

“Family Law Basics in West Virginia”

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1. PROCEDURE AND PROCESS

Ashton Bias and Brittany Ranson Stonestreet

➤ Forms –

You want to file something in Family Court. Where do you start?

- All family court forms are made available to you at the Circuit Clerk's office in your county.
- Additionally, you can find all Family Court forms at www.courtswv.gov by simply going to the website and clicking the "Family Courts" tab. Here, you will be able to fill out the forms on your computer and print them, or, you can print the forms and handwrite on them if you choose.
- You will receive instruction packet that is intended to help you fill out the forms. The instruction packets are thick, but do not be intimidated, these are not forms you are expected to fill out.

HERE ARE HELPFUL TIPS FOR YOUR CLIENTS TO KEEP IN MIND:

- **Read the forms and the instructions that come with them very carefully. Fill out as much of the forms as possible.** The more the Judge knows about your case, the more likely they can help you.
- Once forms are filled out, you MUST file all forms with the Circuit Clerk's office and have them served on the opposing party.
- Frankly - anything that is "FILED" – MUST go to the Circuit Clerk and the opposing party.
- Unless you are granted a fee waiver, you WILL have to pay certain fees at the time of filing your petition—we will discuss the cost of those later.
- *What if the forms specifically ask me to attach something like a paystub?* Some of the documents you will be filing, like a financial statement, require you to attach certain things, which we will talk about shortly. The form will specifically list what

needs attached. You should attach as much as possible. If you cannot obtain something at the time you originally filed, then you should file it later as soon as you obtain it.

- *Where can I find a notary?*
 - Circuit Clerk's office
 - Banks
 - Post offices
 - Library

Focusing on Divorce →

➤ **Initial Documents Filed –**

○ **Petition for Divorce**

- Document contains questions to make sure you're filing in the right state and county, and that the Judge has the ability (or "jurisdiction") to grant you a divorce.
 - *Can you get a divorce in WV?*
 - You or your spouse lived here for at least 1 year prior to filing OR
 - You now live in WV and you were married in WV.
 - *Are you filing in the right county?*
 - County where your spouse now resides
 - County where you and the other party last lived together.
 - OR – if spouse is out of state or the address is unknown, you can also file in the county where you currently live.
 - *What constitutes Date of Separation?*
 - The term "date of separation" refers to the date when you and your spouses decide to **end the marriage with no intent to reconcile.**
 - This date is often a matter of interpretation.
 - It can be the date of filing the petition.
 - It can be a year prior to filing the petition—depending on the circumstances.

- You CANNOT still be having sexual relations and be separated; however, you CAN still be living in the same household.
- Identify your grounds for divorce.
 - Fault vs. no-fault. You will have the opportunity to check these boxes on the form.
- Tell the Judge what you want (“relief”)
 - what assets you want each party to have
 - what debts you want each party to pay
 - Whether you are requesting support
 - Custody, etc.
- **Answer** –
 - Once the Petition for Divorce is filed, the other side, also known as the “Respondent,” will usually have 20 days to file an Answer to your Petition from the date he or she is served.
 - Some exceptions – 30 days to Answer such as when serving an out of state party, or where an attorney accepts service for client.
 - “Answer” forms are also available at the Circuit Clerk’s office or on the Supreme Court website.
 - An Answer generally “Admits” or “denies” the allegations in the Petition for Divorce.
- **Financial Statement:** In most family court cases, but definitely in all divorce cases, you will need to file a financial statement with your petition. See Rule 9(a) WV R. Prac. and. Proc. for Fam. Ct. (FS required in all 51-2A-2 cases). This statement discloses your income, your assets and debts and a value for each. It is very important that this statement is accurate and complete.
 - What are things I am required to attach?
 - Three most recent paystubs
 - Last 2 years Tax Returns

- Self-employed party – a copy of a current financial statement showing gross income, expenses and net income
 - Copies of any invoices or receipts for extraordinary medical expenses for party or a child, expenses for a child’s special needs, and childcare expenses.
- In divorce – also may want to attach:
 - Statements for accounts or debts as of your date of separation
 - Proof of bills for your Monthly Expenses
- **Civil Case Information Statement** – gives the court important information about the case and the parties.
- **Vital Statistics Form** – Form to update WV’s vital statistics records on marriages/divorces.
- If children are involved, you will also have to file the following (available at the Circuit clerk’s office):
 - A **parenting plan**- proposal for how you and the other party will divide time with the children. Important to have DETAILS! Even if getting along now, think you can work it out, the parenting plan is a good “default” schedule if there is disagreement in the future.
 - **Parenting Worksheet**. Describes the percentage of caretaking and decision making you and the other party have performed over a period of time and other information the court may need to set a parenting schedule.
 - **Application for child support and income withholding services from the BCSE.** (must also fill out if requesting spousal support)
- **Can a client go back to their maiden name?**
 - Yes. *But they don’t *have* to.
 - You must request it in the Petition.

- Call the Judge's office to ensure you bring all the necessary documentation.
- **MUST BRING:** social security card and birth certificate.
- **IF CHILDREN INVOLVED, you must attend a parent education class.** The cost is \$25.00 unless the fee has been waived. A certificate showing you've attended must be in your court file BEFORE your first hearing. You can call the Circuit Clerk's Office for dates and times and to register.
- **Filing Fee Costs** (*These are subject to change*)
 - Divorce **\$135.00**
 - Modification of Family Court Order **\$85.00**
 - Expedited Modification of Child Support **\$35.00**
 - Contempt **\$0.00**
 - All other new family court filings are **\$200**
 - Petition to Establish Custodial Responsibility/Paternity **\$200.00**
 - Guardianship **\$200.00**
 - Grandparent Visitation **\$200.00**
 - *What if I cannot afford the filing fee?* You might qualify for a Financial Fee Waiver. You can get one of these forms at the Circuit Clerk's office.
- Some Counties in WV have transitioned to electronic filing: (***Make sure to mention if your surrounding counties are E-filing!***)

Berkeley	Marion
Braxton	Mason
Calhoun	McDowell
Clay	Monroe
Gilmer	Morgan
Hampshire	Pendleton
Hardy	Roane
Jackson	Summers
Jefferson	Wayne

○ **Assignment of the Judge**

- Once your Petition for Divorce has been filed, your case will be assigned to a Family Court Judge.
- If you have previous cases involving same parties before a particular family court judge – your case will generally be reassigned to that judge.
- Example – DVP filed. Divorce previously filed then dismissed.
- *Can I choose my Judge?* The answer is no.
- Which Judge you are assigned to is completely random, unless there is only one Judge in your county, of course.

○ **Service on Opposing Party (“Respondent”)**

- Certified Mail - \$20 fee
- Sherriff - \$25 fee
- **Some fees above may be different if e-filing county*
- Personal Service by process server or third party
 - Must be 18 years of age or older and not a party (not you!)
 - Person will then complete and affidavit that will be filed with circuit clerk’s office.
- Acceptance of service (opposing party can pick up at the Circuit Clerk’s office)
- *What if I don’t know where spouse resides or spouse is out of state and won’t sign return receipt for certified mail?*
 - Affidavit of Non-Residency or Unknown Residency
 - NOTE: limits court’s ability to award child support or spousal support. OR limits court’s ability to grant divorce if only ground is irreconcilable differences (must be admitted by both parties).
 - Deputy Clerk will complete an Order of Publication
 - You will then need to publish it in a newspaper for two weeks in a row. If opposing party’s address is unknown, published in local newspaper. If out of state, publish in

county with last known address.

So, you've filled out your forms. You've filed your forms and attachments. Your spouse has been served. Your case has been assigned a Judge, what's next?

➤ **Scheduling a hearing**

- The next step in your case is a hearing before the family court judge.
- WHAT DO I WEAR AND WHAT SHOULD I BRING/NOT BRING TO COURT?
 - First impressions are important!
 - Ensure that you dress professionally to appear before the court for your hearing. Dress as if you are going to church, work (if you work in a professional setting), or a nice social function.
 - AVOID: ripped jeans, hats, headwear (such as headbands, sunglasses on your head, doo-rags, flowers clipped in hair, etc.), t-shirts, clothing with inappropriate language or images, shorts, sleeveless tops, camisoles or tank tops, sleepwear, flip-flops, and slippers.
 - **Do NOT bring:** knives, guns, chemical sprays, metal nail files, weapons of any kind, any electronic or recording devices, including cell phones or smart watches. **You will have to go through a metal detector.**
 - **Do bring:** ID, wallet/purse, any important documents that will be relevant to your case (example: recent paystubs).
 - **Note: The Court will already have a copy of your file. This will include all your filed pleadings with the circuit clerk. There is no reason to bring a copy of those.*
- Family Court hearings are not open to the public. Only the parties, attorneys for the parties, and court staff are allowed to attend hearing.
- YOU CANNOT RECORD YOUR HEARING; however, you can request (and pay for) a DVD of your hearing.

- All hearings are recorded with audio and video. After your hearing, you may request copies from the Circuit Clerk's office (fee).
- Check your mail for a letter from the family court giving you notice of the date and time of your hearing.
- Make sure circuit clerk's office has your most updated address to ensure you receive any mail related to your case. Best to put any changes in writing.

➤ **Temporary Hearing –**

- The first hearing in a divorce case is generally a “temporary hearing.”
******However, if both there are no disputed issues (agreement) or if the parties are unrepresented, the Court might make your temporary hearing a final hearing. This is left to the Judge's discretion.***
- A Temporary Hearing is typically a short, abbreviated hearing, usually lasting no longer than 15-30 minutes. Witnesses are generally not allowed to testify. The purpose of the temporary hearing is to establish a temporary plan for the parties to operate under until a final decision is made about your case.
- If you have specific things you need on a temporary basis, you should file a Motion for Temporary Relief (available at the Circuit Clerks office).
- Examples of relief the Court may grant on a temporary basis include the following:
 - The parenting plan for your minor children;
 - The amount of child support to be paid;
 - Who will use which vehicles and who will be responsible for payment associated with those vehicles;
 - Who will reside in the former marital home and be responsible for the payments;
 - Whether an award of spousal support is appropriate;
 - Who will pay which marital debts; and
 - The Court may set a final hearing date.

➤ **Final Hearing –**

- The last step of any Family Court case is the Final Hearing where all issues not agreed to are decided by the Judge.
- At the Final Hearing, each side will be able to present his or her case regarding issues in dispute to help the Court in making its decision.
- The Petitioner (person who filed) will be able to present his or her case first. Next, the Respondent will have a chance to present his or her case. Each side may want to present his or her own testimony, other witnesses' testimony or other evidence (i.e. documents, etc.) to help prove your case. Each side should have an opportunity to question the witnesses.
- If you disagree with the Court's ruling on any issue, it is critical that you RESPECTFULLY "object" at the hearing to preserve any issue on appeal.

➤ **Final Order –**

- You will not be divorced and cannot legally remarry until the Court signs a Final Divorce Order.
- If you would like to return to a former/maiden name, make sure the Judge is aware so that it can be included in your final divorce order.
- A Final Divorce Order signed by the Judge and stamped by the Circuit Clerk is the document required to legally divorce you and your spouse.
- The document will also contain the Court's final ruling as to all matter in dispute.

➤ **Appeal –**

- If the Judge made any ruling that you do not agree with and there is a **legal basis** to challenge the ruling, then you can appeal his or her decision within thirty (30) days of the entry of the Final Divorce Order. In some cases, you can appeal directly to the W.Va Supreme Court if both parties file a Notice of Intent to Appeal Family Court Final Order and Waiver of Right to Appeal Circuit Court.
- Typically, the appeal will be heard by a Circuit Court Judge in the same county where your divorce has been filed.

2. PROPERTY DIVISION

Lisa Hawrot and Shari McPhail

This section will give you an idea of how the Family Court Judge might separate property between spouses.

There is a presumption that all marital property (assets and debts) will be divided equally between the parties [48-7-101].

Marital property means the following:

"(1) All property and earnings acquired by either spouse during a marriage, including every valuable right and interest, corporeal or incorporeal, tangible or intangible, regardless of the form of ownership, whether legal or beneficial, whether individually held, held in trust by a third party, or whether held by the parties to the marriage in some form of co-ownership such as joint tenants or tenancy in common, joint tenancy with the right of survivorship, or any other form of shared ownership recognized in other jurisdictions without this State, except that marital property does not include separate property as defined in 48-1-237; *Provide some examples - house, bank accounts, vehicles*

and "(2) The amount of any increase in value in the separate property of either of the parties to a marriage, which increase results from: (A) an expenditure of funds which are marital property, including an expenditure of such funds which reduces indebtedness against separate property, extinguishes liens, or otherwise increases the net value of separate property; or (B) work performed by either or both of the parties during the marriage." [48-1-233] *Provide examples of marital property such as Husband's credit card debt of \$2,000 that he had on the date of marriage that was paid off during the marriage.*

However, just because an asset is only titled or held in the name of one party, does not necessarily mean that asset is not marital. Examples are vehicles purchased during the marriage but only titled in the name of one party or a bank account where monies earned during the marriage are being deposited but is only listed with one name on the account.

It is also important to note that employment income earned during the marriage is considered marital even though only one of the spouse's brought in that income.

Separate property [48-1-237] means the following:

"(1) Property acquired by a person before marriage."

Give or ask for examples of what this might be (car, bank account, house).

"(2) Property acquired by a person during marriage in exchange for separate property which was acquired before the marriage."

Give or ask for examples of what this might be

"(3) Property acquired by a person during marriage, but excluded from treatment from marital property by a valid agreement of the parties entered into before or during the marriage."

These are pre-nuptial or post-nuptial agreements.

"(4) Property acquired by a party during marriage by gift, bequest, devise, descent or distribution."

Give or ask for examples of what this might be (birthday gift, inheritance).

It is important to note that an asset or debt can be characterized as part marital and part separate property. For example, if Husband accumulated a pension prior to the marriage but continue to contribute to and accumulate that pension during the marriage the pre-marriage portion would be considered separate and the after-marriage portion would be considered marital. It is also important to note that it is the burden of the party claiming that an asset or debt is separate to prove that it is separate.

It is also important to note that the character of property can change from separate to marital. *Provide examples of comingling.*

What types of property can be considered marital or separate?

Real estate, oil and gas/mineral interests, cars, motorcycles, ATVs, boats, jet skis, campers, trailers, household goods and furnishings, timeshares, bank accounts, credit union accounts, money market accounts, stocks, bonds, CDs, investment accounts, IRAs, pensions, other types of retirement accounts, stock accounts, stock options, businesses and the various types of ownerships in businesses, credit card

debt, mortgages/home equity loans, vehicle loans, student loans, other personal loans, loans against pensions, loans against life insurance policies.

Household goods and furnishings - There are several options for dividing household goods and furnishings: (1) parties agree on a division - with an agreement, you can consider it a "wash" and not include any formal values or decide the values for what each party is keeping; (2) parties do not agree on a division and obtain appraisals for the property - this means paying someone (such as an auctioneer) to do a formal appraisal; (3) the parties agree to sell the property or the Court orders all property (or what was not agreed on) to be sold. Keep in mind that values for household goods and furnishings are not "new" or "replacement" values. Values are yard sale values or what a reasonable person would pay for the items.

Pets - Pets are considered personal property.

It is important to remember certain other considerations when marital property involves a farm. Depending upon whether the farm itself is a business, farm equipment and farm animals may need to be separately valued.

What if one party solely uses a credit card - is that still marital debt? Any debt incurred during the course of the marriage by either party "for a marital purpose" is considered a marital debt. *Examples would be credit card use for groceries, gasoline, clothing for the kids.*

The presumption that all marital property is to be divided equally between the parties can be overcome, without regard to fault, after considering certain factors. [48-7-103]

Those factors include:

"(1) The extent to which either party has contributed to the acquisition, preservation and maintenance, or increase in value of marital property by monetary contributions, including, but not limited to: (A) Employment income and other earnings; and (B) Funds which are separate property."

Provide or ask for examples.

"(2) The extent to which either party has contributed to the acquisition, preservation and maintenance or increase in value of marital property by nonmonetary

contributions, including, but not limited to: (A) Homemaker services; (B) Child care services; (C) Labor performed without compensation, or for less than adequate compensation, in a family business or other business entity in which one or both parties has an interest; (D) Labor performed in the actual maintenance or improvement of tangible marital property; and (E) Labor performed in the management or investment of assets which are marital property."

Provide or ask for examples.

"(3) The extent to which each party expended his or her efforts during the marriage in a manner which limited or decreased such party's income-earning ability or increased the income-earning ability of the other party, including, but not limited to: (A) Direct or indirect contributions by either party to the education or training of the other party which has increased the income-earning ability of such other party; and (B) Foregoing by either party of employment or other income-earning activity through an understanding of the parties or at the insistence of the other party."

Most common examples are when one party completes additional education during the marriage or one party quits his/her job to become a stay-at-home parent during the marriage.

Marital waste - [48-7-103(4)] - The extent to which either party during the marriage conducted him/herself so as to "dissipate or depreciate" the value of marital property of the parties. *A common example is increasing credit card debt to purchase presents, dinners, gifts, or other items for a third party that one of the party's is having an affair with. Another example is gambling debt.*

What date is used to determine the values of marital assets and the balances of marital debts? [48-7-104] The value is as of the date of separation of the parties or as of such later date determined by the court to be more appropriate for attaining an equitable result.

"Separation" is defined in 48-1-238 as "the uninterrupted separation of a husband and wife for some continuous period of time during which they do not cohabit or otherwise live together as husband and wife." Date of separation can change if the parties co-habit or resume marital relations. If the date of separation changes, valuation dates change which can impact valuation. For example, parties separate on January 1st. On that date, the balance in the parties' bank account is \$5,000 and the debt on the mortgage is \$50,000. On February 14th they attempt to reconcile and

being living together and resume marital relations. It doesn't work out. On October 1st, the parties separate again. On that date, the balance in the bank account is \$3,500 and the debt on the mortgage is \$47,000. If Husband was ultimately allocated the bank account and Wife the mortgage, the Husband receives less from the bank account and the Wife takes on less debt on the mortgage.

"Or of such later date determined by the court to be more appropriate for attaining an equitable result" - This can occur in cases where the parties have significant investment assets whose values flux with the market conditions.

It is important to note that if the date of separation changes, it changes for all assets and debts and not just one class or category of assets or debts. In other words, there cannot be a separate date of separation for investment accounts. The date of separation would apply to all assets and all debts.

How can the values of marital assets and balances of marital debts be determined? Use of bank statements, mortgage statements, NADA values are common examples. Sometimes homes need to be appraised and businesses valued.

What authority does the Court have to divide or sell property? [48-7-104] The Court can equally divide a marital asset (*bank account*) or marital debt (*credit card*). It can assign the entirety of one asset or debt to one of the parties (*credit card, vehicle debt*). It can order property to be sold if it first determines that the property is not susceptible to division (*house*). In that case, the Court must ascertain the projected results of such a sale and determine what is going to happen to the net proceeds from such a sale - are they divided in the case of a home or awarded to one party to balance out the allocation of other assets?

If there is income-producing property (*example rental property*) the Court must ascertain the projected effect of a division or transfer of ownership of that income-producing property in terms of any loss to one of the parties by no longer having that property to produce income. For example, if the parties' rental property netted them \$500 per month and Husband is awarded the value of that property and also receives the net \$500 per month, how does that loss of income affect Wife? The Court could address it by allocating other assets to Wife or taking it into account if there is a claim for spousal support.

Oil and gas/mineral rights - If there is a determination that any oil and gas/mineral rights are marital, the simplest way to address that asset is for the parties to continue to share in that interest moving forward. Valuations of oil and gas/minerals are very expensive. If the parties retain their rights, they can then both be involved in any future lease negotiations, etc. Both would have an interest in maximizing any payments (up front, royalties, etc.) received. If there is already an oil and gas lease in place, the parties will need to contact the company to provide their current address and phone number and provide documentation (PSA, Final Order) to obtain a division order for future payments. This will provide for separate checks to be issued.

Business valuations - In order to obtain an accurate value of any business (whether all marital or any portion marital), a business valuation should be obtained. It is best to involve a CVA, versus a CPA, if possible as CVAs have additional training and a certification for valuations. There are different ways or methods to value a business and the CPA/CVA will know which method is best for the type of business involved. Assets, debts, and income from the business are considered. One should also consider the cost/benefit of obtaining a business valuation as well as the type and number of businesses involved. *(For example do you have a sole proprietorship with most cash or multiple businesses employing a number of people? Will it cost more to obtain the valuation than what that party's potential share of the business is?)* The valuator will be considered an expert by the Court and will prepare a formal, written report and can also provide testimony at a contested hearing on the issue of the value of the business.

The type of ownership one or both parties have in a business is also important when conducting valuations.

Personal goodwill is not marital. *(May v. May and Helfer v. Helfer)* Simply put, what would happen to the business if Husband/Wife was no longer there? Do customers, patients, etc. come to that business specifically because of the skill or abilities of Husband/Wife?

What is the percentage of ownership of one or both parties? Minority or majority? Are there other third parties that have an ownership in the business with Husband/Wife?

With regard to a business, it is possible for a pre-marital business to have a marital component upon separation/divorce. For example, if X's business is worth \$100,000 on the date of marriage but then increases to \$150,000 on the date of separation, the \$50,000 increase in value can be considered marital with Spouse Y entitled to \$25,000 of that increase in value.

QDROs - Qualified Domestic Relations Orders - These are separate orders entered by the Court to facilitate the transfer of retirement monies from one spouse to the other. They are used to so that the person from whom the retirement monies are being transferred from does not incur any taxes or penalties for the monies being removed from the account/plan. For the person receiving the monies, depending upon the retirement plan itself, the monies can be received in cash or transferred directly to another tax-deferred account. If taken in cash, the person receiving the monies must claim the amount received as ordinary income on their tax return. If transferred to a tax-deferred account, any tax liabilities are deferred until further action is taken with that account.

See sample attached worksheet to use as a reference/example.

Marital Property Allocation Summary

Client Name: John Doe

Date: 9/6/2019

Prepared By: lmh

Notes:

	Total	Husband	Wife
1. Division of Marital Estate	100%	50.00%	50.00%
2. Allocation of Retained Marital Property	\$280,700.00	\$211,000.00	\$69,700.00
3. Allocation of Assumed Marital Debts	(\$79,500.00)	(\$71,000.00)	(\$8,500.00)
4. Net Marital Property (Lines 2 and 3 combined)	\$201,200.00	\$140,000.00	\$61,200.00
5. Gross Proceeds From Sales	\$0.00		
6. Debts to Pay From Sales	\$0.00		
7. Less Cost of Sale	\$0.00		
8. Net Sales (Lines 5, 6 and 7 combined)	\$0.00		
9. Net Marital Estate (Lines 4 and 8, distributed per Line 1)	\$201,200.00	\$100,600.00	\$100,600.00
10. Distribution of Net Sales Proceeds	\$0.00	\$0.00	\$0.00
11. Cash Payments To or (From) to Equalize Marital Estate	\$0.00	(\$39,400.00)	\$39,400.00

Marital Property Allocation Distribution of Property

Client Name: John Doe
Date: 9/6/2019
Prepared By: lmh
Notes:

Item	Description	Value	Allocation
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Distribution of Property

1	100 Smith Street	\$100,000.00	Husband
2	2015 Subaru	\$15,000.00	Wife
3	2010 Toyota Camry	\$7,000.00	Husband
4	Bank account #1111	\$500.00	Husband
5	Bank account #2222	\$700.00	Wife
6	Household furnishings	\$2,500.00	Husband
7	Household furnishings	\$3,000.00	Wife
8	Pension plan (H)	\$100,000.00	Husband
9	Pension plan (W)	\$50,000.00	Wife
10	Nationwide life insurance policy (H)	\$1,000.00	Husband
11	Prudential life insurance policy (W)	\$1,000.00	Wife

Total Property =

\$280,700.00

Distribution of Debts

1	Debt on Smith Street	(\$70,000.00)	Husband
2	Debt on Subaru	(\$8,000.00)	Wife
3	Credit card #1234	(\$1,000.00)	Husband
4	Credit card #5678	(\$500.00)	Wife

Total Debts =

(\$79,500.00)

Cost of Sales

Total Cost of Sales =

\$0.00

Net Marital Estate =

\$201,200.00

4. ALIMONY

Lyne Ranson

Most people refer to spousal support as alimony. Simply put, alimony is when one spouse pays a sum of money to or pays 3rd parties on behalf of the other spouse. Alimony can be awarded to the husband or the wife.

Alimony awarded now is not tax deductible to the person who paid it, nor counted as income to the spouse receiving it. The law recently changed.

For alimony awarded before January 1, 2019 the person receiving alimony had to pay state and federal income taxes on alimony just as though it was income from a job. The person previously paying the taxes got to take a tax deduction for the alimony at his tax rate.

There are the basic types of alimony:

1. Temporary alimony – you’ve heard the process that occurs after your petition for divorce is filed. Shortly after the answer is filed the judge will hold a temporary hearing where he will determine whether support or payment is necessary to one spouse.
 - a. There is *no alimony formula* so this decision whether to award and if so, the amount and how long is very much in the court’s discretion.
 - b. It will be important to get a budget together to see what amount of money the person seeking alimony needs to live on in the interim. Temporary alimony is often referred to as a band aid that is temporarily placed on the situation until the court determines who gets what assets later in the proceedings.
 - c. The judge will primarily look to two factors to decide if temporary alimony will be awarded:
 1. What do you “need” to live on in the interim? Is it \$500 per month or \$5000? (*See, WVC 48-5-510 and 48-5-502*)
 2. What is your spouse’s ability to pay. You will hear people refer to how hard it is to live on one paycheck trying to support two households during a separation or divorce. For example, your spouse may net \$2500 and your expenses may be close to \$2000

leaving him \$500 to support his household. The judge will have a tough decision.

- d. Alimony can be paid in a monthly payment, a lump sum or installments. (*See, WVC 48-5-103*) or as I said before to 3rd parties like mortgages, car payments, or insurances.

Temporary alimony stays in effect until the final hearing OR until the parties reach an agreement and a new order is entered.

After the temporary hearing, the next appearance before the judge is usually the final hearing. At the final hearing the judge has several options when considering alimony. We have 20 factors that the judge is required to consider to determine if this is a case where alimony should be awarded and if so, how much and how long.

The judge can award:

- a. **Permanent** alimony
 - b. **Rehabilitative** alimony
 - c. **Reimbursement** alimony
 - d. **Spousal support in gross** (*See, WVC 48-8-101(b)(4)*)
 - e. Or **Deny** alimony
2. **Permanent alimony** – we usually see permanent alimony awarded in long term marriages where people have been married 20 years or so. It will continue until the spouse who is getting alimony *remarries or either spouse dies*.
- a. There are 20 factors judge looks at in awarding spousal support including the following: (*See, WVC 48-6-301*)
 - How long was the marriage?
 - Age, health and education of parties
 - Income each person makes
 - If one person has stayed home to raise children and given up career or moved around the country with military

- Standard of living the parties enjoyed during the marriage.
- Financial need – which we talked about earlier with budget;
- And financial ability to pay support. (for example, ability to pay would be meaningful with one person netting \$2500 per month and the other spouse unemployed and needing \$2200 per month).
Clearly, there would not be a financial ability to pay the support needed so the judge would have to balance.

- b. A question we often get about alimony is whether the amount and award is affected by fault, such as adultery, physical abuse, drunkenness or drug use. The answer is “sometimes”. (*See, WVC 48-8-104*)

Courts are required to consider and compare fault of the two parties and effect it had in the deterioration of the marriage. Adultery is not considered an automatic bar to receiving alimony.

- c. We are often asked by clients how long will I get alimony? The answer is we don’t know for sure, but in some jurisdictions, there are certain *rules of thumb* judges consider such as: (*this should be tailored to your area*)

1. marriages less than 3 years unlikely for alimony to be awarded
2. marriages 4-10 years – fact driven, possibly rehabilitative - discussed below
3. marriages less than 20 years – ½ of the length of the marriage
4. marriages 20 or more years – usually permanent

*Keep in mind these are loose predictors and vary according to judges and areas.

3. **Rehabilitative alimony** – is money paid from one spouse to the other to help him/her become self-supporting, perhaps go to a technical school, finish college or afford to get advanced training for a job (such as a dental hygienist or electrician). (*See, WVC 48-8-105*)

- a. If someone is asking for rehabilitative alimony, he/she needs to show the judge what his/her expenses are to complete this plan-- such as the cost of tuition is, when she will begin and if additional college how many hours required to finish a degree.

- b. A specific Plan must be presented to the judge regarding length, amount of money and when she is expected to finish. It is for a set period of time but if the person hasn't quite finished in the time period – it can be extended. For example, a wife was awarded \$500 per month to finish a 4-year degree and despite her best efforts considering her commitments with children, etc. she can't complete requirements for the degree in 4 years. She can come back before the time expires and ask the judge to extend rehabilitative alimony or even replace with permanent alimony.
- c. **Reimbursement alimony** – this concept was created by the WV Supreme Court in 1988 as a means to repay or reimburse the supporting spouse for his or her financial contributions to the professional education of the student spouse. *See, Hoak v. Hoak 179 W.Va. 509 (W.Va.1988)*

The working spouse provided financial contribution to the student spouse with the expectation of a higher standard of living that did not come to fruition because of the divorce.

The best way to describe this type of alimony is to give you an example: a wife has worked as a secretary and put her husband through medical school; when her husband becomes a doctor, he wants a divorce. Or, another example is where one spouse used \$25,000 of her separate money for husband to go to school. These are reasons for a judge to consider reimbursement support.

- d. **Alimony in Gross** - this alimony is a set amount of support to the other spouse for a set period of time.
4. Other special things to know about alimony:
- a. ***Alimony can be modified.*** If a person is paying alimony and suffers a health illness or disability and can't work as much as at the time the parties were divorced, then he can come back to court and ask for the alimony to stop or be lowered. Until such time as a petition to modify is filed he is still on the hook to pay. So, it is important that a

modification is filed quickly if a substantial change of circumstances occur.

Retirement can also be a basis to modify the amount.

- b. **Contractual alimony** -To be clear alimony that is agreed to by the parties and included in an order is considered a contract and can't usually be modified up or down unless the order says it can. So, if there's an agreement that husband will pay \$500 per month for 10 years that's the requirement.
- c. **Denial of alimony** -On the other hand, if the judge denies a request for alimony at the trial a person can always come back and ask for alimony if the circumstances substantially change; such as a case where at the time of the final hearing we have a nurse and a school teacher making about the same income – probably neither would get alimony; so the judge would deny it. However, if later on one party lost his or her job and couldn't find work she could go back to the judge and ask to receive alimony. (*Banker*)
- d. ***defacto marriage*** -There is another reason that causes permanent alimony to cease and that is called a *defacto marriage*. That term in essence means that the spouse lives with another person in a "marital like relationship" share finances, holds themselves out to be married, gets mail at same residence or performs services to help the other person or his business. (*See, WVC 48-5-707*)

Neither spousal support in gross, nor rehabilitative alimony are terminated when a *defacto marriage* occurs.

If one spouse files a modification and fails to prove the other spouse is engaged in a *defacto* marriage then the judge can award attorney fees to the spouse who had to defend the case.

Even if the court determines there is a *defacto* marriage the judge still has to make a factual investigation into the financial circumstances, income and expenses of the spouse who is getting alimony. The court

has to compare what the parties' financial needs were at the time of divorce and now. See, *Lucas v. Lucas* 215 W.Va. 1 (W.Va. 2003)

- e. **Alimony paid after death of payor.** Unless there is an agreement or Order stating otherwise, rehabilitative alimony and alimony in gross extends beyond the death of the payor if the estate is sufficient and would be fair to do so. (See, *WVC 48-6-202*)

Waiver of Alimony or not?

It is very important in divorce cases to be aware of the legal ramifications of waiver of alimony. If you waive alimony that means you tell the judge you do not want alimony and it is waived forever. You cannot go back and ask the judge to award alimony a year, 5 years or 10 years after your divorce. We tell our clients to be careful in agreeing to waive support because your circumstances could change. We have had cases where a person waives alimony and then loses his or her job or suffers a serious health problem that prohibits him/her from working.

However, just the opposite is true. You can ask the judge to hold the question of alimony in abeyance and NOT waive it. If you do that and a need for support comes up later on then you can go back to court and ask that spousal support be awarded to you. It's important you are unmarried at the time.

The same is true with a nominal or \$1 per year award of alimony. It's a placeholder in the event that a need for alimony would arise later on down the road.

3a. ESTABLISHING A PARENTING PLAN and CHILD SUPPORT

Amy Lanham and Delby Pool

A Guideline to Understanding the Required Forms and What the Court Expects a Party to Present at a Final Hearing on These Two Issues:

A lot of people use the term child custody when referring to how parenting time should be divided between two parties. Throughout my presentation, I am going to talk about a parenting plan for your child as opposed to custody.

Whether you are seeking a parenting plan for a child in a divorce case or a case where you are not married to the person who is a parent of your child, the procedure and burden to provide required information to the family court is the same.

Today, I will discuss with you the forms you must complete, file with the court and serve on the other parent to prepare for a hearing on a parenting plan and child support.

Whether you have an attorney to represent you or are representing yourself, having a basic understanding of the required forms and procedure will help you to be better informed and more able to understand what the court expects of you.

The family court has discretion in ordering terms of a parenting plan. There is not a one size fits all parenting plan. A parenting plan is tailored to a family's specific circumstances. Thus, a court's ruling in a friend's case is not indicative of what will happen in your case. Each case decision when the issues are contested is based on the facts that the court believes have been proven by the parties. You may be ordered to go to mediation which is an alternative that gives you the opportunity to settle all or at least some of the contested issues. A neutral person is appointed to be the mediator, and the costs are allocated according to the income of each party.

Procedurally, there are typically at least two hearings at which the court will establish a parenting plan. The first hearing is for a "temporary order" so that the parties have a parenting plan to follow until they reach a settlement or there is a second hearing after which a final order is issued.

A case to establish a parenting plan is initiated by the filing of a petition in family court. Either you or your attorney will prepare this petition which must assert where you reside, where the other parent resides, and where the child has resided for the past 5 years. The petition will typically assert that you are a fit and proper person to be awarded parenting time with your child and whether or not you think the other parent is a fit and proper person to be awarded parenting time with your child.

When you file a petition you should also file a motion for temporary relief seeking a temporary parenting plan and a provision for child support and medical support for the child. You may want to review W. Va. Code § 48-9-204. You are also expected to file a financial statement (form SCA-FC-106) which provides the court with detailed information as to your annual income; access to medical insurance for the child and the cost and day care expenses. To this form you should attach copies of your three most recent pay stubs and two most recent federal and state income tax returns including all W-2's and 1099's. If you are self employed, be certain your Schedule C is included. If you own a corporation that pays you a salary, include the corporate tax returns. This financial information is crucial to provide to the court because it demonstrates you are able to provide for the care of your child when the child is with you, and that you are able to contribute to the other parent who may be entitled to financial assistance from you.

Before you go to court for a temporary hearing, there are a few things you should do. 1. You should come up with a proposed parenting plan. 2. You should also familiarize yourself with the laws that govern how Family Court judges develop parenting plans. 3. You should also familiarize yourself with the forms that are available on the West Virginia Supreme Court of Appeals website (www.courtswv.gov).

You will need to prepare and file a proposed parenting plan for the court to consider. Often attorneys have a form that they have created which is similar to the form on the West Virginia Supreme Court of Appeals website. Also, sometimes family court judges have a parenting plan form they have created and want you to use. Be sure you know to (1) do a proposed parenting plan; (2) use the correct form.

A parenting plan also establishes decision making authority. It is presumed that all major decisions regarding a child will be made jointly by both parents. There are exceptions such as a history of domestic violence between the parties.

When you go to the temporary hearing, please do not bring any witnesses to testify unless the Court tells you that they will take the testimony of witnesses.

After the temporary hearing is completed, the judge will issue an order before you leave or he or she may take your evidence under advisement, as to the parenting terms so that you know what is the “temporary plan”. If the Judge issues a ruling before you leave, be sure you know the details before you leave the court room as the court will also rule on child support and medical support. The child support is based on a formula. They will provide you with a printout of the calculation. Read it to be sure the income numbers are correct.

OK, you now have an idea of a parenting plan. When the Court establishes a Parenting Plan is established by the Court at the first hearing and final hearing, the judge will look at your Financial Statement and the information you attached with your income. The Family Court uses your gross income or your income before any taxes are taken out. If you are self-employed, it is your adjusted gross income. You need to have documents to back up your income. You also need to have documentation to show what you pay for day care costs for the children, medical insurance for the children or any other extraordinary expenses that you pay on behalf of the children. You will also need to advise the Court if you have any other dependents living in your home or if you pay child support for any other children.

The Judge then takes all of that information and puts it into a formula. I have provided you an example of a child support formula. In this case, Mom and Dad have two children together. Mom made minimum wage income of \$8.50 per hour. Dad has income of \$65,000 per year. Dad has medical insurance available through his employment at a cost of \$100.00 per month for the children's portion. Your human resources department can provide you with this documentation. Mom pays day care of \$250.00 per month.

Mom has the children in her care a majority of the time. Dad would pay Mom \$1,099.74 for child support. If the parties have the children, equally, Dad would pay Mom \$682.50. Once you reach the threshold for the Court to use the extended shares formula, the amount of child support is adjusted based upon the number of overnights spent with the children.

There are two types of child support formulas. The first one is called the Basic Shared Formula. This is when one parent has the children for less than 128 overnights. The other one is called Extended Shared Formula. This is when both parents have the children for more than 128 overnights.

Once a child support obligation is established, it is modifiable in the future based upon a change in financial circumstances of either party. It is important to file a Petition for Modification.

For a final parenting plan, the criteria for the burden of proof is more detailed and you are permitted to present witnesses and written evidence to support your parenting plan. You may want to review W.Va. Code § 48-9-205. These witnesses will be people that have observed you parenting your child. The Court normally does not want to hear from "character witnesses", but people who have first hand knowledge of what was happening before the break up of your relationship.

You should always read any Orders from the Court closely. You need to follow all instructions on forms before you complete them. You should come to Court on time. You should always be respectful to the judge.

3b. RELOCATION

Lorraine Eckard

A brief overview of the West Virginia laws of relocation.

Introduction

Application by Courts around the State of West Virginia, of WV Code §48-9-403, and *Storrie v. Simmons* (and *Kittle v. Burke*), 693 S.E. 2d 70 (WV 2010), is not always consistent. This is understandable, as West Virginia borders a number of different metropolitan cities and Family Court Judges bring their own experiences into the courtroom. The economy has also had its effect on the factors set forth in the statute.

Discussion

These relocation cases divide into the two general categories of: 70% parenting v. anything else. (i.e. "best interests and exercise of custodial responsibility") In other words, if a parent is residential parent at least 70% of the overnights in a year, and is otherwise a fit parent, his or her relocation is likely to be granted by a Court. However, in determining caretaking functions, best interests of the child, and the 70% of parenting, the Court has noted recently, in (*Nicole L. v. Steven W.* No. 18-0025, 2019) that it is important to analyze which parent is primarily responsible for the children's education, transportation, medical visits, extracurricular activities and daily care, rather than to analyze the amount of overnights the child(ren) have spent with each parent. Specifically, the Court recognized the following: related to the essential functions of parenthood, as follows:

- (A) Feeding;
- (B) Dressing;
- (C) Bedtime and wake-up routines;
- (D) Caring for the child when sick or hurt;
- (E) Bathing and grooming;
- (F) Recreation and play;
- (G) Physical safety; and

- (H) Transportation
- (I) Direction of the child's various developmental needs, including the acquisition of motor and language skills, toilet training, self-confidence and maturation;
- (J) Discipline, instruction in manners, assignment and supervision of chores and other tasks that attend to the child's needs for behavioral control and self-restraint;
- (K) Arrangements for the child's education, including remedial or special services appropriate to the child's needs and interests, communication with teachers and counselors and supervision of homework;
- (L) The development and maintenance of appropriate interpersonal relationships with peers, siblings and adults;
- (M) Arrangements for healthcare, which includes making medical appointments, communicating with health care providers and providing medical follow-up and home health care.
- (N) Moral guidance; and
- (O) Arrangement of alternative care by a family member, baby-sitter or other childcare provider or facility, including investigation of alternatives, communication with providers and supervision.

Anything less than 70% is subject to a "best interests" standard, unless the Parenting Plan currently in effect, can be accomplished in a "short distance" relocation within the State or otherwise. In that situation, the current Parenting Plan could still be effective.

Certain factors for a Court to consider, in deciding to allow a relocation are as follows:

- a) Reasonableness

- b) Good faith and a legitimate purpose and to a location that is reasonable in light of the purpose.
- c) Relocation for more favorable employment
- d) Relocation to an area with more exposure of the children to family members
- e) Firm and reasonable preferences of older children

There are other factors which can also affect the Court's interpretation of "best interests" of the children.

Sometimes, relocation can significantly impair a parent's ability to exercise parenting. This is especially true when parents have a Parenting Plan which provides for 50 – 50% parenting, or equal parenting. If mediation cannot resolve that modification of the Parenting Plan, then the court must resolve the matter in a contested hearing.

Unless otherwise ordered by the court, a parent has responsibility under a parenting plan who changes, or intends to change, residence for more than ninety days must give a minimum of sixty days' advance notice, or the most notice practicable under the circumstances, to any other parent with responsibility under the same parenting plan. Notice shall include:

- (1) The relocation date;
- (2) The address of the intended residence;
- (3) The specific reasons for the proposed relocation;
- (4) A proposal for how custodial responsibility shall be modified, in light of the intended move; and
- (5) Information for the other parent as to how he or she may respond to the proposed relocation or modification of custodial responsibility

Failure to comply with the notice requirements of this section without good cause may be a factor in the determination of whether the relocation is in good faith under subsection (d) of this section and is a basis for an award of

reasonable expenses and reasonable attorney's fees to another parent that are attributable to such failure.

You may find the relocation forms at courtwv.com

Relocation may be difficult for children. They will likely change schools; lose contact with close friends; change doctors, dentists and day care providers; and be disrupted in their time with the absentee parent. When possible, parents may want to delay relocation if a child is a critical age or extremely connected to a team sport, debate team or some other accomplished extra-curricular or academic activity. It is important to include the "non-moving" parent in discussions when possible. The law encourages shared decision-making between biological parents, and children adjust better when they know that both parents are united with the decision. Of course, this is not always feasible, but family therapists still encourage shared decision-making between parents.

If relocation is approved by both parents, or is ordered by a Court then the Parenting Plan is usually modified. In most situations, mediation can be productive, or required in some instances. The last resort should be a court intervention.

The most recent WV Supreme Court cases, interpreting the relocation statute seem to focus on job opportunities as the reason for location. In one case, the biological Mother was permitted to relocate from WV to Wisconsin because her fiancé received a substantial promotion and Mother also had better opportunities for employment in the State of Wisconsin. Note that this was not a marriage, but an engagement arrangement.

In another case, Mother was permitted to relocate because she had two other children with a previous relationship and that Father and the two other children resided in Louisiana. The Father had a good job in the state of Louisiana and although the WV father of the third child objected, the relocation was permitted. Note that in this case, the Court allowed relocation of the Mother, to a third party who was the Father of her two previously born children.

So, apparently, the focus of the WV Supreme Court, in the interpretation of WV Code 48-9-403, is on the employment possibilities, upon relocation, at this point. This does not exclude the importance of the other factors, but it

does emphasize that the WV Supreme Court has been more willing to accept arguments related to employment. These cases also emphasize that the relocation may be granted in cases where the children are not related to the Father, by marriage.

5. GUARDIANSHIP

Christine Glover

West Virginia leads the nation in the percentage of homeless children, children in state care and children who do not live with either of their parents.

When someone other than a child's legal parent desires to take on the responsibilities of care for a child, what does that person do? That person will need to file a petition for guardianship. In order for the court to grant the petition, it must find that there is *clear and convincing evidence* that the parents of the child have either:

- Given consent;
- Had their rights terminated. You should be aware that if the parents' rights have been terminated through a circuit court proceeding, and you have been a kinship or foster placement, check with the Child Protective Services (CPS) worker to be sure that the permanency plan for the child includes the option of guardianship, as opposed to adoption. If you are filing a guardianship action for children whose parental rights were terminated, you may be eligible for assistance with attorney's fees and/or subsidies.
- Are unable or unwilling to exercise their parental rights;
- Abandoned their rights (failed to exercise them for more than 6 months). You should be aware that if the parents have had no contact or provided no assistance for the child for more than six months, the matter may be referred to CPS for an investigation and may likely result in an abuse and neglect petition being filed against the parents in circuit court. Additionally, if you consult with an attorney, you should review the option of adoption.
- Or it would result in serious detriment to the child if the petition was not granted.

Guardianship actions are governed by **WV Code 44-10-3** (Guardianship). The proposed guardian has 3 possible options when pursuing guardianship.

1. Get a lawyer.

Your rights and those of the child will be better protected with the help of an attorney. An attorney will understand the legal system and be better equipped to navigate it. An attorney will be able to review the options with you and obtain better long-term financial results for the child and you. All the long hours of

homework that you will spend educating yourself can be avoided by hiring an attorney to be on your side and advocate for your best interests. If you decide to represent yourself, you may actually lose money and peace of mind.

After meeting with an attorney, you learn that the retainer is too much for you to pay. [You may want to share the possible retainer amounts the lawyers in your area request]. The attorney informs you that the total of all fees and costs need to be paid in full before a final court hearing will be scheduled, and that the attorney may also withdraw as counsel prior to any scheduled hearing if fees remain unpaid.

What do I do if I cannot afford an attorney?

2. Apply for the West Virginia Legal Aid program.

The Legal Aid Program may choose to represent qualified low-income individuals. You can apply online or by phone.

What do I do when I make too little for a lawyer, too much to qualify for the Legal Aid Program, or Legal Aid turns down my case?

3. Represent yourself (PRO SE).

[If you have access to smart board, project the search for the audience to see. If not, have audience members take out their cellphones and conduct google searches.]

You want to help a child in need. How do you do it? Where do most people go for information?

GOOGLE. Type in the google browser "guardianship West Virginia." Different states have different laws so be sure to include West Virginia in your search.

"Infant Guardianship- Legal Aid of West Virginia" will appear. Click it.
www.lawv.net

The contents will show a list of frequently asked questions. Read the answers to the questions that you have. For example, "How do I become a guardian?" The answer reads "File a Petition in Family or Circuit Court."

Google "WV infant guardianship petition." Click on "Infant guardianship forms- West Virginia Judiciary."
www.courtswv.gov

Form 1 is the Petition for Appointment of Guardian. The forms are currently being reevaluated by the Supreme Court.

Who can petition/be appointed for guardianship?

When a child's legal parents do not properly care for the child, a judge may appoint someone to look out for the child's best interest. A guardian does not have to be a relative. A guardian can be anyone who has a relationship with the child and is concerned for the child's well-being. A child above the age of 14 may nominate his or her guardian by either making a request on the record before the court or by filing a signed and verified written request at the time of the filing of the petition. In sum, any person who cares about the child can file a petition in either family or circuit court to be the child's guardian.

The judge cannot appoint a guardian if custody is an issue in another court case, and the judge will not appoint a person whose parental rights have been terminated.

STEP 1 Complete the Petition.

Simply complete the fill-in form in which the facts set forth are true to your best knowledge and belief. In the Petition, you **MUST** mention any allegations of abuse or neglect. You **MUST** include the basis of filing for guardianship. The petition will require a notarized signature by the proposed guardian. Some judges may want to see supporting documents, such as a physical of the proposed guardian and/or the most recent federal income taxes to demonstrate the proposed guardian's physical and financial ability to care for the child.

STEP 2 File your Petition.

Decide whether you want to file in family or circuit court. Regardless of whether you wish to file it in family or circuit court, you will file your petition with the circuit clerk of the county in which you reside with the child. If you decide to file your petition as a family court case, the family court judge may refer it to circuit court if the basis of the petition is abuse and neglect of the child.

The law requires you to pay a filing fee and costs. If you cannot afford to pay these fees and court cost, complete the affidavit of indigency to waive fees and court costs. This form may be found by googling "WV affidavit of indigency" and

clicking on the WV Judiciary website. The Financial Affidavit and Application will be found under the Fee Waiver Forms tab.

The clerk will review your financial affidavit and supporting documentation to determine if you meet the legal requirements for having the fees and costs waived.

STEP 3 Serve the Petition.

Upon filing the petition, the circuit clerk shall issue a summons to be served within five (5) days of filing of the petition and at least five (5) days prior to the initial hearing which the judge must set within ten (10) days from filing of the petition. Both the summons and petition shall be served either by the sheriff, by certified mail return receipt requested, delivery restricted. The petition and all other document filed subsequent to the original petition to all parties involved including:

- Every non-petitioner parent whose rights have not been previously terminated, unless that parent has signed a waiver of priority right;
- Any other person with custodial interests listed in the petition;
- Any minor named in the petition who is 14 years of age or older;
- And any proposed guardian if someone other than the petitioner.

If a party is represented by an attorney, service of documents subsequent to the petition and summons shall be made on the attorney unless service upon the party is ordered by the court.

Service of documents subsequent to the petition and summons may be made by hand-delivering a copy to the party or attorney; or by mailing a copy by first class mail to the last-known address of the party or attorney; or if no address is known, by leaving it with the circuit court. If you are the petitioner, you may not be the person to hand deliver any pleading upon the respondent.

STEP 4 Attend the hearing.

Upon filing the petition, the circuit clerk shall provide a copy of the petition, within two days, to the appropriate court. The court shall then schedule a hearing to be conducted within 10 days of the filing. A notice of the scheduled hearing shall be served upon all parties. Additional information regarding the hearing, such as continuances and a temporary guardian may be found in Rule 4 of the Rules for Minor Guardianship Proceedings.

If you file in Circuit Court and are unhappy with the outcome, an appeal would have to be filed with the West Virginia Supreme Court, located in Charleston, West Virginia. If you file in Family Court, you may file an appeal with the Circuit Court.

In the case that the original petition is granted, be aware that guardianship may be revoked or terminated pursuant to WV Code 44-10-3(i) which states that reason for termination or revocation of guardianship is found when:

- The minor reaches the age of 18;
- The guardian or minor dies;
- The guardian resigns;
- Or a petition is filed (and granted) by a guardian, parent, or other parent that the guardian is no longer needed due to change of circumstances and it is in the best interest of the child. It is important to clearly set out the reasons that you are seeking guardianship in your petition and in court. That way the court may include the basis for granting the petition in its order so that it may refer back to the order to determine if in fact there has been a change in circumstance, should the legal parents ever petition to terminate guardianship.

At the hearing what factors does the court consider when determining an appropriate guardian?

- (1) Required to register as a sex offender
- (2) Any misdemeanors or felony convictions
- (3) Subject to a restraining order or final protective order
- (4) Subject of any substantiated report alleging child abuse, neglect, or molestation
- (5) Abuses alcohol or drugs
- (6) Lives with a person who is involved in any of the matters stated above

If you wish to further research the legal proceedings for guardianship, a complete guide for guardianship proceedings can be found in the Rules for Minor Guardianship Proceedings on the West Virginia Judiciary website.

<http://www.courtswv.gov/legal-community/court-rules/MinorGuardian/contents.html>

6. GRANDPARENT RIGHTS AND VISITATION

Scott Summers

The simplest way for grandparents to spend time with their grandchildren is with the parents' permission. However, it isn't always that simple. This presentation will provide an overview of the process available to grandparents who desire to obtain a Court order granting them visitation with their grandchildren in West Virginia.

Grandparents May Ask a Court to Grant Them Visitation with Their Grandchildren.

It is important to understand from the beginning that the grandparent visitation act does not guarantee a right to visitation. The best interest of the child must be given greatest priority. The rights of the child and "fit" parents are superior to those of the grandparent seeking visitation. (*In Re: Samantha S. and Hope S*, 205 W.Va. 383, 667 S.E.2d 573 (2008))

The West Virginia Legislature has determined that "circumstances arise where it is appropriate for circuit courts or family courts of this state to order that grandparents of minor children may exercise visitation with their grandchildren." The West Virginia Legislature noted that, as in all situations involving children, the best interests of the child or children are the paramount consideration in determining whether a Court should enter an Order granting a grandparent visitation. (West Virginia Code §48-10-101)

The West Virginia Legislature and the West Virginia Supreme Court have stated in no uncertain terms that the statutes governing grandparent rights / grandparent visitation are the only avenue in West Virginia for grandparents to assert any rights with regard to visitation with their grandchildren. (West Virginia Code §48-10-102; *In re Hunter H.*, 231 W.Va. 118, 744 S.E.2d 228 (2013)).

Who Can Assert Grandparent Rights / Visitation?

A person seeking a Court order granting them visitation with their grandchild must be a "grandparent" of a "child" residing in West Virginia.

"Grandparent" is defined as "a biological grandparent, a person married or previously married to a biological grandparent, or a person who has previously been

granted custody of the parent of a minor child with whom visitation is sought.” (West Virginia Code §48-10-203)

“Child” is defined as “a person under the age of eighteen years who has not been married or otherwise emancipated.” (West Virginia Code §48-10-202)

Under What Circumstances Can a Grandparent ask the Court to Award them Visitation with a Grandchild?

It is important to understand that, if a grandparent files a petition for visitation when there are no other custody proceedings pending, there is a legal presumption that visitation privileges should not be given to the grandparent if:

the parent through whom the grandparent is related to the grandchild has custody of the child, shares custody of the child, or exercises visitation privileges with the child that would allow participation in the visitation by the grandparent if the parent so chose. This presumption may be rebutted by clear and convincing evidence that an award of grandparent visitation is in the best interest of the child. (West Virginia Code §48-10-702)

However, if there is no current custody proceeding involving the child and the parent through whom the grandparent is related to the grandchild does not: (1) have custody of the child; (2) share custody of the child; or (3) exercise visitation privileges with the child that would allow participation in the visitation by the grandparent if the parent so chose, the grandparent shall be granted visitation if a preponderance of the evidence shows that visitation is in the best interest of the child. (West Virginia Code §48-10-702)

If a parent is not available or is not able to exercise parenting time with the child, such as the death or incarceration of a parent, obtaining a Court order granting a grandparent visitation with a grandchild is much easier. In addition, if the child’s parent refuses to participate in the custody case with the child’s other parent, or if the whereabouts of the child’s parent is unknown, a grandparent may seek an order from the Court permitting grandparent visitation with the child. (West Virginia Code §48-10-701 and 702)

If a custody case is currently pending, a grandparent must show “by a preponderance of the evidence” that visitation with the grandparent is in the best interest of the child.” (West Virginia Code §48-10-701) As long as a parent is a “fit” parent, the Court will give great deference to the wishes of that parent.

If your own child will not let you see your grandchild, it is much more difficult to obtain a Court order granting grandparent visitation. In this case, the law presumes that the Court should not enter an order granting grandparent visitation. The law presumes that you should visit with your grandchild when your child is exercising their parenting time. In order to overcome this presumption, the grandparent must provide the Court with “clear and convincing” evidence Court ordered visitation for a grandparent is in the best interest of the child.

Where Do You Start?

A grandparent must, “by motion or petition, make application to the circuit court or family court in the county in which the grandchild lives.” (West Virginia Code §48-10-301). The grandparent does not have to live in West Virginia in order to request a West Virginia Court to grant them visitation with their grandchild.

If a court case is currently pending between the child’s parents, then the grandparent will need to file a motion in the pending court case.

If the child is the subject of an abuse and neglect proceeding, this motion must be filed in the Circuit Court. If the child is not the subject of an abuse and neglect proceeding, the motion will be filed in Family Court.

The filing of this motion does not make the grandparent a party to the action thereby allowing the grandparent to fully participate in the action. The filing of this motion only permits the Court to call the grandparent as a witness. If the grandparent is called as a witness, the grandparent will be subject to cross examination by the parents, or their respective lawyers. (West Virginia Code §48-10-401 and 402)

If there is no court case currently pending between the parents of the child, the grandparent may file their own Petition and begin their own Court case. It does not matter whether or not the child’s parents are married.

If the grandparent previously filed a motion or petition for grandparent visitation which was denied by the Court, the grandparent may file another Petition “if the circumstances have materially changed since the entry of the earlier order or decree.” (West Virginia Code §48-10-402) A grandparent may also file a motion to modify visitation that was previously granted to the grandparent

How Does the Court Determine Whether a Grandparent Should be Granted Visitation with a Grandchild?

First and foremost, the Court will always consider what is in the best interest of the child. In addition, the Court will consider whether court ordered grandparent visitation will substantially interfere with the parent-child relationship. (West Virginia Code §48-10-501; *In re Nearhoof*, 178 W.Va. 359, 359 S.E.2d 587 (1987).). In other words, the Court is primarily concerned with what is best for the child and the possible impact court ordered grandparent visitation will have on the child's relationship with the child's parent.

In addition, the Court must consider the following factors:

- (1) The age of the child;
- (2) The relationship between the child and the grandparent;
- (3) The relationship between each of the child's parents or the person with whom the child is residing and the grandparent;
- (4) The time which has elapsed since the child last had contact with the grandparent;
- (5) The effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;
- (6) If the parents are divorced or separated, the custody and visitation arrangement which exists between the parents with regard to the child;
- (7) The time available to the child and his or her parents, giving consideration to such matters as each parent's employment schedule, the child's schedule for home, school and community activities, and the child's and parents' holiday and vacation schedule;
- (8) The good faith of the grandparent in filing the motion or petition;
- (9) Any history of physical, emotional or sexual abuse or neglect being performed, procured, assisted or condoned by the grandparent;
- (10) Whether the child has, in the past, resided with the grandparent for a significant period or periods of time, with or without the child's parent or parents;

(11) Whether the grandparent has, in the past, been a significant caretaker for the child, regardless of whether the child resided inside or outside of the grandparent's residence;

(12) The preference of the parents with regard to the requested visitation; and

(13) Any other factor relevant to the best interests of the child. (West Virginia Code §48-10-502)

The Court may also appoint a lawyer to act as a Guardian Ad Litem for the child. (West Virginia Code §48-10-403) The purpose of the Guardian Ad Litem is to conduct an investigation to assist the Court in determining what is in the best interest of the child.

Under certain circumstance, the Judge may interview the child in the Judge's private office regarding the child's wishes and concerns. During this interview, only the Judge, the child and the Guardian Ad Litem (the lawyer appointed to represent the child) and any necessary Court personnel will be present. (West Virginia Code §48-10-601)

Parents and grandparents are typically very concerned about involving the child in this process. The Legislature attempted to put safeguards in the statute to protect the child from appearing in Court. Specifically:

No person shall obtain or attempt to obtain from a child a written or recorded statement or affidavit setting forth the wishes and concerns of the child regarding grandparent visitation matters, and the court, in considering the factors listed in section 10-502 of this article for purposes of determining whether to grant any visitation, establishing a visitation schedule, or resolving any issues related to the making of any determination with respect to visitation or the establishment of any specific visitation schedule, shall not accept or consider such a written or recorded statement or affidavit.

A child shall not be called as a witness in any proceeding to determine whether grandparent visitation should be awarded. (West Virginia Code §48-10-602)

Grandparent Visitation Does Not Mean that a Grandparent has any Decision Making Authority With Regard to the Child.

A child's biological parent has a right to raise their child any way the parent deems suitable, as long as the child is not abused or neglected. Except in exceptional circumstances, the rights of the parents are held sacred by the Courts. In fact, the West Virginia Supreme Court has stated: "The Due Process Clauses of Article III, Section 10 of the Constitution of West Virginia and of the Fourteenth Amendment of the Constitution of the United States protect the fundamental right of parents to make decisions concerning the care, custody, and control of their children." (Syllabus point 3, *Lindsie D.L. v. Richard W.S.*, 214 W.Va. 750, 591 S.E.2d 308 (2003); *Alyssha R. v. Nicholas H.*, 233 W.Va. 746, 760 S.E.2d 560 (2014))

The United States Supreme Court and the West Virginia Supreme Court have also stated that the right of a parent to make decisions concerning the care, custody, and control of her children is among the most cherished fundamental liberty interests. (*Troxel v. Granville*, 530 U.S. 57, 67, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *Alyssha R. v. Nicholas H.*, 233 W.Va. 746, 760 S.E.2d 560 (2014))

As such, when determining whether to grant a grandparent's request for Court ordered visitation with a grandchild, courts must defer to the "preferences of the parent where there had been no showing of unfitness with regard to that parent." (*State ex rel. Brandon L. v. Moats*, 209 W.Va. 752, 755, 551 S.E.2d 674, 677 (2001); *Alyssha R. v. Nicholas H.*, 233 W.Va. 746, 760 S.E.2d 560 (2014))

With the best interest of the child in mind, coupled with the right of a parent to raise their child, if the Court determines that a grant of reasonable visitation for a grandparent is appropriate, the Court may, in its discretion, include key limiting language to the order granting grandparent visitation. Specifically:

1. That the grandparent's visitation with the child be supervised;
2. That the grandparent not attempt to influence any religious beliefs or practices of the child in a manner contrary to the preferences of the child's parents;
3. That the grandparent not engage in, permit or encourage activities, or expose the child to conditions or circumstances, that are contrary to the preferences of the child's parents; or

4. That the grandparent not otherwise act in a manner to contradict or interfere with child-rearing decisions made by the child's parents. (West Virginia Code §48-10-802)

Further, if the Court finds that a grandparent has “materially violated the terms and conditions of the order of visitation,” a Grandparents visitation with the child must be terminated (West Virginia Code §48-10-1002)

Also, any grandparent who knowingly allows contact between a minor grandchild and a parent or other person who has been precluded visitation rights with the child by court order is guilty of a misdemeanor and, upon conviction thereof, shall be confined in the county or regional jail not more than thirty days or fined not less than \$100 nor more than \$1,000. (West Virginia Code §48-10-1201)

What Happens if the Child’s Custodial Parent Gets Remarried?

The remarriage of the custodial parent of a child does not affect the authority of a circuit court or family court to grant reasonable visitation to any grandparent. (West Virginia Code §48-10-901)

What Happens if the Child is Adopted After the Grandparent is Granted Visitation?

If the Child is adopted by a stepparent, grandparent or other relative of the child, then the grandparent’s visitation is not automatically terminated. If the Child is adopted by someone who is not a stepparent, grandparent or other relative of the child, then the grandparent’s visitation is automatically terminated when the order for adoption is entered. (West Virginia Code §48-10-902)