counsel. If the requesting parties have not retained counsel and cannot pay for the services of counsel, the court shall, by order entered of record, appoint an attorney or attorneys to represent the other party or parties and so inform the parties. Under no circumstances may the same attorney represent both the child and the other party or parties, nor shall the same attorney represent both parents or custodians. However, one attorney may represent both parents or custodians where both parents or guardians consent to this representation after the attorney fully discloses to the client the possible conflict and where the attorney assures the court that she or he is able to represent each client without impairing her or his professional judgment; however, if more than one child from a family is involved in the proceeding, one attorney may represent all the children. A parent who has been judicially determined to be battered shall be entitled to his or her own attorney. The court may allow to each attorney so appointed a fee in the same amount which appointed counsel can receive in felony cases. Any attorney appointed pursuant to this section shall by the first day of July, one thousand nine hundred ninety-three, and three hours per year each year thereafter, receive a minimum of three hours of continuing legal education training on representation of children, child abuse and neglect: Provided, however, That where no attorney who has

completed this training is available for such appointment, the court shall appoint a competent attorney with demonstrated knowledge of child welfare law to represent the child. Any attorney appointed pursuant to this section shall perform all duties required as an attorney licensed to practice law in the State of West Virginia.

(b) In any proceeding brought pursuant to the provisions of this article, the court may grant any respondent an improvement period in accord with the provisions of this article. During such 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 such improvement period shall require the Department to prepare and submit to the court a family case plan in accordance with the provisions of section three, article six-d of this chapter.

(c) In any proceeding pursuant to the provisions of 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. 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. Where relevant, the court shall consider the efforts of the state Department to remedy the alleged circumstances. 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 and, if applicable, whether the parent, guardian, or custodian is 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 proof.

(d) Any petition filed and any proceeding held under the provisions of this article shall, to the extent practicable, be given priority over any other civil action before the court, except proceedings under article two-a, chapter forty-eight of this code and actions in which trial is in progress. Any petition filed under the provisions of 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 the provisions of this article shall be held as nearly as practicable on successive days and, with respect to said hearing to be held at the end of an improvement period, shall be held as close in time as possible after the end of said improvement period and shall be held within sixty days of the termination of such improvement period.

(e) Following the court's determination, it shall be inquired of the parents or custodians whether or not appeal is desired and the response transcribed. A negative response shall 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 same 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 therefor.

§49-6-3. Petition to court when child believed neglected or abused -- Temporary custody.

(a) 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 custody of the state department or a responsible person found by the court to be a fit and proper person for the temporary care of the child pending a preliminary hearing, 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 removal of the child, including, but not limited to, the provision of medical, psychiatric, psychological or homemaking services in the child's present custody: *Provided,* That 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 said home unless the alleged abusing person is or has been precluded from visiting or residing in said home by judicial order. 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, and notwithstanding the fact that the allegations of abuse or neglect may pertain to less than all of such 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 such 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. The initial order directing such custody shall contain an order appointing counsel and scheduling the preliminary hearing, and upon its service shall require the immediate transfer of custody of such 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 such 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) 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 custody 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: *Provided,* That 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 such efforts unreasonable or impossible; and

(4) What efforts should be made by the department, if any, to facilitate the child's return home: *Provided, however,* That if the court grants an improvement period as provided in section twelve of this article, the sixty-day limit upon temporary custody is waived.

(c) If a child or children shall, in the presence of a child protective service worker, be 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 three, article one of this chapter, and if such 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, the worker may, prior to the filing of a petition, take the child or children into his or her custody without a court order: *Provided,* That after taking custody of such child or children prior to the filing of a petition, the worker shall forthwith appear before a circuit judge or a

juvenile referee of the county wherein custody was taken, or if no such judge or referee be available, before a circuit judge or a juvenile referee of an adjoining county, and shall immediately apply for an order ratifying 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 juvenile referee, who shall serve at the will and pleasure of the appointing court, and who shall perform the functions prescribed for such position by the provisions of 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, and if at the time the child or children are taken into custody by the worker, the worker 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 such 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 for in subsection (b), section four of this article. If a referee issues such 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. If the emergency taking is ratified by the judge or referee, emergency custody of the child or children shall be vested in the department until the expiration of the next two judicial days, at which time any such 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 the provisions of section three of this article.

(d) For purposes of the court's consideration of temporary custody pursuant to the provisions of subsection (a) or (b) 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 such a murder or voluntary manslaughter or been an accessory before or after the fact to either such 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; or

(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.

(3) The parental rights of the parent to another child have been terminated involuntarily.

§49-6-4. Medical and mental examinations.

(a) 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 such expert, subject to cross-examination and the rules of evidence: Provided, That the court shall not terminate parental or custodial rights of a party solely because the party refuses to submit to the examination, nor shall the court hold such party in contempt for refusing to submit to an examination. 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. If the child, parent or custodian is indigent, such witnesses shall be compensated out of the treasury of the state, upon certificate of the court wherein the case is pending. No 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.

(b) If a person with authority to file a petition under the provisions of this article shall have probable cause to believe that evidence exists

that a child has been abused or neglected and that such evidence may be found by a medical examination, the person may apply to a circuit judge or juvenile referee for an order to take such child into custody for delivery to a physician or hospital for examination. 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 such belief. Upon such 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. If a referee issues such 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. Any child welfare worker and the child's parents, guardians or custodians may accompany the officer for such examination. 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 the provisions of section three of this article.

§49-6-5. Disposition of neglected or abused children.

(a) Following a determination pursuant to section two of this article 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 for in section three, article six-d of this chapter and that also includes at least the following: 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 parents in order to improve the conditions in the parent(s) home; facilitate return of the child to his or her own home or the permanent placement of the child; and address the needs of the child while in 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 may be made at the same time reasonable efforts are made to prevent removal or to make it possible for a child to safely return home. If reunification is not the permanency plan for the child, the plan must state why reunification is not appropriate and detail the alternative placement for the child to include approximate time lines for when such 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. 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 custody of the state 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) What efforts were made or that the emergency situation made such efforts unreasonable or impossible; and

(D) The specific circumstances of the situation which made such 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 shall continue. Considerations pertinent to the determination include whether the child should:

(i) Be continued in foster care for a specified period;

(ii) Be considered for adoption;

(iii) Be considered for legal guardianship;

(iv) Be considered for permanent placement with a fit and willing relative; or

(v) Be placed in another planned permanent living arrangement, but only in cases where 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), (ii), (iii) or (iv) 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 section five, article seven of this chapter; or

(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 fourteen 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 such 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 such efforts were unreasonable due to specific circumstances.

(7) For purposes of the court's consideration of the disposition custody of a child pursuant to the provisions of 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 such a murder or voluntary manslaughter or been an accessory before or after the fact to either such crime;

(iv) Committed a felonious 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; or

(v) 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.

(C) The parental rights of the parent to another child have been terminated involuntarily.

(b) As used in this section, "no reasonable likelihood that conditions of neglect or abuse can be substantially corrected" shall mean 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. Such conditions shall be considered to exist in the following circumstances, which shall not be 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 such 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;

(6) The abusing parent or parents have incurred emotional illness, mental illness or mental deficiency of such duration or nature as to render such parent or parents incapable of exercising proper parenting skills or sufficiently improving the adequacy of such skills; or

(7) The battered parent's parenting skills have been seriously impaired and said 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.

(c) 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.

§49-6-5a. Permanency hearing when court determines reasonable efforts to preserve families not required.

(a) If the court finds, pursuant to the provisions of subdivision (7), subsection (a), section five of 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 thirty days following the entry of the court order so finding and must be conducted at least once every three calendar months thereafter until a permanent placement is achieved.

(b) The purpose of the permanency hearing is to determine the permanency plan for the child that includes: (1) When the child will be returned to the parent; (2) when the child will be placed for adoption, in which event the state will file a petition for termination of parental rights; or (3) when the child will be referred for legal guardianship. In cases where the department has demonstrated a compelling reason for determining it would not be in the best interests of the child to return home, the court shall determine whether the child should be referred for termination of parental rights, be placed for adoption, be placed with a fit and willing relative, be placed with a legal guardian or placed in another planned permanent living arrangement. At the conclusion of each permanency hearing, the court must enter an order stating whether or not the department made reasonable efforts to finalize the permanency plan.

(c) Any foster parent, preadoptive parent or relative providing care for the child shall be given notice of and the opportunity to be heard at the permanency hearing provided in this section.

§49-6-5b. When efforts to terminate parental rights required.

(a) Except as provided in subsection (b) of this section, 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 fifteen of the most recent twenty-two 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 sixty days after the child is removed from the home;

(2) If a court has determined the child is abandoned; or

(3) If a court has determined the parent has committed murder or voluntary manslaughter of another of his or her children or the other parent of his or her children; has attempted or conspired to commit such 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 or to the other parent of his or her children; or the parental rights of the parent to a sibling have been terminated involuntarily.

(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 with a relative;

(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 article five of this chapter, 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.

§49-6-6. Modification of dispositional orders.

Upon motion of a child, a child's parent or custodian or the state department alleging a change of circumstances requiring a different disposition, the court shall conduct a hearing pursuant to section two of this article and may modify a dispositional order: Provided, That a dispositional order pursuant to subdivision (6), subsection (a) of section five shall not be modified after the child has been adopted. 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 and to the state department.

§49-6-7. Consensual termination of parental rights.

An agreement of a natural parent in termination of parental rights shall be valid if made by a duly acknowledged writing, and entered into under circumstances free from duress and fraud.

§49-6-8. Foster care review; annual reports to the court.

(a) If, twelve months after receipt by the department or its authorized agent of physical custody 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 or placed the child with a natural parent or placed the child in legal guardianship or permanently placed the child with a fit and willing relative, the department shall file with the court a petition for review of the case. The department shall also file with the court a report detailing the efforts that have been made to place the child in a permanent home and copies of the child's case plan, including the permanency plan as defined in section five, article six of this chapter. Copies of the report shall be sent to the child's attorney and be made available to the child's parent(s) or guardian. The court shall schedule a hearing in chambers, giving notice and the right to be present to: The child's attorney; the child, if twelve years of age or older; the child's parents; the child's guardians; the child's foster parents; any preadoptive parent or any relative providing care for the child; and such 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 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 and to determine what efforts are necessary to provide the child with a permanent home. At the conclusion of the hearing the court shall, in accordance with the best interests of the child, enter an appropriate order of disposition. 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 such effort unreasonable; (2) whether or not the department made reasonable efforts to finalize the permanency plan for the child; and (3) identify services required to meet the child's needs: *Provided,* That the department is not required to make reasonable efforts to preserve the family if the court determines any of the conditions set forth in subdivision (7), subsection (a), section five of this article exist. The court shall possess continuing jurisdiction over cases reviewed under this section for so long as a child remains in temporary foster care or, when a child is returned to his or her natural

parents subject to conditions imposed by the court, for so long as the conditions are effective.

(b) The state department shall file a supplementary petition for review with the court within twelve months and every twelve months thereafter for every child that remains in the physical or legal custody of the state department until the child is placed in an adoptive home or returned to his or her parents or placed in legal guardianship or permanently placed with a fit and willing relative.

(c) The state department shall annually report to the court the current status of the placements of children in permanent care and custody of the state department who have not been adopted.

(d) The state department shall file a report with the court in any case where any child in the temporary or permanent custody of the state receives more than three placements in one year no later than thirty days after the third placement. This report shall be provided to all parties and their counsel. Upon motion by any party, the court shall review these placements and determine what efforts are necessary to provide the child with a stable foster or temporary home: *Provided,* That no report shall be provided to any parent or parent's attorney whose parental rights have been terminated pursuant to this article.

(e) The state department shall notify, in writing, the court, the child, if over the age of twelve, the child's attorney, the parents and the parents' attorney forty-eight hours prior to the move if this is a planned move, or within forty-eight hours of the next business day after the move if this is an emergency move, except where such notification would endanger the child or the foster family. This notice shall not be required in any case where the child is in imminent danger in the child's current placement. The location of the child need not be disclosed, but the purpose of the move should be. This requirement is not waived by placement of the child in a home or other residence maintained by a private provider. No notice shall be provided pursuant to this provision to any parent or parent's attorney whose parental rights have been terminated pursuant to this article.

(f) 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 such petition upon a showing that there is a change in circumstance or needs of the child that warrants court review.

§49-6-9. Custody in emergency situations.

(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 three of this article by a law-enforcement officer (1) if the child is abandoned as defined in subsection (g) of this section, or (2) if such

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 such 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 such emergency medical treatment, may be retained in a hospital by a physician against the will of such parents, parent, guardian or custodian, as provided in subsection (c) of this section.

(b) A child taken into protective custody as abandoned under the provisions of this section may be housed by the state department or in any authorized child shelter facility. The authority to hold such child in protective custody as abandoned, absent a petition and proper order granting temporary custody pursuant to section three of this article, shall terminate by operation of law upon the happening of either of the following events, whichever shall first occur: (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 abandonment. No child may be considered abandoned and custody withheld from such child's parents, parent, guardian or custodian presenting themselves, himself or herself in a fit and proper condition and requesting physical custody of such child. No child may be removed from a place of residence as abandoned 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 such arrangements can be made, (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 such 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 such 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 the provisions of this section for emergency medical treatment may be held in a hospital under the care of a physician against the will of such 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 such child in a hospital. The authority to retain a child in protective custody in a hospital as requiring emergency medical treatment shall terminate by operation of law upon the happening of either of the following events, whichever shall first occur: (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 such 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 the provisions of this section, a physician or worker from the state department shall require a typed or legibly handwritten statement from such officer identifying such 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 state department assuming custody of a child pursuant to the provisions of this section shall immediately notify the parents, parent, guardian or custodian of the child of the taking of such 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 such child, such child shall temporarily be placed in such custody.

(f) No child shall be taken into custody under circumstances not justified by this section or pursuant to section three 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) As used in this section:

(1) "Abandoned" means to be 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 such child;

(2) A "law-enforcement officer" means a law-enforcement officer of the department of public safety, a municipality or county sheriff's department;

(3) A "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; such a 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.

§49-6-10. Duties of prosecuting attorney.

It shall be the duty of every prosecuting attorney to fully and promptly cooperate with persons seeking to apply for relief under the provisions of this article in all cases of suspected child abuse and neglect, to promptly prepare applications and petitions for relief requested by such 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.

§49-6-10a. Dispute resolution.

(a) Whenever, pursuant to the provisions of this article, 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.

(b) Nothing in this code shall 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 chapter forty-nine, article six of this code.

§49-6-11. Conviction for offenses against children.

In any case where a person is convicted of an offense described in section twelve, article eight, chapter sixty-one of this code or articles eight-b or eight-d of said chapter against a child 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 such further steps as are required by this article.

§49-6-12. Improvement period in cases of child neglect or abuse.

(a) 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 two of this article only 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 the court further makes a finding, on the record, of the terms of the improvement period;

(3) In the order granting the improvement period, the court (A) orders that a hearing be held to review the matter within sixty days of the granting of the improvement period, or (B) 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

(4) The order granting the improvement period requires the department to prepare and submit to the court an individualized family case plan in accordance with the provisions of section three, article six-d of this chapter;

(b) After finding that a child is an abused or neglected child pursuant to section two of this article, a court may grant a respondent an improvement period of a 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 the court further makes a finding, on the record, of the terms of the improvement period;

(3) In the order granting the improvement period, the court (A) orders that a hearing be held to review the matter within sixty days of the granting of the improvement period, or (B) 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;

(4) 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

(5) The order granting the improvement period requires the department to prepare and submit to the court an individualized family case plan in accordance with the provisions of section three, article six-d of this chapter.

(c) The court may grant an improvement period not to exceed six months as a disposition pursuant to section five of this article when:

(1) The respondent moves in writing for 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 the court further makes a finding, on the record, of the terms of the improvement period;

(3) In the order granting the improvement period, the court (A) orders that a hearing be held to review the matter within sixty days of the granting of the improvement period, or (B) 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;

(4) 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

(5) 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 the provisions of section three, article six-d of this chapter.

(d) When any improvement period is granted to a respondent pursuant to the provisions of 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 such expenses.

(e) When any improvement period is granted to a respondent pursuant to the provisions of 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. Such release shall be

accepted by any such professional or facility regardless of whether the release conforms to any standard required by that facility.

(f) When any respondent is granted an improvement period pursuant to the provisions of this article, the department shall monitor the progress of such person in the improvement period. When the respondent fails to participate in any service mandated by the improvement period, the state department shall initiate action to inform the court of that failure. When the department demonstrates that the respondent has failed to participate in any provision of the improvement period, the court shall forthwith terminate the improvement period.

(g) A court may extend any improvement period granted pursuant to subsections (b) or (c) 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 such extension is otherwise consistent with the best interest of the child.

(h) 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.

(i) 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.

(j) Any hearing scheduled pursuant to the provisions of this section may be continued only for good cause upon a written motion properly served on all parties. When a court grants such continuance, the court shall enter an order granting the continuance which shall specify a future date when the hearing will be held.

(k) 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 said improvement period and shall be held no later than sixty days of the termination of such improvement period.

ARTICLE 6A. REPORTS OF CHILDREN SUSPECTED TO BE ABUSED OR NEGLECTED.

§49-6A-1. Purpose.

It is the purpose of this article, through the complete reporting of child abuse and neglect, to protect the best interests of the child, to offer protective services in order to prevent any further harm to the child or any other children living in the home, to stabilize the home environment, to preserve family life whenever possible and to encourage cooperation among the states in dealing with the problems of child abuse and neglect.

§49-6A-2. Persons mandated to report suspected abuse and neglect.

When 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 or magistrate has reasonable cause to suspect that a child is neglected or abused or observes the child being subjected to conditions that are likely to result in abuse or neglect, such person shall immediately, and not more than forty-eight hours after suspecting this abuse, report the circumstances or cause a report to be made to the Department of Health and Human Resources: Provided, That 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, or cause a report to be made, to the State Police and any law-enforcement agency having jurisdiction to investigate the complaint: Provided, however, That any person required to report under this article who is a member of the staff of a public or private institution, school, facility or agency shall immediately notify the person in charge of such institution, school, facility or agency, or a designated agent thereof, who shall report or cause a report to be made. However, nothing in this article is intended to prevent individuals from reporting 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 such 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.

§49-6A-2a. Notification of disposition of reports.

(a) The Department of Health and Human Resources shall develop and implement a procedure to notify any person mandated to report suspected child abuse and neglect under the provisions of section two of this article, of whether an investigation into the reported suspected abuse or neglect has been initiated and when the investigation is completed.

(b) The Department of Health and Human Resources shall develop and implement the above described procedure on or before the first day of January, two thousand six.

§49-6A-2b. 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 two 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.

§49-6A-3. Mandatory reporting to medical examiner or coroner; postmortem investigation.

Any person or official who is required under section two 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 such a report, the medical

examiner or coroner shall cause an investigation to be made and report his 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.

§49-6A-4. 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.

§49-6A-5. Reporting procedures.

Reports of child abuse and neglect pursuant to this article shall be made immediately by telephone to the local state department child protective service agency and shall be followed by a written report within forty-eight hours if so requested by the receiving agency. The state department shall establish and maintain a twenty-four hour, seven-day-a-week telephone number to receive such calls reporting suspected or known child abuse or neglect.

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 shall be confidential and unless there are pending proceedings with regard thereto shall be destroyed thirty years following their preparation. Reports of known or suspected institutional child abuse or neglect shall be made and received as all other reports made pursuant to this article.

§49-6A-6. Immunity from liability.

Any person, official or institution participating in good faith in any act permitted or required by this article shall be immune from any civil or criminal liability that otherwise might result by reason of such actions.

§49-6A-7. Abrogation of privileged communications.

The privileged quality of communications between husband and wife and between any professional person and his patient or his client, except that between attorney and client, is hereby abrogated in situations involving suspected or known child abuse or neglect.

§49-6A-8. Failure to report; penalty.

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 five 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, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be confined in the county jail not more than ten days or fined not more than one hundred dollars, or both.

§49-6A-9. Establishment of child protective services; general duties and powers; immunity from civil liability; cooperation of other state agencies.

(a) The state 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: *Provided,* That under no circumstances shall 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: *Provided, however,* That 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.

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 such 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 such cross-filing of such person's name limited to the internal use of the department;

(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 fourteen 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) 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 seventy-two 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

(5) In addition to any other requirements imposed by this section, when any matter regarding child custody is pending, the circuit court or family law master 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 law master within the time frames set forth by the circuit court or family law master.

(c) 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.

(d) 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.

(e) 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 such assistance and information as will enable it to fulfill its responsibilities.

(f)(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.

(g) No child protective services caseworker may be held personally liable for any professional decision or action thereupon: arrived at in the performance of his or her official duties as set forth in this section or agency rules promulgated thereupon *Provided,* That 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.

§49-6A-10. Educational programs.

Within available funding and as appropriate, the state department shall conduct educational programs with the staff of the state department, persons required to report, and the general public in order to 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.

§49-6A-11. Statistical 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 the provisions of section one, article seven, chapter forty-nine of this code, 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.

ARTICLE 6D. WEST VIRGINIA CHILD PROTECTIVE SERVICES ACT.

§49-6D-1. Short title.

This article shall be known and cited as the "West Virginia Child Protective Services Act."

§49-6D-2. Purpose and intent.

(a) In pursuit of the purposes of this chapter to provide a comprehensive system of child welfare throughout the state which will (1) assure to each child such care and guidance, preferably in the child's home, as will serve the spiritual, emotional, mental and physical welfare of the child, and (2) preserve and strengthen the family ties wherever possible, while recognizing both the fundamental rights of parenthood and the state's responsibility to assist the family in providing the necessary training and education of all children, the Legislature enacts this article to provide for the protection of the children of this state from abuse and neglect and to provide direction to responsible state officers. This article is enacted in pursuit of the purpose of this chapter and the heretofore expressed intention of the Legislature to provide for the removal of a child from the custody of the child's parents only when the child's welfare cannot be otherwise adequately safeguarded, and is enacted to secure to a child removed from the family a degree of custody, care and control consistent with the child's best interests and the other goals of this chapter, as expressed in section one, article one of this chapter.

(b) In light of this purpose, the Legislature intends to provide for:

(1) The acceptance by the department of referrals or reports of abuse or neglect, both judicial and extra judicial, voluntary or involuntary, and the offering of opportunities by the department whereby parents, guardians or custodians and their children may avail themselves of public and private resources offering programs and services which are primarily preventive and nonpunitive and geared toward a rehabilitation of the home and a treatment of the underlying factors which cause or tend to cause abuse and neglect;

(2) The vigorous and fair assessment and investigation of alleged cases of child abuse or neglect to the end that no child subjected to abuse or neglect shall be left without assistance consistent in all respects with the purposes and goals of this chapter and article;

(3) The thorough and professional diagnosis of cases to determine whether child abuse or neglect exists, whether court action is appropriate, or whether a high risk or danger to children requires emergency services or the initiation of an immediate response;

(4) An assessment of the family, family members and family problems in each case, to identify strengths as well as areas for improvement, and to determine how best to augment the protective services functions of the department with community resources available to and needed by the family, to the end that a plan can be implemented whereby every abused or neglected child in the state will be provided an environment for his or her custody, care and control which offers as normal a family life as practicable, free of abuse or neglect, preferably in the child's own home;

(5) In cases where removal of a child is required, but a termination of parental rights is not ordered, the opportunity for the family to visit and maintain family ties in the family home or in home-like and other conducive surroundings, avoiding, wherever possible, the austere surroundings of a public or private agency with limited time and lack of privacy;

(6) The fulfillment of the state's responsibility to assist the family in a manner consonant with the purposes of this article, even in cases requiring temporary removal of the child, without fear by the citizens that the state's exercise of that responsibility will be unfairly used as a means of terminating family ties;

(7) The prompt and effective termination of parental rights in cases where there is an abject failure of the parents or custodians to reasonably utilize fair, professionally developed and communicated opportunities to end the abuse or neglect.

§49-6D-3. Family case plans for parents of abused or neglected children.

(a) The department shall develop a family case plan for every family wherein a person has been referred to the department after being allowed an improvement period under the provisions of section twelve, article six of this chapter. The department may also prepare a family 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 family case plan is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening those problems. Every family case plan prepared by the department shall contain the following:

(1) A listing of specific, measurable, realistic goals to be achieved;

(2) An arrangement of goals into an order of priority;

(3) A listing of the problems that will be addressed by each goal;

(4) A specific description of how the assigned caseworker or caseworkers and the abusing parent, guardian or custodian will achieve each goal;

(5) A description of the departmental and community resources to be used in implementing the proposed actions and services;

(6) A list of the services, including time-limited reunification services as defined in section three, article one of this chapter, which will be provided;

(7) Time targets for the achievement of goals or portions of goals;

(8) An assignment of tasks to the abusing or neglecting parent, guardian or custodian, to the caseworker or caseworkers and to other participants in the planning process;

(9) A designation of when and how often tasks will be performed; and

(10) The safety of the placement of the child and plans for returning the child safely home.

(b) In cases where the family has been referred to the department by a court under the provisions of this chapter, and further action before the court is pending, the family case plan described in subsection (a) of this section shall be furnished to the court within thirty days after the entry of the order referring the case to the department, and shall be available to counsel for the parent, guardian or custodian and counsel for the child or children. The department shall encourage participation in the development of the family case plan by the parent, guardian or custodian, and, if the child is above the age of twelve years and the child's participation is otherwise appropriate, by the child. It shall be the duty of counsel for the participants to participate in the development of the family case plan. The family case plan may be modified from time to time by the department to allow for flexibility in goal development, and in each such 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 family 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) (1) In addition to the family case plan provided for under the provisions of subsection (b) of this section, the department shall prepare, as an appendix to the family case plan, an expanded "worker's case plan". As utilized by the department under the provisions of this section, the worker's case plan shall consist of the following:

(A) All of the information contained in the family case plan described in subsection (c) of this section;

(B) A prognosis for each of the goals projected in the family case plan, assessing the capacity of the parent, guardian or custodian to achieve the goal and whether available treatment services are likely to have the desired outcome;

(C) A listing of the criteria to be used to assess the degree to which each goal is attained;

(D) A description of when and how the department will decide when and how well each goal has been attained;

(E) If possible, a listing of alternative methods and specific services which the caseworker or caseworkers may consider using if the original plan does not work; and

(F) A listing of criteria to be used in determining when the family case plan should be terminated.

(2) Because the nature of the information contained in the worker's case plan described in subdivision (1) of this subsection may, in some cases, be construed to be negative with respect to the probability of change, or may be viewed as a caseworker's attempt to impose personal values into the situation, or may raise barriers of hostility and resistance between the caseworker and the family members, the worker's case plan shall not be made available to the court or to persons outside of the department, but shall be used by the department for the purpose of confirming the effectiveness of the family case plan or for determining that changes in the family case plan need to be made.

(d) 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 and supervision of satellite centers and attention homes, as well as providing advice and consultation to individuals, agencies and organizations which request such 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 such 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 secretary of the federal department of health and human services for demonstration programs and projects designed to identify, prevent and treat child abuse and neglect.

(e) 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 the secretary thereof, 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.

ARTICLE 6E. EMERGENCY POSSESSION OF CERTAIN ABANDONED CHILDREN.

§49-6E-1. Accepting possession of certain abandoned children.

A hospital or health care facility operating in this state, shall, without a court order, take possession of a child if the child is voluntarily delivered to the hospital or health care facility by the child's parent within thirty days of the child's birth and the parent did not express an intent to return for the child. A hospital or health care facility that takes possession of a child under this section shall perform any act necessary to protect the physical health or safety of the child. In accepting possession of the child, the hospital or health care facility may not require the person to identify themselves, but shall otherwise respect the person's desire to remain anonymous.

§49-6E-2. Notification of possession of abandoned child.

(a) 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 under section one of this article, 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 to the department of health and human resources division of child protective services any information provided by the parent delivering the child. The hospital or health care facility shall refer any inquiries about the child to the department of health and human resources 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 or health care facility, and may contract with private child care agency for the care and placement of the child after the child leaves the hospital or health care facility.

§49-6E-3. Filing petition after accepting possession of abandoned child.

A child of whom the department of health and human resources assumes care, control and custody under the provisions of this article shall be deemed an abandoned child and be treated in all respects as a

child taken into custody under the provisions of section nine, article six of this chapter. Upon taking custody of a child under the provisions of this article, the department with the cooperation of the county prosecuting attorney shall cause a petition to be presented pursuant to the provisions of section three, article six of this chapter. Thereafter, the department shall proceed in compliance with the provisions of article six of this chapter.

§49-6E-4. Affirmative defense for certain prosecutions.

It is an affirmative defense to prosecution under subsection (a), section four, article eight-d, chapter sixty-one of this code if a parent charged under that section delivered the child, for whom the parent is charged, within thirty days of the child's birth.

§49-6E-5. Placement of child for adoption.

The child shall be eligible for adoption as an abandoned child under article four, chapter forty-eight of the code.

ARTICLE 7. GENERAL PROVISIONS.

§49-7-1. Confidentiality of records.

(a) Except as otherwise provided in this chapter or by order of the court, all records and information concerning a child or juvenile which are maintained by the division of juvenile services, the department of health and human resources, a child agency or facility, court or law-enforcement agency shall be kept confidential and shall not be released or disclosed to anyone, including any federal or state agency.

(b) Notwithstanding the provisions of subsection (a) of this section or any other provision of this code to the contrary, records concerning a child or juvenile, except adoption records, juvenile court records and records disclosing the identity of a person making a complaint of child abuse or neglect shall be made available:

(1) Where otherwise authorized by this chapter;

(2) To:

(A) The child;

(B) A parent whose parental rights have not been terminated; or

(C) The attorney of the child or parent;

(3) With the written consent of the child or of someone authorized to act on the child's behalf; or

(4) Pursuant to an order of a court of record: Provided, That the court shall review such record or records for relevancy and materiality to the issues in the proceeding, and may issue an order to limit the examination and use of the records or any part thereof.

(c) In addition to those persons or entities to whom information may be disclosed under subsection (b) of this section, information related to child abuse or neglect proceedings, except information relating to the identity of the person reporting or making a complaint of child abuse or neglect, shall be made available, upon request, to:

(1) Federal, state or local government entities, or any agent of such entities, including law-enforcement agencies and prosecuting attorneys, having a need for such information in order to carry out its responsibilities under law to protect children from abuse and neglect;

(2) The child fatality review team;

(3) Child abuse citizen review panels;

(4) Multidisciplinary investigative and treatment teams; or

(5) A grand jury, circuit court or family law master, upon a finding that information in the records is necessary for the determination of an issue before the grand jury, circuit court or family law master.

(d) In the event of a child fatality or near fatality due to child abuse and neglect, information relating to such fatality or near fatality shall be

made public by the department of health and human resources and to the entities described in subsection (c) of this section, all under the circumstances described in that subsection: Provided, That information released by the department of health and human resources pursuant to this subsection shall not include the identity of a person reporting or making a complaint of child abuse or neglect. For purposes of this subsection, "near fatality" means any medical condition of the child which is certified by the attending physician to be life-threatening.

(e) Except in juvenile proceedings which are transferred to criminal proceedings, law-enforcement records and files concerning a child or juvenile shall be kept separate from the records and files of adults and not included within the court files. Law-enforcement records and files concerning a child or juvenile shall only be open to inspection pursuant to the provisions of sections seventeen and eighteen, article five of this chapter.

(f) Any person who willfully violates the provisions of this section is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than one thousand dollars, or confined in the county or regional jail for not more than six months, or be both fined and confined. A person convicted of violating the provisions of this section shall also be liable for damages in the amount of three hundred dollars or actual damages, whichever is greater.

(g) Notwithstanding the provisions of this section, or any other provision of this code to the contrary, the name and identity of any juvenile adjudicated or convicted of a violent or felonious crime shall be made available to the public.

§49-7-2. Guardianship of estate of child not affected by chapter.

The provisions of this chapter shall 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, at such times and in such 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 any such child is heard.

§49-7-3. Proceedings under chapter not to be evidence against child, or be published; adjudication not deemed conviction and not 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, shall not in any civil, criminal or other cause or proceeding whatever in any court, be lawful or proper evidence against such child for any purpose whatsoever except in subsequent cases under this chapter involving the same child; nor shall 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 shall any such adjudication upon the status of any child by a juvenile court operate to impose any of the civil disabilities ordinarily imposed by conviction, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction, nor shall any such adjudication operate to disqualify a child in any future civil service examination, appointment, or application.

§49-7-4. Placing children in infirmaries.

A child shall not be placed in a county infirmary or similar institution for other than temporary care. When a child is so placed, written notification shall be given to the state department not later than three days after the child enters the infirmary. When a mentally defective child is so placed, notice shall be given to the state commissioner of public institutions.

A superintendent of an infirmary or other institution who fails to notify the state department or the state commissioner of public institutions, as the case may be, shall be guilty of a misdemeanor.

§49-7-5. Support of child placed in home or institution or under guardianship.

If it appears upon the hearing of a petition under this chapter that a person legally liable for the support of the child is able to contribute to the support of such child, the court or judge shall order the person to pay the state department, institution, organization, or private person to whom the child was committed, a reasonable sum from time to time for the support, maintenance, and education of the child.

The court or judge may require the person liable for the support to give reasonable security for payment. Upon failure to give security or to pay, the court or judge may enforce obedience by proceeding as for contempt of court. The court or judge may, on application, and on such notice as the court or judge may direct, from time to time, make such alterations in the allowance as shall appear reasonable and proper.

§49-7-6. Enforcement of order for support from wages.

If a person ordered to pay for the support, maintenance and education of a child pursuant to a proceeding under chapter forty- eight

or forty-nine of this code is employed for wages, salary or commission, the court or judge may order that the sum to be paid by him shall be paid to the guardian, institution, organization or person having custody of such child, out of such wages, salary or commission, and that he shall execute an assignment thereof pro tanto. The court or judge may also order the person to report to the court or judge, from time to time, his place of employment and the amount earned by him. Upon his failure to obey the order of the court or judge, after proper notice and hearing, he may be punished as for contempt of court.

§49-7-7. Contributing to delinquency or neglect of a child.

(a) A person who by any act or omission contributes to, encourages or tends to cause the delinquency or neglect of any child, including, but not limited to, aiding or encouraging any such child to habitually or continually refuse to respond, without just cause, to the lawful supervision of such child's parents, guardian or custodian or to be habitually absent from school without just cause, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than fifty nor more than five hundred dollars, or imprisoned in the county jail for a period not exceeding one year, or both fined and imprisoned.

(b) In addition to any penalty provided under this section and any restitution which may be ordered by the court under article eleven-a of chapter sixty-one, the court may order any person convicted under the provisions of this section to pay all or any portion of the cost of medical, psychological or psychiatric treatment of the child resulting from the act or acts for which the person is convicted, whether or not the child is considered to have sustained bodily injury.

(c) The provisions of this section shall not apply to any parent, guardian or custodian who fails or refuses, or allows another person to fail or refuse, to supply a child under the care, custody or control of such parent, guardian or custodian with necessary medical care, when such medical care conflicts with the tenets and practices of a recognized religious denomination or order of which such parent, guardian or custodian is an adherent or member.

§49-7-8. Proof in cases of contributing to delinquency of a child.

In finding a person guilty of contributing to the delinquency of a child, it shall not be necessary to prove that the child has actually become delinquent, if it appears from the evidence that the accused is guilty of conduct or of an act of neglect or omission of duty on his part toward the child which would tend to bring about or to encourage the delinquency.

§49-7-9. Court may suspend sentence, etc., following conviction under chapter.

A court or judge, upon such convictions as are imposed in accordance with the provisions of this chapter, may:

(1) Suspend the sentence of a person found guilty of contributing to the delinquency of a child.

(2) Stay or postpone the enforcement of execution of sentence.

(3) Release the person from custody.

§49-7-10. Maintenance of delinquent child by convicted person.

If the sentence of the person found guilty is suspended, the court or judge may make it a condition of suspending sentence that the person pay for whatever treatment and care may be required for the welfare of such child, and for its support and maintenance while in the custody of the department, person, or institution, and any other expense that may have resulted from, or be necessary because of, the act or acts of the person found guilty.

§49-7-11. Care of child upon conviction for contributing to its delinquency.

Where a person is found guilty of contributing to the delinquency of a child, the court or judge may place the child in the temporary custody of the state department or of some responsible person or approved institution.

§49-7-12. Custody of child by convicted person.

If the guilty person had custody of the child prior to conviction, the court or judge may, on suspending sentence, permit the child to remain in the custody of the person, and make it a condition of suspending sentence that the person provides whatever treatment and care may be required for the welfare of the child, and shall do whatever may be calculated to secure obedience to the law or to remove the cause of such delinquency.

§49-7-13. Suspension of sentence -- Conditions which may be attached.

The conditions upon which the sentence of a person found guilty of contributing to the delinquency, or to the neglect of any child, may be suspended, may include the furnishing of a good and sufficient bond to the state of West Virginia in such penal sum as the court shall determine, not exceeding one thousand dollars, conditioned upon:

(1) Furnishing whatever treatment and care may be required for the welfare of such child.

(2) Doing whatever may be calculated to secure obedience to the law or to remove the cause of delinquency, or neglect.

(3) Payment of such amount as the court may order, not exceeding twenty dollars per month, for the support, care, and maintenance of the child to whose delinquency the person contributed. The sum shall be expended under the order of the court or judge for the purposes enumerated.

§49-7-14. Same -- Recovery on forfeited bond.

The penalty of a bond given upon suspension of sentence which becomes forfeited shall be recoverable without separate suit. The court or judge may cause citation or summons to issue to the principal and surety, requiring that they appear at a time named by the court or judge, not less than ten nor more than twenty days from the issuance of the summons, and show cause why judgment should not be entered for the penalty of such bond and execution issued against the property of the principal and of the surety. Upon failure to appear, or failure to show sufficient cause, the court shall enter judgment in behalf of the state of West Virginia against the principal and surety in an amount not to exceed the penalty of the bond plus costs.

Any money collected or paid upon an execution, or upon the bond, shall be deposited with the clerk of the court in which the bond was given. The money shall be applied first to the payment of all court costs and then to the treatment, care, or maintenance of the child for whose delinquency conviction was had. If any money so collected is not required for these purposes, it shall be paid within one year into the state treasury.

§49-7-15. Same -- Permissive enforcement of sentence.

If it appear to the satisfaction of the court or judge at any time while a suspension of sentence or stay of execution remains in effect, that the sentence ought to be enforced, the court or judge may enforce the sentence. A jail sentence shall commence from the date upon which the sentence is so ordered to be enforced.

§49-7-16. Same -- Compulsory enforcement of sentence.

If the conditions of suspension are complied with, the sentence shall remain suspended, subject to enforcement upon the violation of any of the conditions imposed. Upon a failure to comply with any of the conditions imposed, the sentence shall be enforced and any bond given to insure the performance of the conditions shall be forfeited.

§49-7-17. Same -- Not to exceed two years.

A sentence shall not be suspended, or final judgment or execution stayed, for a period exceeding two years. At the end of two years from the time of imposition of sentence or sooner in the discretion of the court or judge, the defendant shall be finally released and discharged.

§49-7-18. Interference with disposition of child punishable as contempt of court.

A person who interferes with the direction of disposition of a child in accordance with an order of the court or judge made in pursuance of the provisions of this chapter, or with the state department, or a probation or other officer of the court in carrying out the directions of the court or judge under such an order, shall be subject to punishment as for contempt of court.

§49-7-19. Enticing child from custody.

A person who personally or by agent entices or forcibly removes a child from a custody in which the child was placed under the provisions of this chapter shall be guilty of a misdemeanor, and upon conviction shall be fined not more than one hundred dollars, or be imprisoned not more than six months, or both such fine and imprisonment.

§49-7-20. Penalties.

A person who violates an order, rule, or regulation made under the authority of this chapter, or who violates a provision of this chapter for which punishment has not been specifically provided, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten nor more than one hundred dollars, or confined in jail not less than five days nor more than six months, or both such fine and imprisonment.

§49-7-21. Exercise of powers and jurisdiction under chapter by judge in vacation.

The powers and jurisdiction of the court, under the provisions of this chapter, may be exercised by the judge thereof in vacation.

§49-7-22. Procedure for appealing decisions under chapter.

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.

§49-7-23. Preservation of records.

The proceedings, records, reports, case histories, and all other papers or documents of or received by the state department in the administration of this chapter shall be filed of record and preserved.

§49-7-24. Rules and regulations under chapter.

The secretary of the department of health and human resources shall propose for promulgation legislative rules in accordance with the provisions of chapter twenty-nine-a of this code to implement the provisions of this chapter.

§49-7-25. State department to gather statistics.

The state department shall gather statistics and study legislation and problems connected with neglected and delinquent children, and publish the results from time to time. It shall also make available, so far as possible, to officials, institutions and organizations dealing with these problems, such literature as shall tend to promote the efficiency of child welfare services.

§49-7-26. Duty of prosecuting attorney.

The prosecuting attorney shall render to the state department of welfare, without additional compensation, such 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 such a manner as to permit the state and its citizens to obtain maximum fiscal benefits under federal laws, rules and regulations.

§49-7-27. Emancipation.

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 the provisions of article three, chapter fifty-nine of this code. Upon a showing that such child can provide for his physical and financial well-being and has the ability to make decisions for himself, the court may for good cause shown declare the child emancipated. The child shall thereafter have full capacity to contract in his own right and the parents or custodians shall have no right to the custody and control of such child or duty to provide the child with care and financial support. A child over the age of sixteen years who marries shall be emancipated by operation of law. An emancipated child shall have all of the privileges, rights and duties of an adult, including the right of contract, except that such child shall

remain a child as defined for the purposes of articles five and five-a of this chapter.

§49-7-28. Proceeding by the state department of welfare.

The state department of welfare 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.

§49-7-29. General provisions relating to court orders regarding custody; promulgation of rules.

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 cause to be disseminated no later than the first day of July, two thousand three, form court orders to effectuate provisions of chapter forty-nine of this code which authorize disclosure and transfer of juvenile records between agencies while requiring maintenance of confidentiality, the provisions of Title 142 U. S. C. Section 620, *et seq.*, and Title 42 U. S. C. Section 670, *et seq.*, relating to the promulgation of uniform court orders for placement of minor children and the regulations promulgated thereunder, for use in the magistrate and circuit courts of the state.

Circuit judges and magistrates, upon being supplied the form orders required by the provision of this section, shall act to ensure the proper form order is entered in such case so as to allow federal funding of eligible out-of-home placements.

§49-7-30. Certificate of need not required.

(a) A certificate of need, as provided for in article two-d, chapter sixteen 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, if a summary review is performed in accordance with the provisions of this section.

(b) A summary review of proposed health care facilities or 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, is initiated when the proposal is recommended to the health care cost review authority by the secretary of the department of health and human resources and the secretary has made the following findings:

(1) That the proposed facility or service is consistent with the state health plan;

(2) That the proposed facility or service is consistent with the department's programmatic and fiscal plan for behavioral health services for children with mental health and addiction disorders;

(3) That the proposed facility or service contributes to providing services that are child and family driven, with priority given to keeping children in their own homes;

(4) That the proposed facility or service will contribute to reducing the number of child placements in out-of-state facilities by making placements available in in-state facilities;

(5) That the proposed facility or service contributes to reducing the number of child placements in in-state or out-of-state facilities by returning children to their families, placing them in foster care programs or making available school-based and out-patient services; and

(6) If applicable, that the proposed services will be community-based, locally accessible and provided in an appropriate setting consistent with the unique needs and potential of each child and his or her family.

(c) The secretary's findings required by subsection (b) of this section shall be filed with the secretary's recommendation and appropriate documentation. If the secretary's findings are supported by the accompanying documentation, the proposal shall not require a certificate of need.

(d) Any entity that does not qualify for summary review shall be subject to certificate of need review.

(e) Notwithstanding any other provision of law to the contrary, the provision of regular or therapeutic foster care services does not constitute a behavioral health care facility or a behavioral health care service that would subject it to the summary review procedure established in this section or to the
certificate of need requirements provided in article two-d, chapter sixteen of this code.

§49-7-31.

Repealed by Acts 2007, c. 39, eff. June 3, 2007.

§49-7-32. Juvenile justice database.

The West Virginia Supreme Court of Appeals is responsible for collecting, compiling and disseminating information in the juvenile justice database. Notwithstanding any other provision of this code to the contrary, the court shall grant the Division of Criminal Justice Services access to confidential juvenile records for the limited purpose of the collection and analysis of statistical data: *Provided,* That the

division shall keep the records confidential and not publish any information that would identify any individual juvenile.

§49-7-33. Payment of services.

At any time during any proceedings brought pursuant to articles five and six of this chapter, the court may upon its own motion, or upon a motion of any party, order the West Virginia department of health and human resources to pay for professional services rendered by a psychologist, psychiatrist, physician, therapist or other 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. The West Virginia department of health and human resources shall set the fee schedule for such services in accordance with the Medicaid rate, if any, or the customary rate and adjust the schedule as appropriate. Every such psychologist, psychiatrist, physician, therapist or other health care professional shall be paid by the West Virginia 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 and procedures implemented by the West Virginia department of health and human resources.

§49-7-34. Commission to study residential placement of children.

(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 therefore 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 hereby created within the Department of Health and Human Resources a Commission to Study the Residential Placement of Children. The Commission shall consist of the Secretary of the Department of Heath 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 monthly basis at the call of the chairman.

(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; and

(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.

(e) Beginning July 1, 2005, the Chair, or his or her designee, shall report on the work of the Commission to the legislative Juvenile Task Force during the Legislature's monthly interim meetings.

(f) On or before December 1, 2005, the Commission shall report to the Joint Committee on Government and Finance its conclusions and recommendations, including an implementation plan whereby:

(1) Out-of-state placements shall be reduced by at least ten per cent 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.

§49-7-35. Pilot program for the placement of children four to ten years of age in foster care; requirements.

(a) This section shall be known as "Jacob's Law."

(b) The Legislature finds that:

(1) The needs of young children are not always adequately addressed when the Department of Health and Human Resources is required to take custody of them;

(2) Often the behavior of young children taken from their homes pose special challenges for the department and other individuals who are charged with their care;

(3) The department must take extraordinary precautions to prevent serious emotional damage to these children; and

(4) The department has resources within the department that can be redirected to meet many of the needs of the program required by this section.

(c) The department shall choose four regions in which to implement a two-year pilot program to address children ages four through ten immediately after removal from their homes by the Child Protective Service Division due to child abuse and neglect and who, by the nature of their removal, are in crisis.

(d) The program shall:

(1) Include early intervention for children in crisis;

(2) Provide for the development of a short-term and an ongoing long-term plan for each child;

(3) Provide that each child is evaluated for emotional and physical trauma and other medical, educational, dental and other needs, in a timely manner;

(4) Require that each child be assigned an independent advocate through the community advocacy programs as staff or volunteers are made available; and

(e) The plans required by subsection (d) of this section shall:

(1) Address abandonment, separation anxiety, post traumatic stress and other emotional and physical needs of the child;

(2) Be developed by appropriately trained professional staff;

(3) Require the participation of a child care agency, the Department of Education, community programs and other appropriate agencies providing services to children ages four through ten; and

(4) Be developed to meet the ongoing emotional needs of each child.

(f) The short-term plan required by subsection (d) of this section shall address the child's needs for the first thirty days under the department's supervision.

(g) During the initial evaluation period, and when the child is being placed into foster care, the department shall when possible place the child into an enhanced specialized foster care home. Providers offering enhanced specialized foster care homes shall include crisis intervention staffed with trained and educated professional individuals and specialized training on how to manage a child's reaction to trauma and the crisis of being removed from the custody of a parent, parents or other guardians, with emphasis on the child's emotional needs. This program shall limit the number of children in one location to three foster children at a time. A greater number is permitted if all of the children are siblings.

(h) After a short-term and long-term plan is developed, the department shall:

(1) Provide the foster family with training and education in the plan;

(2) Evaluate the child and foster parent or parents on the interaction between the child and parents;

(3) Train the foster parent on how to respond to the child's emotional crisis and how to understand the child's crisis reactive behavior; and

(4) Evaluate the foster family on its understanding of the need for this early intervention and the need for appropriate crisis management.

(i) The providers of enhanced specialized foster care services shall:

(1) Create and train a team to provide crisis intervention;

(2) Provide a call system for the enhanced specialized foster parents and the child so that the enhanced specialized foster parents or the child can speak to a team member or other appropriately trained professional during a crisis; and

(3) Require a crisis team member to visit the home if unable to adequately resolve the crisis over the telephone and to do a follow up visit within two days to meet with the enhanced specialized foster parents and child, individually, to determine the crisis was satisfactorily resolved.

(j) The department shall develop a system to evaluate the pilot program for outcomes and standards of care and report back to public, private and community partners. In addition the evaluation shall be reported to the Joint Committee on Government and Finance or other designated committees every six months for two years. The evaluation shall be contracted by the department through an external entity who shall:

(1) Establish measurable outcomes for purposes of evaluation; (2) Collect, analyze and report data quarterly and annually;

(3) Identify trends and make recommendations for program improvement;

(4) Conduct an analysis of the impact of the pilot program on the child's emotional stability including the number of placements that the child experiences and the basis for required moves;

(5) Provide technical assistance and training to the pilot program;

(6) Provide leadership in the development of data collection and outcome reporting models;

(7) Provide feedback for quality improvement to those responsible for the pilot program; and

(8) Monitor, research and present best practices through everyday communication and training opportunities.

Chapter 7

RULES OF PROCEDURE FOR CHILD ABUSE AND NEGLECT PROCEEDINGS

(including amendments through 12/31/11)

Chapter Contents

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 § 49-6-1, *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 § 49-6-2 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 § 49-6-5 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 § 49-6-1;

(e) "Civil protection proceedings" shall mean proceedings instituted by the filing of a civil petition under W. Va. Code § 49-6-1;

(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 § 49-6-1, *et seq*.;

(g) "Preliminary hearing" shall mean the hearing contemplated by W.Va. Code § 49-6-3(b) 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; and (4) whether efforts should be made by the Department to facilitate the child's return, and if so, what efforts should be made;

(h) "Permanency hearing" shall mean the hearing contemplated by W.Va. Code § 49-6-8 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 § 49-6-5 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 §§ 49-6-2(b), 49-6D-3 and 49-6-12 following the grant of an improvement period;

(k) "Guardian ad Litem" means the attorney appointed to represent the child;

(l) "Parent" or "parents" means the child's natural parent(s), custodian(s), or legal guardian(s);

(m) "Parties" means the petitioner, the respondent or respondents, and the child or children;

(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.

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 § 49-6A-2a 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 § 49-6-5b 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 § 49-6-3(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 § 49-7-1; 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 § 49-6A-2a 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 § 49-6-1, *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 §49-6-1(a), the Department and/or a reputable person may file a petition to initiate a civil protection 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 civil protection 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 civil 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 § 49-6-1, *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 § 49-7-1 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(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(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(s);

(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(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(s) intend(s) to introduce evidence, the respondent(s) 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(s) and which the respondent(s) intend(s) 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(s), which the respondent(s) intend(s) to introduce as evidence in chief at the trial or which were prepared by a witness whom the respondent(s) intend(s) 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(s) intend(s) 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 § 49-6-2(c) and -2(e). 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, 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 court order shall be governed by the provisions of W. Va. Code §§ 49-6-3(c) and 49-6-9.

(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 § 49-6-3(a).

(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 § 49-1-3(7), 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 § 49-6-3(b). 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 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.

(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 mutual 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 § 49-6-3, 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 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 § 49-6-1 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 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 § 49-6-3, 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 civil protection 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 § 49-6-1 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 civil protection 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 § 49-6-3(a).

(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 § 49-6-3(a), the court may transfer temporary custody as provided in W. Va. Code § 49-6-3(b) 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 §§ 49-6-2(b) and 49-6-12(a). 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 § 49-6D-3. 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 § 49-6-12(a), 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(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 § 49-6-12(a), 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 § 49-6-3(a), 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 sixty (60) 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 § 49-6-2(c) and -2(d).

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(s') problems, conduct, or condition; and

(2) A statement of respondent's(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 § 49-6-2(c). 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 §§ 49-6-5 and 49-6D-3, 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 under W. Va. Code § 49-6D-3. 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 and availability of suggested services;

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

(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.

(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

(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 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:

(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(s')/respondent's(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;

(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 16 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

(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 § 49-6-12(b) and then no later than sixty (60) days.

(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 §§ 49-6-5 and 49-6D-3 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(s) is/are present at the hearing but fail(s) to contest termination of parental rights, the court shall determine whether the parent(s) fully understand(s) the consequences of a termination of parental rights, is/are aware of possible less drastic alternatives than termination, and was/were informed of the right to a hearing and to representation by counsel.

(2) If the parent(s) is/are not present in court and has/have not relinquished parental rights but has/have failed to contest the termination, the petitioner shall make a prima facie showing that there is a legal basis for the termination of parental rights and the court shall determine whether the parent(s) was/were given proper notice of the proceedings.

(3) If the parent(s) is/are present in court and voluntarily has/have signed a relinquishment of parental rights, the court shall determine whether the parent(s) fully understand(s) the

consequences of a termination of parental rights, is/are aware of possible less drastic alternatives than termination, and was/were informed of the right to a hearing and to representation by counsel.

(4) If the parent(s) is/are not present in court but has/have 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(s) was/were thoroughly advised of and understood the consequences of a termination of parental rights, is/are aware of possible less drastic alternatives than termination, and was/were 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 § 49-6-5. 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 § 49-6-5a, 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

(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 §§ 49-6-5(c) and 49-6-12(b) or (c), 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 § 49-6D-3. 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 § 49-6-12(b) and -12(c), 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(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 sixty (60) 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 § 49-6-5(c). 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.

(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 and services needed in the future;

(3) Compliance by the respondent(s) 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(s) 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;

(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 16 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) 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(s) 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 16 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.

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 §§ 49-2-14 and 49-6-8. 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 § 49-6-5(a)(6) shall not be modified after the child has been adopted. 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 § 49-6-1, *et seq.*, are governed by Revised 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. Appeals may proceed without a transcript, as deemed appropriate by the Supreme Court. 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 civil protection petition is filed, the court shall cause to be convened a meeting of a multi-disciplinary treatment team assigned to the case, said multi-disciplinary treatment team to include those members mandated pursuant to W. Va. Code § 49-5D-3, 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 § 49-5D-2, the multi-disciplinary treatment team created pursuant to W. Va. Code § 49-5D-3, and the multidisciplinary community over-sight team created pursuant to W. Va. Code § 49-1-3(9) 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 §§ 49-5D-2(d), 49-5D-3(d), 49-5D-6, 49-7-1, and any other relevant provisions of law. Any multi-disciplinary 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 civil protection 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 § 49-7-1, 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 § 49-2B-2(x).

Chapter 8

CASELAW DIGEST CASES

Full text of all listed cases can be found on digital version of Benchbook.

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)

Alireza D. v. Kim Elaine W., 198 W. Va. 178, 479 S.E.2d 688 (1996)

Alonzo v. Jacqueline F., 191 W. Va. 248, 445 S.E.2d 189 (1994)

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, 2011 WL 5923517 (W. Va.)

Ault v. Waid, 654 F. Supp. 2d 465 (N.D.W.Va. 2009)

Austin G., In re, 220 W. Va. 582, 648 S.E.2d 346 (2007)

B.B., In re, 224 W. Va. 647, 687 S.E.2d 746 (2009)

Belinda Kay C. v. John David C., 193 W. Va. 196, 455 S.E.2d 565 (1995)

Bennett v. Warner, 179 W. Va. 742, 372 S.E.2d 920 (1988)

Beth Ann B., In re, 204 W. Va. 424, 513 S.E.2d 472 (1998)

Betty J.W., In the Interest of, 179 W. Va. 605, 371 S.E.2d 326 (1988)

Billy Joe M., In re, 206 W. Va. 1, 521 S.E.2d 173 (1999)

Billy Lee C. (DHHR v.), 199 W. Va. 541, 485 S.E.2d 710 (1997)

Boarman v. Boarman, 190 W. Va. 533, 438 S.E.2d 876 (1993)

Bobby Lee B., In re, 218 W. Va. 689, 629 S.E.2d 748 (2006)

Boley (DHS v.), 178 W. Va. 179, 358 S.E.2d 438 (1987)

Bowens v. Maynard, 174 W. Va. 184, 324 S.E.2d 145 (1984)

Brandon L. (State ex rel.) v. Moats, 209 W. Va. 752, 551 S.E.2d 674 (2001)

Brandon Lee B., In re, 211 W. Va. 587, 567 S.E.2d 597 (2001)

Brandon Lee H.S., In re, 218 W. Va. 724, 629 S.E.2d 783 (2006)

Brenda C. (DHHR v.), 197 W. Va. 468, 475 S.E.2d 560 (1996)

Brian D., In the Matter of, 194 W. Va. 623, 461 S.E.2d 129 (1995)

Brian James D., In re, 209 W. Va. 537, 550 S.E.2d 73 (2001)

Brianna Elizabeth M., In re, 192 W. Va. 363, 452 S.E.2d 454 (1994)

Bryanna H., In the Matter of, 225 W. Va. 659, 695 S.E.2d 899 (2010)

Burdette v. Lobban, 174 W. Va. 120, 323 S.E.2d 601 (1984)

C.N.S. (State v.), 173 W. Va. 651, 319 S.E.2d 775 (1984)

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)

Carter v. Carter, 196 W. Va. 239, 470 S.E.2d 193 (1996)

Cecil T., In re, 2011 WL 864950 (W. Va.)

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)

Chastity D. (State ex rel. DHHR and) v. Hill, 207 W. Va. 358, 532 S.E.2d 358 (2000)

Cheryl M. (State ex rel. DHS v.), 177 W. Va. 688, 356 S.E.2d 181 (1987)

Chevie V., In re, 226 W. Va. 363, 700 S.E.2d 815 (2010)

Chris Richard S. (State ex rel.) v. McCarty, 200 W. Va. 346, 489 S.E.2d 503 (1997)

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)

Clark (DHHR v.), 209 W. Va. 102, 543 S.E.2d 659 (2000)

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004)

Czaja (Wright) v. Czaja, 208 W. Va. 62, 537 S.E.2d 908 (2000)

Daniel D., In re, 211 W. Va. 79, 562 S.E.2d 147 (2002)

Danielle T., In re, 195 W. Va. 530, 466 S.E.2d 189 (1995)

Darla B., In the Interest of, 175 W. Va. 137, 331 S.E.2d 868 (1985)

David L. (DHHR v.), 192 W. Va. 663, 453 S.E.2d 646 (1994)

David M. v. Margaret M., 182 W. Va. 57, 385 S.E.2d 912 (1989)

Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L.Ed.2d 224 (2006)

DeBerry (State v.), 185 W. Va. 512, 408 S.E.2d 91 (1991)

Dejah Rose P., In re, 216 W. Va. 514, 607 S.E.2d 843 (2004)

Delaney (State v.), 187 W. Va. 212, 417 S.E.2d 903 (1992)

Desarae M., In re, 214 W. Va. 657, 591 S.E.2d 215 (2003)

Destiny Asia H., In re, 211 W. Va. 481, 566 S.E.2d 618 (2002)

DHHR (State ex rel.) v. Yoder, 226 W. Va. 520, 703 S.E.2d 292 (2010)

Diva P. (State ex rel.) v. Kaufman, 200 W. Va. 555, 490 S.E.2d 642 (1997)

Doris S. (DHHR v.), 197 W. Va. 489, 475 S.E.2d 865 (1996)

E.H. v. Matin, 201 W. Va. 463, 498 S.E.2d 35 (1997)

Edward B., In re, 210 W. Va. 621, 558 S.E.2d 620 (2001)

Edward Charles L., Sr. (State v.), 183 W. Va. 641, 398 S.E.2d 123 (1990)

Elizabeth A., In re, 217 W. Va. 197, 617 S.E.2d 547 (2005)

Elizabeth F., In re, 225 W. Va. 780, 696 S.E.2d 296 (2010)

Elizabeth Jo "Beth" H., In re, 192 W. Va. 656, 453 S.E.2d 639 (1994)

Elmer Jimmy S. v. Kenneth B., 199 W. Va. 263, 483 S.E.2d 846 (1997)

Emily B., In re, 208 W. Va. 325, 540 S.E.2d 542 (2000)

Emily G., In re, 224 W. Va. 390, 686 S.E.2d 41 (2009)

Erica C., In re, 214 W. Va. 375, 589 S.E.2d 517 (2003)

Faith C., In re, 226 W. Va. 188, 699 S.E.2d 730 (2010)

Ferguson (State v.), 216 W. Va. 420, 607 S.E.2d 526 (2004)

Fox (State ex rel. DHHR v.), 218 W. Va. 397, 624 S.E.2d 834 (2005)

Frances J.A.S., In re, 213 W. Va. 636, 584 S.E.2d 492 (2003)

George B.W. (State ex rel.) v. Kaufman, 199 W. Va. 269, 483 S.E.2d 852 (1997)

George Glen B., Jr., In re, 207 W. Va. 346, 532 S.E.2d 64 (2000)

George Glen B., Jr., In the Matter of, 205 W. Va. 435, 518 S.E.2d 863 (1999)

Graham (State v.), 208 W. Va. 463, 541 S.E.2d 341 (2000)

Grandparent Visitation of Cathy L.M. v. Mark Brent R., In re, 217 W. Va. 319, 617 S.E.2d 866 (2005)

Haller v. Haller, 198 W. Va. 487, 481 S.E.2d 793 (1996)

Harley C., In re, 203 W. Va. 594, 509 S.E.2d 875 (1998)

Hewitt v. DHHR, 212 W. Va. 698, 575 S.E.2d 308 (2002)

Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979)

Hisman (W. Va. DHHR ex rel.) v. Angela D., 203 W. Va. 335, 507 S.E.2d 698 (1998)

Hunter H., In re, 715 S.E.2d 397 (W. Va. 2011)

Isaiah A., In re, 2010 WL 1488012 (W. Va.)

Isferding (State ex rel.) v. Canady, 199 W. Va. 209, 483 S.E.2d 555 (1997)

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)

Jamie Nicole H., In the Interest of, 205 W. Va. 176, 517 S.E.2d 41 (1999)

Jamison Nicholas C., In re Adoption of, 219 W. Va. 729, 639 S.E.2d 821 (2006)

Jason S., In re, 219 W. Va. 485, 637 S.E.2d 583 (2006)

Jeanette H. (State ex rel.) v. Pancake, 207 W. Va. 154, 529 S.E.2d 865 (2000)

Jeffrey R.L., In re, 190 W. Va. 24, 435 S.E.2d 162 (1993)

Jessica G., In the Interest of, 226 W. Va. 17, 697 S.E.2d 53 (2010)

Jessica M. (State v.), 191 W. Va. 302, 445 S.E.2d 243 (1994)

John D.K. v. Polly A.S., 190 W. Va. 254, 438 S.E.2d 46 (1993)

Jonathan G., In re, 198 W. Va. 716, 482 S.E.2d 893 (1996)

Jonathan Michael D., In re, 194 W. Va. 20, 459 S.E.2d 131 (1995)

Jonathan P., In the Matter of, 182 W. Va. 302, 387 S.E.2d 537 (1989)

Joseph A., In re, 199 W. Va. 438, 485 S.E.2d 176 (1997)

Joseph G., In re, 214 W. Va. 365, 589 S.E.2d 507 (2003)

Julie G. (State v.), 201 W. Va. 764, 500 S.E.2d 877 (1997)

Kaitlyn P., In re, 225 W. Va. 123, 690 S.E.2d 131 (2010)

Kasey M., In re, 2011 WL 5830325 (W. Va.)

Katelyn T., In re, 225 W. Va. 264, 692 S.E.2d 307 (2010)

Katherine B.T. v. Jackson, 220 W. Va. 219, 640 S.E.2d 569 (2006)

Katie S. and David S., In re, 198 W. Va. 79, 479 S.E.2d 589 (1996)

Kennedy v. Frazier, 178 W. Va. 10, 357 S.E.2d 43 (1987)

Kenneth B. v. Elmer Jimmy S., 184 W. Va. 49, 399 S.E.2d 192 (1990)

Kristin Y., In re, 227 W. Va. 558, 712 S.E.2d 55 (2011)

Kristopher E., In re, 212 W. Va. 393, 572 S.E.2d 916 (2002)

Kristopher O. v. Mazzone, 227 W. Va. 184, 706 S.E.2d 381 (2011)

Kutil (State ex rel.) v. Blake, 223 W. Va. 711, 678 S.E.2d 310 (2009)

Kyiah P., In re, 213 W. Va. 424, 582 S.E.2d 871 (2003)

La Rea Ann C.L. (W. Va. DHS v.), 175 W. Va. 330, 332 S.E.2d 632 (1985)

Lacey P., In re, 189 W. Va. 580, 433 S.E.2d 518 (1993)

Lindsey C., In the Matter of, 196 W. Va. 395, 473 S.E.2d 110 (1995)

Lomholt v. Iowa, 327 F.3d 748 (8th Cir. 2003)

Lowe (State ex rel.) v. Knight, 209 W. Va. 134, 544 S.E.2d 61 (2000)

Maranda T., In re, 223 W. Va. 512, 678 S.E.2d 18 (2009)

Mark M., III, In re, 201 W. Va. 265, 496 S.E.2d 215 (1997)

Mary Ann P. v. William R.P., 197 W. Va. 1, 475 S.E.2d 1 (1996)

Mary D. v. Watt, 190 W. Va. 341, 438 S.E.2d 521 (1992)

Maryland v. Craig, 497 U.S. 836, 110 S. Ct. 3157 (1990)

McCormick v. Allstate Insurance Company, 197 W. Va. 415, 475 S.E.2d 507 (1996)

Mechling (State v.), 219 W. Va. 366, 633 S.E.2d 311 (2006)

Megan B., In the Matter of, 224 W. Va. 450, 686 S.E.2d 590 (2006)

Micah Alyn R., In the Interest of, 202 W. Va. 400, 504 S.E.2d 635 (1998)

Michael M. (State v.), 202 W. Va. 350, 504 S.E.2d 177 (1998)

Michael Ray T., In re, 206 W. Va. 434, 525 S.E.2d 315 (1999)

Michael S., Jr., In re, 218 W. Va. 1, 620 S.E.2d 141 (2005)

Misty D.G., In re Marriage of, 221 W. Va. 144, 650 S.E.2d 243 (2007)

Mongold (State v.), 220 W. Va. 259, 647 S.E.2d 539 (2007)

N.A., In re, 227 W. Va. 458, 711 S.E.2d 280 (2011)

Nancy Viola R. v. Randolph W., 177 W. Va. 710, 356 S.E.2d 464 (1987)

Napoleon S. v. Walker, 217 W. Va. 254, 617 S.E.2d 801 (2005)

Nelson B., In re, 225 W. Va. 680, 695 S.E.2d 910 (2010)

Ortner v. Pritt, 187 W. Va. 494, 419 S.E.2d 907 (1992)

Pancake (State ex rel. WVDHHR v.), 224 W. Va. 39, 680 S.E.2d 54 (2009)

Paul B. (State ex rel.) v. Hill, 201 W. Va. 248, 496 S.E.2d 198 (1997)

Peggy F. (DHS v.), 184 W. Va. 60, 399 S.E.2d 460 (1990)

R.J.M., In re, 164 W. Va. 496, 266 S.E.2d 114 (1980)

R.O., In the Matter of, 180 W. Va. 190, 375 S.E.2d 823 (1988)

Randy H., In re, 220 W. Va. 122, 640 S.E.2d 185 (2006)

Rebecca K.C., In re, 213 W. Va. 230, 579 S.E.2d 718 (2003)

Renae Ebony W., In the Interest of, 192 W. Va. 421, 452 S.E.2d 737 (1994)

Richard P., In re, 227 W. Va. 285, 708 S.E.2d 479 (2010)

Robert Darrell O. v. Theresa Ann O., 192 W. Va. 461, 452 S.E.2d 919 (1994)

Ronald Lee Willis, In the Matter of, 157 W. Va. 225, 207 S.E.2d 129 (1973)

Rose L. (State ex rel.) v. Pancake, 209 W. Va. 188, 544 S.E.2d 403 (2001)

Rozas v. Rozas, 176 W. Va. 235, 342 S.E.2d 201 (1986)

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)

S.C., In the Interest of, 168 W. Va. 366, 284 S.E.2d 867 (1981)

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)

Shanee Carol B., In re, 209 W. Va. 658, 550 S.E.2d 636 (2001)

Shrewsbury (State v.), 213 W. Va. 327, 582 S.E.2d 774 (2003)

Skyelan H., In re, 219 W. Va. 661, 639 S.E.2d 753 (2006)

Smith (DHHR v.), 218 W. Va. 480, 624 S.E.2d 917 (2005)

Snodgrass (State v.), 207 W. Va. 631, 535 S.E.2d 475 (2000)

Stacy (State v.), 179 W. Va. 686, 371 S.E.2d 614 (1988)

Stephen Tyler R., In re, 213 W. Va. 725, 584 S.E.2d 581 (2003)

Summer D., In re, 222 W. Va. 219, 664 S.E.2d 104 (2008)

T.C. (State v.), 172 W. Va. 47, 303 S.E.2d 685 (1983)

Tammy B. (DHS v.), 180 W. Va. 295, 376 S.E.2d 309 (1988)

Taylor B., In the Matter of, 201 W. Va. 60, 491 S.E.2d 607 (1997)

Tessla N.M., In re, 211 W. Va. 334, 566 S.E.2d 221 (2002)

Thaxton, In re, 172 W. Va. 429, 307 S.E.2d 465 (1983)

Tiffany Marie S., In the Interest of, 196 W. Va. 223, 470 S.E.2d 177 (1996)

Tiffany P., In re, 215 W. Va. 622, 600 S.E.2d 334 (2004)

Tonjia M., In re, 212 W. Va. 443, 573 S.E.2d 354 (2002)

Tracy C., In re, 205 W. Va. 602, 519 S.E.2d 885 (1999)

Travis W., In re, 206 W. Va. 478, 525 S.E.2d 669 (1999)

Treadway (State ex rel.) v. McCoy, 189 W. Va. 210, 429 S.E.2d 492 (1993)

Tristen K. (State ex rel.) v. Janes, Memorandum Order, No. 35718

Tyler D., In re, 213 W. Va. 149, 578 S.E.2d 343 (2003)

Virginia M. (State ex rel.) v. Virgil Eugene S., 197 W. Va. 456, 475 S.E.2d 548 (1996)

Walker v. West Virginia Ethics Com'n, 201 W. Va. 108, 492 S.E.2d 167 (1997)

William John R., In re, 200 W. Va. 627, 490 S.E.2d 714 (1997)

Wood (State v.), 194 W. Va. 525, 460 S.E.2d 771 (1995)

Wright (State ex rel.) v. Stucky, 205 W. Va. 171, 517 S.E.2d 36 (1999)

Zachary William R., In the Matter of, 203 W. Va. 616, 509 S.E.2d 897 (1998)