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OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

FIRST REGULAR SESSION, 2005



ENROLLED

COMMITTEE SUBSTITUTE
FOR

House Bill No. 2229

(By Delegates Hamilton, Wakim, Hrutkay and Yost)



Passed April 9, 2005

In Effect Ninety Days from Passage

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H. B. 2229

(BY DELEGATES HAMILTON, WAKIM, HRUTKAY AND YOST)

[Passed April 9, 2005; in effect ninety days from passage.]

AN ACT to amend and reenact §48-27-403 of the Code of West Virginia, 1931, as amended, and to amend and reenact §49-5-7 and §49-5-8 of said code, all relating to custody of juveniles who are respondents in an emergency protective order by law-enforcement officials.

Be it enacted by the Legislature of West Virginia:

That §48-27-403 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that §49-5-7 and §49-5-8 of said Code be amended and reenacted, all to read as follows:

CHAPTER 48. DOMESTIC RELATIONS.

ARTICLE 27. PREVENTION AND TREATMENT OF DOMESTIC VIOLENCE.

§48-27-403. Emergency protective orders of court; hearings; persons present.

1 (a) Upon the filing of a verified petition under this article,
2 the magistrate court may enter an emergency protective order
3 as it may deem necessary to protect the petitioner or minor
4 children from domestic violence and, upon good cause shown,
5 may do so ex parte without the necessity of bond being given
6 by the petitioner. Clear and convincing evidence of immediate
7 and present danger of abuse to the petitioner or minor children
8 shall constitute good cause for the issuance of an emergency
9 protective order pursuant to this section. If the respondent is not
10 present at the proceeding, the petitioner or the petitioner's legal
11 representative shall certify to the court, in writing, the efforts
12 which have been made to give notice to the respondent or just
13 cause why notice should not be required. Copies of medical
14 reports or records may be admitted into evidence to the same
15 extent as though the original thereof. The custodian of such
16 records shall not be required to be present to authenticate such
17 records for any proceeding held pursuant to this subsection. If
18 the magistrate court determines to enter an emergency protec-
19 tive order, the order shall prohibit the respondent from possess-
20 ing firearms.

21 (b) Following the proceeding, the magistrate court shall
22 order a copy of the petition to be served immediately upon the
23 respondent, together with a copy of any emergency protective
24 order entered pursuant to the proceedings, a notice of the final
25 hearing before the family court and a statement of the right of
26 the respondent to appear and participate in the final hearing, as
27 provided in subsection (d) of this section. Copies of any order
28 entered under the provisions of this section, a notice of the final
29 hearing before the family court and a statement of the right of
30 the petitioner to appear and participate in the final hearing, as
31 provided in subsection (d) of this section, shall also be deliv-
32 ered to the petitioner. Copies of any order entered shall also be

33 delivered to any law-enforcement agency having jurisdiction to
34 enforce the order, including municipal police, the county
35 sheriff's office and local office of the State Police, within
36 twenty-four hours of the entry of the order. An emergency
37 protective order is effective until modified by order of the
38 family court upon hearing as provided in subsection (d) of this
39 section. The order is in full force and effect in every county in
40 this state.

41 (c) Subsequent to the entry of the emergency protective
42 order, service on the respondent and the delivery to the peti-
43 tioner and law-enforcement officers, the court file shall be
44 transferred to the office of the clerk of the circuit court for use
45 by the family court.

46 (d) The family court shall schedule a final hearing on each
47 petition in which an emergency protective order has been
48 entered by a magistrate. The hearing shall be scheduled not
49 later than ten days following the entry of the order by the
50 magistrate. The notice of the final hearing shall be served on the
51 respondent and delivered to the petitioner, as provided in
52 subsection (b) of this section, and must set forth the hearing
53 date, time and place and include a statement of the right of the
54 parties to appear and participate in the final hearing. The notice
55 must also provide that the petitioner's failure to appear will
56 result in a dismissal of the petition and that the respondent's
57 failure to appear may result in the entry of a protective order
58 against him or her for a period of ninety or one hundred eighty
59 days, as determined by the court. The notice must also include
60 the name, mailing address, physical location and telephone
61 number of the family court having jurisdiction over the pro-
62 ceedings. To facilitate the preparation of the notice of final
63 hearing required by the provisions of this subsection, the family
64 court must provide the magistrate court with a day and time in
65 which final hearings may be scheduled before the family court
66 within the time required by law.

67 (e) Upon final hearing the petitioner must prove, by a
68 preponderance of the evidence, the allegation of domestic
69 violence or that he or she reported or witnessed domestic
70 violence against another and has, as a result, been abused,
71 threatened, harassed or has been the subject of other actions to
72 attempt to intimidate him or her, or such petition shall be
73 dismissed by the family court. If the respondent has not been
74 served with notice of the emergency protective order, the
75 hearing may be continued to permit service to be effected. The
76 failure to obtain service upon the respondent does not constitute
77 a basis to dismiss the petition. Copies of medical reports may
78 be admitted into evidence to the same extent as though the
79 original thereof, upon proper authentication, by the custodian
80 of such records.

81 (f) No person requested by a party to be present during a
82 hearing held under the provisions of this article shall be
83 precluded from being present unless such person is to be a
84 witness in the proceeding and a motion for sequestration has
85 been made and such motion has been granted. A person found
86 by the court to be disruptive may be precluded from being
87 present.

88 (g) Upon hearing, the family court may dismiss the petition
89 or enter a protective order for a period of ninety days or, in the
90 discretion of the court, for a period of one hundred eighty days.
91 The hearing may be continued on motion of the respondent, at
92 the convenience of the court. Otherwise, the hearing may be
93 continued by the court no more than seven days. If a hearing is
94 continued, the family court may modify the emergency protec-
95 tive order as it deems necessary.

96 (h) Notwithstanding any other provision of this code to the
97 contrary, a petition filed pursuant to this section that results in
98 the issuance of an emergency protective order naming a
99 juvenile as the respondent, shall be treated as a petition autho-

100 rized by section seven, article five, chapter forty-nine of this
101 code, alleging the juvenile is a juvenile delinquent: *Provided,*
102 That the magistrate court shall notify the prosecuting attorney
103 in the county where the emergency protective order is issued
104 within twenty-four hours of the issuance of the emergency
105 protective order and the prosecuting attorney may file an
106 amended verified petition to comply with the provisions of
107 subsection (a) of section seven, article five, chapter forty-nine
108 of this code within two judicial days.

CHAPTER 49. CHILD WELFARE

ARTICLE 5. JUVENILE PROCEEDINGS.

§49-5-7. Institution of proceedings by petition; notice to juvenile and parents; subpoena.

1 (a)(1) A petition alleging that a juvenile is a status offender
2 or a juvenile delinquent may be filed by a person who has
3 knowledge of or information concerning the facts alleged. The
4 petition shall be verified by the petitioner, shall set forth the
5 name and address of the juvenile's parents, guardians or
6 custodians, if known to the petitioner, and shall be filed in the
7 circuit court in the county where the alleged status offense or
8 act of delinquency occurred: *Provided,* That any proceeding
9 under this chapter may be removed, for good cause shown, in
10 accordance with the provisions of section one, article nine,
11 chapter fifty-six of this code. The petition shall contain specific
12 allegations of the conduct and facts upon which the petition is
13 based, including the approximate time and place of the alleged
14 conduct; a statement of the right to have counsel appointed and
15 consult with counsel at every stage of the proceedings; and the
16 relief sought.

17 (2) Upon the filing of the petition, the court shall set a time
18 and place for a preliminary hearing as provided in section nine
19 of this article and may appoint counsel. A copy of the petition

20 and summons may be served upon the respondent juvenile by
21 first class mail or personal service of process. If a juvenile does
22 not appear in response to a summons served by mail, no further
23 proceeding may be held until the juvenile is served a copy of
24 the petition and summons by personal service of process. If a
25 juvenile fails to appear in response to a summons served in
26 person upon him or her, an order of arrest may be issued by the
27 court for that reason alone.

28 (b) The parents, guardians or custodians shall be named in
29 the petition as respondents and shall be served with notice of
30 the proceedings in the same manner as provided in subsection
31 (a) of this section for service upon the juvenile and required to
32 appear with the juvenile at the time and place set for the
33 proceedings unless such respondent cannot be found after
34 diligent search. If any such respondent cannot be found after
35 diligent search, the court may proceed without further require-
36 ment of notice: *Provided*, That the court may order service by
37 first class mail to the last known address of such respondent.
38 The respondent shall be afforded fifteen days after the date of
39 mailing to appear or answer.

40 (c) The court or referee may order the issuance of a
41 subpoena against the person having custody and control of the
42 juvenile ordering him or her to bring the juvenile before the
43 court or referee.

44 (d) When any case of a juvenile charged with the commis-
45 sion of a crime is certified or transferred to the circuit court, the
46 court or referee shall forthwith cause the juvenile and his or her
47 parents, guardians or custodians to be served with a petition as
48 provided in subsections (a) and (b) of this section. In the event
49 the juvenile is in custody, the petition shall be served upon the
50 juvenile within ninety-six hours of the time custody began and
51 if the petition is not served within that time, the juvenile shall
52 be released forthwith.

53 (e) The clerk of the court shall promptly notify the local
54 office of the department of Health and Human Resources of all
55 proceedings under this article, which shall then be responsible
56 for convening and directing the multidisciplinary treatment
57 planning process in accordance with the provisions of section
58 three, article five-d of this chapter: *Provided*, That in status
59 offense or delinquency cases where a case manager has not
60 been assigned, the juvenile probation officer shall be responsi-
61 ble for notifying the local office of the Department of Health
62 and Human Services which will assign a case manager who will
63 initiate assessment and be responsible for convening and
64 directing the multidisciplinary treatment planning process.

65 (f) Notwithstanding any other provision of this code to the
66 contrary, a petition filed pursuant to section four hundred-three,
67 article twenty-seven, chapter forty-eight of this code, that
68 results in the issuance of an emergency protective order naming
69 a juvenile as the respondent, shall be treated as a petition
70 authorized by this section, alleging the juvenile is a juvenile
71 delinquent: *Provided*, That the magistrate court shall notify the
72 prosecuting attorney in the county where the emergency
73 protective order is issued within twenty-four hours of the
74 issuance of the emergency protective order and the prosecuting
75 attorney may file an amended verified petition to comply with
76 the provisions of subsection (a) of this section within two
77 judicial days.

§49-5-8. Taking a juvenile into custody.

1 (a) In proceedings formally instituted by the filing of a
2 juvenile petition, the circuit court, a juvenile referee or a
3 magistrate may issue an order directing that a juvenile be taken
4 into custody before adjudication only upon a showing of
5 probable cause to believe that one of the following conditions
6 exists: (1) The petition shows that grounds exist for the arrest
7 of an adult in identical circumstances; (2) the health, safety and

8 welfare of the juvenile demand such custody; (3) the juvenile
9 is a fugitive from a lawful custody or commitment order of a
10 juvenile court; or (4) the juvenile is alleged to be a juvenile
11 delinquent with a record of willful failure to appear at juvenile
12 proceedings and custody is necessary to assure his or her
13 presence before the court. A detention hearing pursuant to
14 section eight-a of this article shall be held by the judge, juvenile
15 referee or magistrate authorized to conduct such hearings
16 without unnecessary delay and in no event may any delay
17 exceed the next day.

18 (b) Absent a court order, a juvenile may be taken into
19 custody by a law-enforcement official only if one of the
20 following conditions exists: (1) Grounds exist for the arrest of
21 an adult in identical circumstances; (2) emergency conditions
22 exist which, in the judgment of the officer, pose imminent
23 danger to the health, safety and welfare of the juvenile; (3) the
24 official has reasonable grounds to believe that the juvenile has
25 left the care of his or her parents, guardian or custodian without
26 the consent of such person, and the health, safety and welfare
27 of the juvenile is endangered; (4) the juvenile is a fugitive from
28 a lawful custody or commitment order of a juvenile court; (5)
29 the official has reasonable grounds to believe the juvenile to
30 have been driving a motor vehicle with any amount of alcohol
31 in his or her blood; or (6) the juvenile is the named respondent
32 in an emergency protective order issued pursuant to section four
33 hundred three, article twenty-seven, chapter forty-eight of this
34 code and the individual filing the petition for the emergency
35 protective order is the juvenile's parent, guardian, or custodian.

36 (c) Upon taking a juvenile into custody, with or without a
37 court order, the official shall:

38 (1) Immediately notify the juvenile's parent, guardian,
39 custodian or, if the parent, guardian or custodian cannot be
40 located, a close relative;

41 (2) Release the juvenile into the custody of his or her
42 parent, guardian or custodian unless:

43 (A) Circumstances present an immediate threat of serious
44 bodily harm to the juvenile if released;

45 (B) No responsible adult can be found into whose custody
46 the juvenile can be delivered: *Provided*, That each day the
47 juvenile is detained, a written record must be made of all
48 attempts to locate such a responsible adult; or

49 (C) The juvenile has been taken into custody for an alleged
50 act of delinquency for which secure detention is permissible.

51 (3) If the juvenile is an alleged status offender or has been
52 taken into custody pursuant to subdivision (6) of subsection (b),
53 immediately notify the Department of Health and Human
54 Resources, and, if the circumstances of either paragraph (A) or
55 (B), subdivision (2) of this subsection exist and the require-
56 ments therein are met, the official may detain the juvenile, but
57 only in a nonsecure or staff-secure facility;

58 (4) Take the juvenile without unnecessary delay before a
59 juvenile referee or judge of the circuit court for a detention
60 hearing pursuant to section eight-a of this article: *Provided*,
61 That if no judge or juvenile referee is then available in the
62 county, the official shall take the juvenile without unnecessary
63 delay before any magistrate then available in the county for the
64 sole purpose of conducting such a detention hearing. In no
65 event may any delay in presenting the juvenile for a detention
66 hearing exceed the next day after he or she is taken into
67 custody.

68 (d) In the event that a juvenile is delivered into the custody
69 of a sheriff or director of a detention facility, the sheriff or
70 director shall immediately notify the court or juvenile referee.
71 The sheriff or director shall immediately provide to every

72 juvenile who is delivered into his or her custody a written
73 statement explaining the juvenile's right to a prompt detention
74 hearing, his or her right to counsel, including appointed counsel
75 if he or she cannot afford counsel, and his or her privilege
76 against self-incrimination. In all cases when a juvenile is
77 delivered into a sheriff's or detention center director's custody,
78 that official shall release the juvenile to his or her parent,
79 guardian or custodian by the end of the next day unless the
80 juvenile has been placed in detention after a hearing conducted
81 pursuant to section eight-a of this article.

That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.


Chairman Senate Committee


Chairman House Committee

Originating in the House.

In effect ninety days from passage.


Clerk of the Senate


Clerk of the House of Delegates


President of the Senate


Speaker of the House of Delegates

The within is approved this the 4th
day of May, 2005.


Governor

PRESENTED TO THE
GOVERNOR

APR 26 2005

Time 4:30 pm