

**SUBSTANCE ABUSE AND THE COURTS: DO WE HELP THE PARENTS
OR PROTECT THE CHILDREN?**

*The fundamental right of a parent to custody of a child is not absolute.
The best interest of the child is the polar star by which we are guided.*

Section I: The Filing of Abuse and Neglect Petitions

What statutes apply?

- * West Virginia Code §§49-6-1 through 49-6-12
- * WV Rules of Procedure for Child Abuse and Neglect

Who can file a petition?

The DHHR or a reputable person who believes that a child is abused or neglected

Where is the petition filed?

- * in the county where the child resides; or
- * in the county where the custodial respondent or other named party abuser resides (if filed by DHHR); or
- * where the abuse or neglect occurred

What happens once a verified Petition is filed?

- * Court sets time and place for preliminary hearing
- * at least 10 days notice given to both parents, DHHR, and any other custodian
 - if person outside WV, serve by certified mail
 - if not successful, service must be by publication
 - "unknown" father
- * appoints counsel for the child and custodians
- * Court may order custody of the child to DHHR or a responsible person for not more than 10 days pending a preliminary hearing
 - imminent danger and to reasonably available alternatives to removal

Can a Petition be amended after it is filed?

- * yes, until the time the commencement of the adjudicatory hearing but the adverse party must be provided with sufficient time to respond
- * after the adjudicatory hearing if not prejudicial to the adverse party

Must an abuse/neglect petition be filed in order to remove a child?

- * no, DHHR worker can take child into emergency custody prior to filing a petition
- * after removal, DHHR worker to appear "forthwith" before a Circuit Court Judge or Juvenile Referee (Magistrate) and if none available apply for an order ratifying the emergency custody pending the filing of the petition
- * if order entered by Magistrate, must receive oral confirmation of order from Circuit Court, who enters an order of confirmation on the next judicial day
- * if done this way, petition for abuse/neglect must be filed within 2 judicial days

Section II: The Hearing Process

A. Preliminary Hearing

- * Rule 22
- * held within 10 days after transfer of custody is ordered
- * burden of proof: probable cause of abuse/neglect
- * imminent danger to the health, welfare, or safety of a child

B. Adjudicatory Pre-Hearing Conference

- * Rule 24
- * by Motion of Court or at the request of any party
- * topics: service of parties, issues of counsel for unrepresented parties, if child to be present to testify at adjudication, any unresolved discovery matters, identify issues of law and fact for adjudication, require list of witnesses, coordinate witness issues, confirm date for adjudication and length of time needed for hearing

C. Adjudicatory Hearing

- * burden of proof: clear and convincing evidence
- * finding that parent was abusive and/or neglectful at the time of the filing of the petition
- * to be held within 30 days of temporary custody order entered following the preliminary hearing, unless a pre-adjudicatory improvement period has been granted

D. Stipulated Adjudications

- * Rule 26
- * should be submitted in writing, although some Court's do not require
- * must include the agreed upon facts supporting court involvement regarding the parent's problems, conduct or conditions and states the parent's problems or deficiencies to be addressed at final disposition
- * Court can refuse to accept if it doesn't believe stipulations are sufficient under the circumstances
- * must be voluntary and in the child's best interest

E. Voluntary Relinquishment/Termination of Parental Rights

- * §49-6-7 and Rule 35
- * must be in writing and acknowledged by parent
- * made free from fraud and duress
- * Court will typically take testimony from parent
- * if in writing meeting requirements of rule and statute and parent's counsel present, Court can accept without testimony or presence of parent
- * cannot be objected to by the State or GAL

F. Dispositional Hearing

- * §49-6-5
- * to be held within 45 days of the entry of the final adjudicatory order unless an improvement period has been granted
- * can be held immediately following adjudication only if all parties agree, the child's case plan was completed and submitted or all parties waive the filing, and notice of

disposition was waived

- * child's case plan to have been submitted at least 5 days prior to the hearing
- * witness list and issues of law and fact to be exchanged by all parties at least 5 judicial days prior to the hearing
- * burden of proof to terminate parental rights is "clear and convincing"
- * preference for disposition as follows:
 - dismiss petition
 - referral to community agency and dismiss petition
 - reunification with supervision by DHHR
 - reunification with specific terms of supervision ordered
 - if parent unwilling or unable to provide adequately for the child's needs commit child temporarily to DHHR, licensed private child welfare agency, or suitable person who may be appointed as guardian
 - ** order must state continuation in home contrary to best interest of child and why; whether DHHR made reasonable efforts to preserve the family; what efforts were made or why efforts were unreasonable or impossible; and why efforts were unreasonable if services were not offered
 - ** order must also include under what circumstances the child's commitment to DHHR continues -- foster care, adoption, legal guardianship, permanent placement with fit and willing relative, or other planned permanent living arrangement
 - find that there is no reasonable likelihood that the conditions of abuse/neglect can be substantially corrected in the near future and terminate parental rights
 - phrase means that based upon the evidence the abusing adult(s) have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help [§49-6-5(b)]
 - such conditions shall be considered to exist when the abusing parent has habitually used or is addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and the parent has not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning [§49-6-5(b)(1)] or
 - when the abusing parent has not responded to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse/neglect of the child, as evidenced by the continuation or insubstantial diminution of conditions which threatened the health, welfare or life of the child [§49-6-5(b)(3)]
- * Court shall give consideration to wishes of a child age 14 or older or otherwise of an age of discretion as determined by the Court regarding termination of parental rights
- * Consideration for termination of parental rights
 - clear and convincing evidence
 - efforts by DHHR to provide remedial and reunification services to parent

- continuation in the home is not in the child's best interest and why
 - reunification is not in the child's best interest and why
 - whether DHHR made reasonable efforts to preserve the family, what efforts were made or why efforts were unreasonable or impossible and
 - why efforts were unreasonable if services were not offered
 - ** criminal conviction in and of itself not sufficient to terminate - must consider length of sentence, type of sentence, factors surrounding sentence
- In re: Brian James D., 209 W.Va. 537, 550 S.E.2d 73 (2001)

* With certain limited exceptions, DHHR is to make reasonable efforts to preserve the family

G. Post-Termination Contact

- * a right retained by the child
- * must be made in writing and submitted to Court
- * parent has burden of proof: strong emotional bond exists and cessation would be detrimental to the child
best interest of child - not because best for parent
- * In re: Jonathan G., 198 W.Va. 716, 482 S.E.2d 893 (1996)

H. Appeals

- * Rule 49 - must be filed within 60 days of judgment

I. Modification of Dispositional Orders

- * §49-6-6
- * upon the motion of a child, a child's parent/custodian or the State
- * must allege a change of circumstances requiring a different disposition
- * Court may modify the order - discretionary
- * order cannot be modified after child adopted
- * a parent whose parental rights have been terminated does not have standing to file such a motion [In re: Cesar L., 221 W.Va. 249, 654 S.E.2d 373 (2007)]

Section III: Improvement Periods

A. Pre-Adjudicatory Improvement Period

- * §49-6-2(b), §49-6-12(a) and Rule 23
 - * must file written motion
 - * not to exceed 3 months
 - * burden of proof on parent of clear and convincing evidence that parent is likely to fully participate
 - * terms of improvement period are placed on the record
 - * if granted, DHHR to submit family case plan within 30 days
 - * hearing to be held in 60 or 90 days for case review
 - * DHHR to submit family case plan
 - * DHHR required to monitor parent's progress
 - * if successfully completed, case can be dismissed
 - ** parent is responsible for the initiation and completion of all terms
 - ** parent must sign release for all medical, mental health, and substance abuse records
 - this release shall be accepted by any professional or facility regardless of whether the release conforms to any standard required by that facility
- [§49-6-12(e)]

B. Post-Adjudicatory Improvement Period

- * §49-6-12(b) and Rule 37
 - * must file written motion
 - * not to exceed 6 months
 - * burden of proof on parent of clear and convincing evidence that parent is likely to fully participate
 - * terms of improvement period are placed on the record
 - * if granted, DHHR to submit family case plan within 30 days
 - * cannot have been previously granted an improvement period or must demonstrate a substantial change in circumstances
 - * hearing to be held in 60 or 90 days for case review
 - * DHHR to submit family case plan
 - * DHHR required to monitor parent's progress
 - ** parent is responsible for the initiation and completion of all terms
 - ** parent must sign release for all medical, mental health, and substance abuse records
 - this release shall be accepted by any professional or facility regardless of whether the release conforms to any standard required by that facility
- [§49-6-12(e)]

C. Dispositional Improvement Period

- * §49-6-12(c), §49-6-5(c) and Rule 37
- * must file written motion
- * not to exceed 6 months
- * burden of proof on parent of clear and convincing evidence that parent is likely to fully participate
- * terms of improvement period are placed on the record
- * if granted, DHHR to submit family case plan within 30 days

- * cannot have been previously granted an improvement period or must demonstrate a substantial change in circumstances and that due to the change in circumstances parent is likely to fully participate in the improvement period
- * hearing to be held in 60 or 90 days for case review
- * DHHR to submit family case plan
- * DHHR required to monitor parent's progress
- ** parent is responsible for the initiation and completion of all terms
- ** parent must sign release for all medical, mental health, and substance abuse records
 - this release shall be accepted by any professional or facility regardless of whether the release conforms to any standard required by that facility [§49-6-12(e)]

D. Denial/Granting of Improvement Periods

- * "compelling circumstances" to deny
 - examples: abandonment
prior termination + clear and convincing evidence of current allegations

E. Termination of Improvement Periods

- * by written motion setting forth basis for termination
- * typically when parent not compliant with terms or not making necessary/sufficient progress
- * if parent fails to participate in any service, DHHR shall initiate action to inform the Court [§49-6-12(f)]
- * if DHHR demonstrates failure to participate, the Court shall terminate improvement period
- * GAL or any other party can also file Motion

F. Extension of Improvement Periods

- * §49-6-12(g)
- * only applies to post-adjudicatory or dispositional improvement periods
- * Court may extend for 3 months - discretionary
- * Court must find that parent has substantially complied with the terms and continuation won't impair DHHR's ability to permanently place the child and the extension is consistent with the best interest of the child
- * writ of prohibition can be filed to restrain court from granting additional time
 - State ex rel. Amy M. Kaufman, 196 W.Va. 251, 470 S.E.2d 205 (1996)

Section IV: Family Court Overlap Statutes

West Virginia Code provides a mechanism for Family Courts to address issues of alleged abuse and neglect. [Rules 47 and 48 of the West Virginia Rules of Practice and Procedure for Family Court]

When do the Rules come into play?

- * reasonable cause by the Family Court to suspect abuse/neglect
- * suspicion can be obtained from allegations in filings with the Court, testimony or other evidence presented

What responsibility does the Family Court Judge have?

- * must immediately report the suspected abuse/neglect to DHHR and Circuit Court
- * Family Court Judge is a mandatory reporter under §49-6A-2
- * Family Court Judge must also prepare and submit a written referral to the DHHR and send copies to the Circuit Court and Prosecuting Attorney, which includes specific allegations/information led to the determination of reasonable cause
- * shall notify the DHHR of the closure of any cases in which they are providing services

What responsibility does the DHHR have?

- * must promptly provide Family Court Judge, Circuit Court and Prosecutor with copies of any report of investigation of the allegations
- * must advise the Family Court of any material change of circumstances involving the child or services to the family in any case where DHHR is involved in providing services but has not filed a petition
- * §49-6a-9(B)(1)(5) - if the Family Court makes a referral for an investigation, it can require the DHHR to submit a written report of the investigation within time frames set by the Court

What court retains/obtains jurisdiction to hear the case?

- * Family Court until an abuse/neglect petition is filed
- * once a petition is filed, orders of the Circuit Court supercede those orders of Family Court regarding parental rights and responsibilities
- * if no Orders for parental rights have been entered, then the Family Court proceedings are stayed and deference is given to Circuit Court orders

If no petition is filed and the Family Court still has concerns regarding the safety and welfare of the child, what other options are available?

- * Rule 47 gives the Family Court authority to appoint a Guardian ad Litem for the child
- * pros -- another avenue for the Family Court to address allegations that do not rise to the level of an abuse/neglect petition or in situations when no Petition is filed
 - there are no specific statutory time frames in which to close or issue a final ruling in the case, although Family Court's won't keep the case open indefinitely
- * con -- if the DHHR is not involved, there are limitations on the services and resources available to the Family Court and the family

Section V: A Child's Right to Permanency vs. A Parent's Need for Treatment

A. Treatment options

- * AA/NA
- * programs affiliated with religious/spiritual groups
- * crisis units for high risk (suicidal, homicidal, etc.)
- * in-patient options
- * out-patient options
- * private counseling
- * drug testing (urine, blood, hair follicle)
- * half-way houses
- * residential facilities

B. Potential limitations of programs

- * availability: how do you deal with wait lists?
what services can the parent be provided with in the interim?
- * location
- * contact between the parent and child - can you/how do you implement visitation?
- * can the child live with the parent while in the program?

C. How long does the parent need treatment?

- * different for each parent depending on substance used, type and frequency of use, availability of services, and parent's willingness to participate
- * how does the time needed for treatment fit within the statutory time frames for the hearings and improvement periods

D. Impact on the child

- * if an infant, may be dealing with fetal alcohol syndrome, substance withdrawal, etc. such that additional medical care is required - can that parent address his/her own substance abuse and these needs of the child?
- * is visitation/contact with the parent appropriate and in the child's best interest?
- * if visitation/contact is appropriate, can it be monitored so the child is safe?
- * what happens when a child loses contact with parent for an undetermined period of time?

C. Application of the law

- * how long does the child have to wait for the parent to obtain/maintain sobriety?
- * the welfare of the child is the polar star by which the discretion of the Court shall be guided in making its award of legal custody
 - In re Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973)
 - In re: Emily and Amos B., 208 W.Va. 325, 540 S.E.2d 542 (2000)
- * unjustified procedural delays wreak havoc on a child's development, stability and security
 - In re: Carlita B., 185 W.Va. 613, 408 S.E.2d 365 (1991)
 - In re: Jonathan G., 198 W.Va. 716, 482 S.E.2d 893 (1996)
 - In re: Emily and Amos B., 208 W.Va. 325, 540 S.E.2d 542 (2000)

- * courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened
 - In re: RJM, 164 W.Va. 496, 266 S.E.2d 114 (1980)
 - In re: Carlita B., 185 W.Va. 613, 408 S.E.2d 365 (1991)
 - In re: Emily and Amos B., 208 W.Va. 325, 540 S.E.2d 542 (2000)
- * "no reasonable likelihood that the conditions of abuse/neglect can be substantially corrected in the near future" means that based upon the evidence the parent has demonstrated an inadequate capacity to solve the problems of abuse/neglect on his/her own or with help [§49-6-5(b)]
 - such conditions shall be considered to exist when the abusing parent has habitually used or is addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and the parent has not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning [§49-6-5(b)(1)]
- * In re: Aaron Thomas M., 212 W.Va. 604, 575 S.E.2d 214 (2002) - mother's rights terminated when mother used drugs in front of her children, failed to follow through with recommended treatment, and did not respond to rehabilitative efforts
- * In re: Dejah Rose P., 216 W.Va. 514, 607 S.E.2d 843 (2004) - mother's rights terminated when she had history of drug addiction, she failed to comply with terms of improvement period for drug addiction, and the length of her drug treatment program was uncertain