

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 3<sup>rd</sup> day of April 2006, the following order was made and entered:

**IN RE:       Emergency Proposed Amendments to The West Virginia Rules of Procedure For Child Abuse and Neglect Proceedings; Rules of Practice and Procedure for Domestic Violence Civil Proceedings; and Rules of Practice and Procedure for Family Court.**

On a former day to-wit, December 5, 2005 the Court published for comment proposed amendments to Rules 1, 4, 17, and 26, and the addition of Rules 3A and 16A to the Rules of Procedure for Child Abuse and Neglect Proceedings; amendments to Rules 2(c), 8(c), 11(b), 13, 14, 18(b) and 25, and the addition of rule 25A to the Rules of Procedure for Domestic Violence Civil Proceedings; and amendments to Rule 47 and addition of Rule 47A to the Rules of Practice and Procedure for Family Court. Comments were received and considered.

On this day came the Court on its own motion and proceeded to consider the Final Summary and Recommended Rules of the Court Improvement Program Oversight Board Regarding the Overlap of Child Abuse and Neglect Issues in Family and Circuit Court, including the proposed amendments to Rules 1, 4 and 17, and the addition of Rules 3a and 16A to the Rules of Procedure for Child Abuse and Neglect Proceedings; amendments to Rules 8(c), 14, and the addition of rules 16a and 25a to the Rules of Procedure for Domestic Violence Civil Proceedings; and amendments to Rule 47 and addition of Rule 47a to the Rules of Practice and Procedure for Family Court.

Our thanks to the Court Improvement Program Oversight Board Regarding the Overlap of Child Abuse and Neglect Issues in Family and Circuit Court.

Upon consideration whereof, the Court is of opinion to and doth hereby adopt the following rules with amendments to read as follows, effective immediately. Deletions are indicated by strikethroughs and insertions are indicated by underscoring.

## **AMENDMENTS TO THE RULES OF PROCEDURE FOR CHILD ABUSE AND NEGLECT PROCEEDINGS**

### **Rule 1. Scope of child abuse and neglect rules.**

These rules set forth procedures for circuit courts in child abuse and neglect proceedings instituted pursuant to W. Va. Code § 49-6-1, et seq. ~~These rules apply only to the extent that they are not in conflict with the Rules of Evidence and other court rules or statutes applicable to such proceedings. If these rules conflict with other rules or statutes, these rules shall apply.~~

### **Rule 3a. Pre-Petition Investigations.**

**(a) Administrative Order Regarding Investigation.** Upon receiving a written referral from a family court pursuant to Rule 47 of the Rules of Practice and Procedure for Family Courts, a circuit court shall forthwith cause to be entered and served an administrative order in the name of and regarding the affected child or children directing the Department to submit to the court an investigation report or appear before the court in not more than 45 days, at a scheduled hearing, to show cause why the Department's investigation report has not been submitted to the circuit court and referring family court. If a circuit court, based upon a review of the written referral from family court, determines that the allegations or other information present reason to believe a child may be in imminent danger, the circuit court may shorten the time for the Department to act upon the referral and appear before the circuit court. The scheduled hearing may be mooted by the Department's earlier submission of the investigation report or, in the alternative, the filing of an abuse and neglect petition under Chapter 49 of the West Virginia Code relating to the matters which were the subject of the family court referral and circuit court administrative order. The duties of the Department under this rule shall be in addition to the Department's obligations pursuant to W. Va. Code § 49-6A-2a regarding notification of disposition to persons mandated to report suspected child abuse and neglect.

**(b) Mandamus Relief.** Following review of an investigation report in which the Department concludes that a civil petition is unnecessary, if the circuit court believes that the information in the family court's written referral and the Department's investigation report, considered together, suggest circumstances upon which the Department would have a duty to file a civil petition, the court shall treat the written referral as a petition for a writ of mandamus in the name of and regarding the affected child or children. A show-cause

order shall issue by the court setting a prompt hearing to determine whether the respondent Department has a duty to file a civil petition under the particular circumstances set forth in the written referral and investigation report. If it is determined by the court that the Department has a nondiscretionary duty pursuant to W. Va. Code § 49-6-5b to file a petition seeking to terminate parental rights, the Department shall be directed by writ to file such petition within a time period set by the court. If it is determined that the circumstances bring the filing decision within the Department's discretionary authority, no such writ shall issue unless the court specifically finds aggravated circumstances, consistent with the meaning and usage of that term in W. Va. Code § 49-6-3(d)(1), and that the Department acted arbitrarily and capriciously in the exercise of its discretion.

**(c) Service and Notice.** Orders and other documents issued pursuant to this rule shall be served on the Department by mail or facsimile transmission directed to the Department's local child protective services office. Copies of such orders shall also be delivered to the prosecuting attorney.

**(d) Confidentiality.** All orders and other documents pertaining to matters arising under this rule, and docket entries regarding the same, shall be treated as confidential records concerning a child consistent with W. Va. Code § 49-7-1; and any hearings conducted pursuant to this rule may be attended by those persons provided notice under subsection (c) above, but shall be closed to the general public except that persons whom the circuit court determines have a legitimate interest in the proceedings may attend. If the case in family court that gave rise to the referral to the Department was a domestic violence proceeding, staff from any involved licensed family protection program is entitled access to circuit court proceedings under this rule to the same extent such access is afforded under statutes and rules pertaining to domestic violence proceedings.

#### **Rule 4. Transfer and Consolidation**

A circuit court before which a civil petition is filed pursuant to W. Va. Code § 49-6-1, et seq., may order any other proceeding pending before another circuit court, family court, or magistrate court, or family law master which arises out of the same facts alleged in the civil petition or involves the question of whether such abuse and neglect occurred transferred to the court where the civil petition is pending and may consolidate such proceedings, except criminal and delinquency proceedings, all in accordance with Rule 42 of the Rules of Civil Procedure and W. Va. Code § 56-9-1.

#### **Rule 16a. Required Entry of Support Orders.**

**(a) Entry of Support Orders.** Every order in an abuse and neglect proceeding that alters the custodial and decision-making responsibility for a child and/or commits the child to the custody of the Department of Health and Human Resources must impose a support obligation upon one or both parents for the support, maintenance and education of the child.

**(b) Use of Guidelines.** Any order establishing a child support obligation in an abuse and neglect proceeding must use the *Guidelines for Child Support Awards* found in W. Va. Code § 48-13-101, et seq. The Guidelines may be disregarded, or the calculation of an award under the Guidelines may be adjusted, only if the court makes specific findings that use of the Guidelines is inappropriate.

**(c) Modifications.** Any order establishing a child support obligation in an abuse and neglect proceeding may be modified by the court upon motion of any party. An order granting modification of a support obligation must use the Guidelines for Child Support Awards found in W. Va. Code § 48-13-101, et seq.

**(d) Transfer to family court prohibited.** No portion of an abuse and neglect proceeding may be transferred or remanded to a family court for assessment of a child support obligation.

**Rule 17. Pleadings allowed; Form of motions and other papers.**

**(a) Pleadings.** There shall be a verified petition and a verified answer. Upon mutual consent of the co-petitioners, the verified petition may have co-petitioners, in which case each petitioner must indicate which allegation(s) he/she verifies in the petition. If one of the petitioners is a parent, then that parent shall be appointed counsel pursuant to W. Va. Code § 49-6-3, separate from the prosecuting attorney. No other pleading shall be allowed except by permission of the Court. The petition shall not be taken as confessed. Other than in a criminal prosecution for false swearing, evidence shall not be given against an accused of any statement made by him in any pleadings filed pursuant to these rules.

**(c) Motions and other papers.** (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is made in a written notice of the hearing on the motion.

(2) The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) All motions shall be signed in accordance with Rule 11 of the Rules of Civil Procedure.

(4) All motions must be accompanied by or contained within a notice of hearing setting forth the date and time of hearing on the motion.

**(5) At the time of first hearing, the court shall require the parents to complete financial statement forms for determination of Title IV-D eligibility, the necessary forms to be provided by the Department of Health and Human Resources, and those forms necessary to determine both indigence and/or possible child support obligations. No portion of the case may be transferred or remanded to family court for this purpose.**

# AMENDMENTS TO THE RULES OF PRACTICE AND PROCEDURE FOR DOMESTIC VIOLENCE CIVIL PROCEEDINGS

## Rule 8. Filing of petitions and other pleadings.

(a) **Commencement of action.** To commence an action for a protective order, a verified petition shall be filed in the magistrate court.

(b) **Petition.** The petition shall contain a short and plain statement of the facts showing that the petitioner is entitled to relief, and a demand for the relief the petitioner seeks.

(c) **Pleadings filed after original petition.** All pleadings filed after the original petition, ~~except pleadings including petitions for criminal contempt shall be filed with the circuit clerk. Pleadings~~ Misdemeanor complaints for criminal contempt violation of protective orders shall be filed in the magistrate court.

(d) **Other required documents.** The original petition, and petitions for contempt or modification of a protective order, shall be accompanied by a completed domestic civil case information statement.

(e) **Petitioner's identifying information.** At petitioner's request, the magistrate court shall immediately seal within the file the domestic civil case information statement and any other document containing the address or other identifying information for the petitioner such as the petitioner's phone number, facsimile number, or e-mail address, until further order.

## Rule 14. Continuances.

(a) **Filing of motion for continuance.** A movant may file a motion for continuance with the circuit clerk, or with the ~~family court judge~~, at the convenience of the court.

(b) **Requirements for a continuance.** A continuance may be granted upon a showing of good cause.

(c) **Notice requirements.** A motion for continuance may be heard after such reasonable notice to the opposing party as required by the ~~family court judge~~.

(d) **Continuance of a final hearing.** A final hearing may be continued on motion of the respondent at the convenience of the court. Otherwise, the final hearing may be continued by the court no more than seven days. If a hearing is continued, the ~~family court~~ may modify the emergency protective order as it deems necessary.

**Rule 16a. Child Abuse and Neglect.**

At any stage of domestic violence proceedings, if a family court judge has reasonable cause to suspect any minor child involved in the proceedings has been abused or neglected, in addition to mandatory reporting duties the judge shall follow the written referral procedures set forth in Rule 47(b) of the Rules of Practice and Procedure for Family Court.

**Rule 25a. Child Protection Investigations.**

**(a) Administrative Order Regarding Investigation.** Upon receiving a written referral of possible child abuse and neglect from a family court pursuant to Rule 47(b) of the Rules of Practice and Procedure for Family Courts, a circuit court shall forthwith cause to be entered and served an administrative order in the name of and regarding the affected child or children directing the Department of Health and Human Resources to submit to the court an investigation report or appear before the court in not more than 45 days, at a scheduled hearing, to show cause why the Department's investigation report has not been submitted to the circuit court and referring family court. If a circuit court, based upon a review of the written referral from family court, determines that the allegations or other information present reason to believe a child may be in imminent danger, the circuit court may shorten the time for the Department to act upon the referral and appear before the circuit court. The scheduled hearing may be mooted by the Department's earlier submission of the investigation report or, in the alternative, the filing of an abuse and neglect petition under Chapter 49 of the West Virginia Code relating to the matters which were the subject of the family court referral and circuit court administrative order. The duties of the Department under this rule shall be in addition to the Department's obligations pursuant to W. Va. Code § 49-6A-2a regarding notification of disposition to persons mandated to report suspected child abuse and neglect.

**(b) Mandamus Relief.** Following review of an investigation report in which the Department concludes that a child abuse and neglect petition is unnecessary, if the circuit court believes that the information in the family court's written referral and the Department's investigation report, considered together, suggest circumstances upon which the Department would have a duty to file a such a petition, the court shall treat the written referral as a petition for a writ of mandamus in the name of and regarding the affected child or children. A show-cause order shall issue by the court setting a prompt hearing to determine whether the respondent Department has a duty to file a child abuse and neglect petition under the particular circumstances set forth in the written referral and investigation report. If it is determined by the court that the Department has a nondiscretionary duty pursuant to W. Va. Code § 49-6-5b to file a petition seeking to terminate parental rights, the Department shall be directed by writ to file a child abuse and neglect petition within a time period set by the court. If it is determined that the circumstances bring the filing decision within the Department's discretionary authority, no such writ shall issue unless the court specifically finds aggravated circumstances, consistent with the meaning and usage of that term in W.

Va. Code § 49-6-3(d)(1), and that the Department acted arbitrarily and capriciously in the exercise of its discretion.

(c) **Service and Notice.** Orders issued pursuant to this rule shall be served on the Department by mail or facsimile transmission directed to the Department's local child protective services office. Copies of such orders shall also be delivered to the prosecuting attorney.

(d) **Confidentiality.** All orders and other documents pertaining to matters arising under this rule, and docket entries regarding the same, shall be treated as confidential records concerning a child consistent with W. Va. Code § 49-7-1; and any hearings conducted pursuant to this rule may be attended by those persons provided notice under subsection (c) above, but shall be closed to the general public except that persons whom the circuit court determines have a legitimate interest in the proceedings may attend. If the case in family court that gave rise to the referral to the department was a domestic violence proceeding, staff from any involved licensed family protection program is entitled access to circuit court proceedings under this rule to the same extent such access is afforded under statutes and rules pertaining to domestic violence proceedings.

(e) **Abuse and Neglect Co-Petitions for Child Protection.** The petitioner for the protective order may appear as a co-petitioner on the child abuse and neglect petition filed by the Department pursuant to W. Va. Code § 49-6-1, et seq., if both so agree. Nothing herein shall be construed as either a requirement that the petitioner for the protective order be a co-petitioner under W. Va. Code § 49-6-1, et seq., or a prohibition against the filing of a petition pursuant to W. Va. Code § 49-6-1, et seq. by the petitioner for the protective order should the Department show cause why it will not file such a petition.

## **AMENDMENTS TO THE RULES OF PRACTICE AND PROCEDURE FOR FAMILY COURT**

### **Rule 47. Child Abuse and Neglect**

(a) **Reports by Family Court.** If a family court has reasonable cause to suspect any minor child involved in family court proceedings has been abused or neglected, that family court shall immediately report the suspected abuse or neglect to the state child protective services agency, pursuant to W. Va. Code § 49-6A-2, and the circuit court.

(b) **Written Referrals.** In addition to any oral communication made by the family court to the state child protective services agency pursuant to subdivision (a), the family court shall forthwith prepare and submit a written referral to the agency and, at the same time, transmit copies of the referral to the appropriate circuit court, as determined by the chief judge, and to the prosecuting attorney. Such written referral shall set forth the specific allegations or information that led to the family court's determination of reasonable cause to

suspect that a child or children involved in family court proceedings has been abused or neglected.

**(b) (c) Reports of Investigations of Child Abuse and Neglect.** The state child protective services agency shall promptly provide the family court, ~~and the circuit court, and the prosecuting attorney~~ copies of any report of any investigation regarding the abuse and neglect of any minor child involved in family court proceedings, including those investigations conducted pursuant to subsection (b) above and Rule 3a of the Rules of Procedure for Child Abuse and Neglect Proceedings.

**(c) (d) Jurisdiction of Proceedings.** The family court shall retain full jurisdiction of proceedings until an abuse or neglect petition is filed. If an abuse or neglect petition is filed and the family court has entered an order regarding the allocation of custodial and decision-making responsibility between the parents, orders of the circuit court shall supercede and take precedence over any order of the family court regarding the allocation of custodial and decision-making responsibility between the parents. If the family court has not entered an order for the allocation of custodial and decision-making responsibility between the parents, the family court shall stay any further proceedings concerning the allocation of custodial and decision-making responsibility between the parents and defer to the orders of the circuit court.

**(e) Material Change of Circumstances Reports.** While the Department of Health and Human Resources is under no duty to monitor cases for family courts, the Department shall advise the family court of any material change of circumstances involving the child or services to the child's family in any pending family court case in which the Department is involved but has not filed a petition pursuant to W. Va. Code § 49-6-1, et seq. The family court shall notify the Department of the closure or pendency of any such cases.

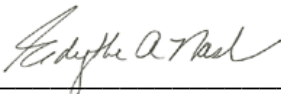
#### **Rule 47a. Infant Guardianship Proceedings.**

**(a) Removal by family court to circuit court of infant guardianship cases involving child abuse and neglect.** If a family court learns that the basis, in whole or part, of a petition for infant guardianship brought pursuant to W. Va. Code § 44-10-3, is an allegation of child abuse and neglect as defined in W. Va. Code § 49-1-3, then the family court before whom the guardianship proceeding is pending shall remove the case to the circuit court for hearing. Should the family court learn of such allegations of child abuse and neglect during the hearing, then the family court shall continue the hearing, subject to an appropriate temporary guardianship order, and remove the case to the circuit court for hearing to be conducted within 10 days, for determination of all issues. At the circuit court hearing, allegations of child abuse and neglect must be proven by clear and convincing evidence. Immediately upon removal, the circuit clerk shall forthwith send the removal notice to the circuit court. Upon receipt of the removal notice, the circuit court shall forthwith cause notice to be served in accordance with W. Va. Code § 44-10-3 and to the

Department of Health and Human Resources who shall be served with notice of the petition, including a copy of the petition, and of the final hearing to be conducted before the circuit court. Such notice to the Department of Health and Human Resources shall constitute a report by the family and circuit courts pursuant to W. Va. Code § 49-6A-2.

**(b) Investigation of Abuse and Neglect.** Upon removal of the infant guardianship petition, the circuit court may utilize the investigative and mandamus process and related procedures set forth in Rule 3a of the Rules of Procedure for Child Abuse and Neglect Proceedings if the court deems it necessary or appropriate under the circumstances presented. The circuit court shall allow the petitioner for infant guardianship to appear as a co-petitioner on the petition filed by the Department of Health and Human Services pursuant to W. Va. Code § 49-6-1, et seq., if both so agree. Nothing herein shall be construed as either a requirement that the petitioner for infant guardianship be a co-petitioner under W. Va. Code § 49-6-1, et seq., or a prohibition against the filing of a W. Va. Code § 49-6-1, et seq., petition by the petitioner for infant guardianship should the Department show cause why it will not file such a petition.

A True Copy

Attest:   
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Deputy Clerk, Supreme Court of Appeals